ABA Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Environmental Enforcement and Crimes Committee Newsletter

Vol. 15, No. 1 **April 2014**

MESSAGE FROM THE CO-CHAIRS

Walter D. James III & Benjamin S. Lippard
Co-Chairs, Environmental Enforcement and Crimes Committee

Greetings from the Co-Chairs!

It seems that every message from the chair (or in this case, the co-chairs) opens with "Once again, we have been somewhat busy since the last newsletter." We have been busy.

The committee got off to a great start this year. We have hosted monthly leadership calls. We have a lot of "new" blood on the committee leadership roster this year and the planning sessions are very productive and lively. I am confident that the committee will be very active this upcoming year. You can see the entire roster of the vice chairs on the committee's webpage at http://www.abanet.org/environ/committees/environcrimes/home.html.

Some of the things you will not see this year, but hopefully will see results of are as follows: We will submit a program proposal for the fall meeting (Miami—mark your calendars!); we are continuing our public service project of collecting and posting jury charges for charged environmental crimes (we are posting the government submission, the defense submission, and then the actual charge given by the Court); we are also planning four newsletters with an emphasis on practical applications.

This issue of the newsletter is full of useful information, covering a variety of local, state, and federal issues as well as war stories. We are continually working on creating and presenting even better newsletters. We are always looking for more participation. If you have an interest in getting timely national or regional information into the newsletters for your colleagues, please let us know. The newsletter editor works very hard to put a quality product together and with the help of our membership, it can only get better.

Now is also the time to get involved in the committee. If you have an interest in participating on this committee as a vice chair, let us know, and we will pass your name on to the ABA leadership for consideration for next year's committee leadership. We would love to have your active participation!

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Environmental Enforcement and Crimes Committee Newsletter
Vol. 15, No. 1, April 2014
Timothy K. Webster, Editor

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AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

May 2, 2014
State of the Practice Symposium
Vanderbilt University Law School
Nashville, TN

May 2-4, 2014
Spring Council Meeting
The Hutton Hotel
Nashville, TN

May 29, 2014
Key Environmental Issues in US EPA Region 2
Primary Sponsor: New York State Bar Association
Columbia Law School
New York, NY

June 4-6, 2014
32nd Annual Water Law Conference
The Red Rock Resort, Casino and Spa
Las Vegas, NV

August 8-10, 2014
ABA MAGNITUDE360 (ABA Annual Meeting)
Sheraton Boston Hotel
Boston, MA

Oct. 8-11, 2014
22nd Fall Conference
Trump National Doral Miami
Miami, FL

For full details, please visit www.ambar.org/EnvironCalendar

SHOULD FISH WEAR HELMETS?

Joseph G. Nassif

In the course of trying an environmental criminal case, one would not think the answer to the above question would be significant to whether a defendant is convicted or not. Before we answer the question, it is best to have some background.

Federal prosecutors have such a great conviction record they can get sloppy particularly if they believe they have an easy case. One example I can recall was an appointed federal case involving the sale of an eight ball of cocaine. It was my first criminal trial some 30 years ago and I was up against an experienced Assistant U.S. Attorney. The government had five U.S. Post Office inspectors prepared to identify my client as the person who sold the drug. Despite having met the day before to get their stories straight, they didn't quite get things in the correct order.

For the first witness, on cross we brought out a schematic of the abandoned filling station at which the buy went down and asked the witness to mark the location of the car that defendant was driving at the time the inspector observed the sale of the drugs. For each successive witness, a new schematic was presented and the same question asked. After the five inspectors had finished their testimony, each of the inspectors had put the defendant's car in a markedly different location. In closing we pointed out to the jury that only one of the witnesses might actually be telling the truth but the other four were definitely lying despite getting together to review the facts the day before. We continued with the argument that the witnesses could not recall the location of the car, but they could identify a black man sitting in a car with tinted windows in the middle of the night in an abandoned filling station with no direct lighting. The moral is that every once in a while the government simply throws you a bone and you have to be alert and pounce on it. Now let's talk about fish needing helmets.

I was asked by the federal public defender to enter an appearance in a Clean Water Act case involving a release of hundreds of gallons of styrene that eventually found its way into an active creek killing about ten thousand fish. Working with a federal public defender, my task was to cross the government's environmental experts. Our client had spent the last 22 years of his life in prison for robbing a bank and had been out for a few months and was newly trained in driving rigs pulling trailers carrying chemical products.

The allegation was that the defendant, in the middle of a downpour adjacent to a public area, knowingly released a heel of styrene after having difficulty getting the load fully delivered. The defendant was charged with a felony. Because of his prior conviction, the defendant was facing serious jail time.

Following some initial testimony by police who were called to the scene, the jury was given a break while the government brought in nearly a hundred poster boards of blown up photos of dead fish. Before the jury was brought back into the courtroom I asked the Court to allow me to challenge the government's fish biologist who took the pictures.

I started the questioning asking about the photos and establishing that this witness was the only government employee tasked with assessing the extent and cause of the fish kill. The government objected to my line of questions on the basis that I was essentially doing what I should be doing on cross-examination and not simply doing discovery. The Court allowed me to proceed.

I then went into the testing of the fish and to my surprise the witness indicated that he had tested live fish which they had caught in the stream and detected the presence of styrene. I asked him if he had tested any of the thousands of dead fish in the photos on the three-foot high boards and he said no. I then moved to strike any testimony by the witness relating to the dead fish or any testing for styrene.

The Judge asked what the basis was for my motion and I said that since the biologist had only tested live fish and found styrene all he had proven was that styrene doesn't kill fish. After looking puzzled, the Court turned to the expert and asked why he hadn't tested any dead fish and he responded, "because they were dead."

Looking a bit perturbed the judge asked me over the boisterous objection of the federal prosecutor, "Mr. Nassif, what killed these fish?" I proceeded to tell the Court that we would never know because none of the dead fish were tested. He asked again and I responded, "Your Honor, with all due respect, it was a wild and stormy night and the fish could have hit their heads on rocks." Again, with a stern look the Court said, "Are you suggesting this to be the cause of their deaths?" I simply said we would never know because fish don't typically need safety helmets. The Court laughed and said, "So you are the fish helmet lawyer." I replied that I had never thought of that before, but this case was my first massive fish kill. The court ordered the expert not to talk about any dead fish (which he of course "inadvertently" violated) and told the government to get all of the boards out of the courtroom.

Since most of the damages suffered by the government had to do with the loss of fish and the subsequent cleanup of the dead fish, I moved the Court to strike any mention of these costs and it was granted. The government was furious and threatened to appeal the Court's rulings but the Court held firm. The government then requested leave to add a negligence count but the defendant refused based on his belief that he would not be convicted on any count arguing intentional conduct.

After the jury delivered its verdict, the Court asked the defendant if he wanted to say something prior to sentencing. We had advised the defendant to say no. Our concern was our image of a very uneducated person who spent 22 years in prison of his 50 or so years and who was suffering from hepatitis, and had trouble speaking in any way that was understandable, addressing the Court. Despite our concerns, he insisted that he wanted to address the Court.

He pulled a crumbled up piece of paper from his right jean pocket that one could hardly read. Without looking at it, he suddenly stood tall for five minutes and gave a speech that any experienced trial lawyer would have sold her soul to give. He slowly but clearly without any break or hesitation in his voice, told the Court how sorry he was and how he had no excuse but wanted to let the Court know that he never considered there to be anything in the tank but air pressure. Nevertheless, he took full responsibility for his actions and thanked the jury and the Court for their time. He went on and on and I stood there with my mouth open and realized how great a moment this was for me personally, and why everyone should be entitled to a first-rate defense.

In the end it was obvious that the Court was moved and it sentenced him to one year in jail on a lesser count with a year of supervision. I am convinced that had Mr. Miller not spoken as he did, his sentence would have been much more severe. *United States v. Miller* (E.D. Mo.).

I now know the answer to the question, "Should fish wear helmets?" The obvious answer is "Yes."

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TRENDS IN THE ENFORCEMENT OF CALIFORNIA'S PROPOSITION 65

Judith M. Praitis

How Proposition 65 Enforcement Works

Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code section 25249.5 et seq., requires persons doing business in California to provide a clear and reasonable warning before exposing consumers or California employees to chemicals known to the state to cause cancer or reproductive harm. Over 900 chemicals currently appear on the list. 27 Cal. Code Reg. § 25000. Defendants are subject to civil penalties of up to $2500 per day for each violation, as well as injunctions ordering violating entities to provide the requisite warnings, or to cure the violation.

Proposition 65 is enforced by public prosecutors and citizens acting "in the public interest." Proposition 65 includes no private right of action. A citizen seeking to enforce the law must tender notice to the defendant and all public prosecutors in California 60 days prior to suit and can only proceed if a public prosecutor does not diligently pursue the claim. Public prosecutors rarely preempt citizen enforcers. While hundreds of claims can be resolved in a year, typically public prosecutors prosecute only a very small percentage of the total cases. This means citizen enforcers shape outcomes under Proposition 65 to a significant degree. That said, since all consent judgments proposed under Proposition 65 are subject to a mandatory 45-day review period, during which the attorney general may provide formal or informal comments to the parties, or file objections with the court, the attorney general also influences outcomes and even convinces parties to alter executed agreements.

This relatively unique enforcement scheme results in strange and sometimes counter-intuitive outcomes from jurisprudential and public policy perspectives. Proposition 65 is one of the few laws continually rewritten by attorneys, prosecutors, plaintiffs, defendants, judges and, to a lesser degree, by scientifically or regulatory experts. Tomorrow the rules may shift from the landscape of today, sometimes leaving defendants whipsawed and guessing. Prosecutors can exploit the extraordinary power afforded under Proposition 65, which imposes "feather light" burdens on plaintiffs, but requires defendants to establish complex, costly, and scientifically grounded defenses.

For years defendants labored under the disadvantages embedded in the very DNA of Proposition 65. To escape liability, defendants had to prove exposures to listed chemicals did not exceed the relevant warning trigger levels. Sometimes those warning trigger levels are unknown and need to be established under complex risk assessment methodology. Since complexity breeds opportunity for disagreement, no matter how sound the science, defendants face continual risks that their affirmative defenses, like a fragile water balloon, can be punctured at any moment by the barrage of darts launched by prosecutors. Finally, even when defendants convince skeptical plaintiffs of the merits of an affirmative defense, resulting in a settlement based on a vetted, scientifically grounded rationale, the attorney general frequently second-guesses the parties, requiring yet more justification.

The Enforcement Trends

Against this backdrop, we can see several enforcement trends: First, pressure for reform to mitigate the harsh imbalances created by Proposition 65; second, waves of industry-wide enforcement, which foster cooperation and uniform solutions to ensure a level playing field and enable funding of the scientific defenses that can be too costly for an individual defendant to fund; and third, defendants increasingly fighting back in court—and prevailing. Finally, the attorney general has been more active in shaping and even rewriting consent judgments, using the threat of its ability to file objections to compel concessions from the parties.

1. Reform

For the first time in nearly a decade, serious legislative efforts to reign in enforcement excesses

or abuses were undertaken. Governor Jerry Brown publicly expressed support for reforms. Once reform efforts commenced, however, trench warfare ensued. Neither plaintiffs nor defendants realized their goals. In the end, modest reforms aimed to relieve small businesses being persecuted by "gotcha" lawsuits based on technicalities were adopted. The 2013 amendment to Proposition 65 allows certain businesses (restaurant owners, parking garage owners, and those who own premises where smoking is permitted) a 14-day cure period to remedy alleged violations without being subject to civil penalties, other than a $500 flat fee. This is only the second substantive amendment to Proposition 65 since its adoption by voters in 1986. Efforts at broader reforms have failed for the time being.

Still, Proposition 65 previously was regarded as sacrosanct in what is effectively a one political party state, and the fact that the legislature adopted even modest reforms gives some hope that additional steps to add predictability, transparency, and uniformity in enforcement might yet emerge.

2. Industry-Wide Enforcement

Massive enforcement waves targeting entire industries have always existed under Proposition 65. Currently active enforcement waves have targeted coffee sellers (acrylamide), furniture retailers and manufacturers (flame retardants in foams), shampoos, body washes and other liquid soaps (cocamide DEA/DEA), and powdered cosmetics and sunscreens (titanium dioxide). Ongoing enforcement against the dietary supplement industry (for lead) is a similar wave, but the enforcement is fragmented into individual cases. Other major waves have targeted lead and cadmium in jewelry, handbags and other fashion accessories, and the chemical DEHP in a wide range of soft plastic products.

The upshot of these enforcement waves is that enforcement can be more standardized. Both monetary and injunctive relief outcomes are more predictable. Given how uncertain Proposition 65 warning trigger levels can be, industry-wide enforcement provides publicly ascertainable standards, much needed transparency, and usually commercial feasibility for a sizable segment of the targeted industry. Individual case enforcement often leads to a "crazy quilt of outcomes." Multi-defendant cases allow defendants to pool resources and tip the balance of power away from plaintiffs on scientific issues, which may be too costly to establish for any single defendant but become affordable when scores are sued simultaneously.

3. Defendants Fight Back

Due to the asymmetries favoring enforcers, the vast majority of Proposition 65 cases are resolved in the form of consent judgments subject to review and approval by California Superior Courts. Trials under Proposition 65 are extremely rare. This is due to the heavy burden of proof that defendants face. Yet two trial court verdicts in 2013 illustrate that defendants can prevail. The most notable is the trial court victory by defendant baby food and juice/fruit pack defendants. In *ELF v. Beech-Nut*, Case No. RG11 597384, Alameda County Superior Court, Judge Brick found that defendants established an affirmative defense that lead levels in the subject products did not trigger the Proposition 65 duty to warn. Judge Brick found that the frequency of consumption was less than daily, and that exposures to lead could be averaged over time. He rejected the affirmative defense that lead in the products was naturally occurring. The matter presently is on appeal.

Additionally, defendants prevailed in San Francisco Superior Court before Judge Munter on the question of whether dietary supplements are "food" under Proposition 65. *Gillett v. Garden of Life, et al.*, Case No. CGC 08 4797027. This legal determination matters, because sellers of foods can raise certain affirmative defenses not available for non-food consumer products.

It is too early to determine if defendants increasingly will resort to trials, but frustration levels continue to climb and perhaps more will

elect to press their rights. The trial outcomes in 2013 have already shifted the tenor of some cases, although more defense trial victories will be needed to even the playing field. Plaintiffs still typically hold and play the stronger hand.

4. The Attorney General Asserts Herself

For the first two years of her term, Attorney General Kamala Harris and her deputies maintained a fairly low profile in Proposition 65 cases. Enforcement, interventions, and even comments on pending consent judgments were limited. Enforcers grew emboldened given the apparent passivity of the Office of the Attorney General. Defendants, too, sought novel solutions to entrenched enforcement conundrums. Perhaps this helped spur the zeal for reform voiced by both plaintiffs' and defendants' groups.

More recently, the Office of the Attorney General has become far more active in monitoring enforcers and in commenting on negotiated settlements. First, the attorney general has written letters admonishing a range of enforcers who engaged in abusive or improper enforcement practices. Sometimes enforcers responded with positive modifications in behavior, yet at other times they dismissed the criticism and insisted the judiciary resolve any enforcement problems, forcing defendants to fund defenses.

Second, the attorney general has aggressively commented on pending consent judgments. With the threat that she will intervene in their suit, or file objections urging the court to reject the settlement, most parties must consider the comments or objections seriously. Sometimes negotiated settlements are unraveled and renegotiated to resolve the attorney general's concerns. Judges do seem to weigh the attorney general's comments with care, so parties can ignore the comments or objections only at their peril.

Closing

Proposition 65 remains a vexing law. The four trends discussed here have the potential to re-shape the law. Yet what is new is old as well—Proposition 65 continually evolves due to a cacophony of voices. If that evolution can be based on scientific validity, if enforcement abuses can be minimized so parties do not compromise solely for financial reasons, and if transparency increases so case outcomes are more predictable and uniform, then Proposition 65 may better serve the public who voted for the initiative in 1986.

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ENVIRONMENTAL CRIMES IN A MUNICIPAL CONTEXT: AN ASSESSMENT OF A HALF-MEASURE

Eric L. Gomez

The City of Austin has codified the Texas Penal Code within its municipal land development ordinances, which penalizes environmental violations as class C misdemeanors. Each misdemeanor offense includes a possible fine of up to $2000. The City relies on this code to achieve both punishment of land use violations and compliance with the ordinances, the latter being unequivocally preferable. In practice, compliance has become a much more elusive result than punishment, which may be explained by the City's complete reliance on the criminal system for its environmental enforcement function.

Regarding land development cases within the City's jurisdiction, most environmental violations result from a defendant's failure to comply with a permit's terms. For example, a defendant has obtained a permit, but has developed beyond the permit's specified limitations. The remaining violations are the result of investigated complaints, which most often originate from a local governmental entity or citizen, and involve a defendant's alleged failure to pull a development permit for a specified activity. In either scenario, a city inspector will investigate the violation and will have limited options to achieve compliance. The first is to simply notify the defendant of the violation and hope that the warning will provide sufficient incentive to comply. The second is to literally shut down a development site by issuing a stop work order. The stop work order creates a flag in the City's permitting database that prevents the defendant from acquiring further permits or from incurring future inspections at the site. If a defendant chooses to ignore the stop work order or fails to acquire a permit for a particularly egregious violation, a third option is to issue the defendant a citation. Inspectors must then complete and submit a probable cause affidavit along with a signed copy of the citation to the municipal court in order to formally initiate a criminal case.

Although the process appears fairly straightforward, in practice several legal issues arise from the city's attempt to graft together the criminal and environmental law. These issues occur within two categories: pre-trial and trial phases. During the pre-trial phase, naming a defendant and operating against municipal practices are some of the more noteworthy complications. Since environmental cases often involve the interactions of multiple parties, simply naming the right defendant has a decisive impact on a case's outcome. Here, the Texas Penal Code is indispensable. Very briefly, one person is criminally responsible for another's conduct if she or he is criminally responsible for that other person. A corporation is criminally responsible for the conduct of its agents; a corporation's agents can be held criminally responsible, as individuals, for conduct performed on behalf of a corporation. Moreover, criminal responsibility for another includes acting with the culpability required for the offense and aiding, soliciting, encouraging, etc., a nonresponsible or innocent party; or, acting with the intent to promote or assist the offense through solicitation, promotion, direction, etc.; or, having a legal duty to prevent the offense and failing to make a reasonable effort to do so.

A case example helps to highlight the difficulty involved with simply naming a defendant. In this case, a protected vegetative buffer zone is illegally cleared along a scenic roadway in order to develop a site for a multinational corporation's new store. City code requires an immediate restoration of the vegetative buffer. Despite the City's efforts at mediation, no progress is made and enforcement of the violation ensues. The potential parties to the offense include the local developer of the project, the contracted company that cleared the vegetation, the store's manager who pulled the building permits, a corporate officer, such as a registered agent or the CEO, or the corporation itself. Who does the City charge with the violation? If the local developer is charged, the advantages include availability, incentive from negative publicity, deterrence on future projects, and often times, familiarity. The disadvantages include culpability, agency issues—

developers are arguably independent contractors—and the developer's resources and legal authority to bring the site into full compliance. If the City charges the corporate officers, the advantages include the resources to achieve compliance, agency, and the company's attention; the disadvantages include a protracted legal battle, culpability, availability, and identity. Finally, charging a named corporation is often fruitless; at the hearing docket, if no one appears for the defense, the court is unsure against whom to issue a capias (arrest warrant). The charge, therefore, is essentially a posturing that relies entirely on publicity. Although every factor and defendant are not examined, these few hopefully demonstrate some of the weighty considerations involved in selecting the right defendant.

An additional pre-trial obstacle includes the burden of entrenched municipal practices. The City uses a permitting database to track the develop activities occurring within the City. This database does not keep a record of developers who have demonstrated histories of environmental violations; rather, it tracks the properties where those violations have occurred. From this information, encumbrances are placed on titles, utilities are withheld, and fiscal securities are leveraged, all with the goal of ensuring environmental protection. Yet, the criminal law operates to hold a person, not a property, responsible. This fact creates great difficulty when, for example, a defendant who is being prosecuted sells his or her property, thereby relinquishing a right of legal entry to bring about the compliance sought. The City must then decide whether to drop its case and charge the new property owner or continue pursuing the case with the only possible outcome being punishment. Moreover, many defendants enter into deferred disposition agreements that typically provide a six-month window to achieve compliance before charges automatically stick. Rarely do City representatives conduct the necessary research on a project that would reveal an open criminal case before agreeing to terms with a defendant—again, the system tracks properties. Therefore, environmental enforcement must often overcome defendants who have been granted privileges by City staff above and beyond those that had been delimited in a deferred disposition agreement.

During the trial phase, additional obstacles complicate the City's reliance on the criminal law to achieve environmental compliance. Confusion is chief among them. The entire court, including the jury, prosecutors, and the judge hang on by a thread to understand the complicated and technical requirements of the City's permitting process, especially when it applies to a fact pattern. Proof beyond a reasonable doubt, then, is exacerbated by even a halfway decent defense attorney who endeavors to keep the waters muddy. For example, the City recently lost a decision in a case involving failed water quality controls. Upon questioning the jurors, a large majority agreed that the defendant had clearly done something wrong, but they could not understand the prosecutor's charge.

Confounding this issue is the task of preparing witnesses, who mostly consist of City staff. Here, scientists and engineers become the best and worst witnesses at the same time. This professional cohort possesses the greatest understanding of the factual technicalities that make or break a case but often struggles with communicating the complicated fact pattern to a lay jury. Moreover, a successful defense attorney will attempt to undermine these witnesses, who without fail, take the bait and misinterpret the tactic as an intellectual challenge.

An expected solution to the many problems created by a municipality's complete reliance on the criminal system is to begin incorporating civil remedies. Texas Local Government Code, chapter 54, outlines the many civil remedies afforded to a Texas municipality to enforce its rules, ordinances, and regulations. A few of the noteworthy advantages of pursuing civil actions over criminal charges, in the context of environmental protection, include a less stringent burden of proof, remedies tailored to a specific violation, and more cases tried before a judge than a jury. Furthermore, within the criminal legal framework the City is burdened with manipulating the right incentive to achieve

compliance. Some defendants are simply undeterred by the threat of a $2000 fine, a class C misdemeanor, or mounting a defense against a City prosecutor. Within the civil framework the City may rely on the prospect of a judicial order that requires the specific compliance sought. Accordingly, the City's total reliance on the criminal law to enforce its environmental violations may be representative of municipal practice, or just an aberration, but a careful consideration of alternatives would further the City of Austin's environmental objectives.

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BSEE ENFORCEMENT OF SEMS REGULATIONS

J. Michael DiGiglia

Introduction

Many of you are asking, who is BSEE, what is SEMS, who is subject to SEMS, and how long has it been around? These are all good questions. On May 19, 2010, the U.S. Department of Interior, Minerals Management Service (MMS) was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). On October 1, 2011, BOEMRE was split into three independent entities, the Bureau of Safety and Environmental Enforcement (BSEE), the Bureau of Ocean Energy Management, and the Office of Natural Resources Revenue.

On October 15, 2010, the final rule for Safety and Environmental Management Systems (SEMS) was first published by BOEMRE in the *Federal Register*. *See* 75 Fed. Reg. 63,610 (Oct. 15, 2010). This final rule incorporates by reference, and makes mandatory, the American Petroleum Institute's (API) Recommended Practice (RP) 75, third edition, May 2004, reaffirmed in May 2008, commonly referred to as "API RP 75." The SEMS regulations, authorized by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1301, apply to operators performing oil, gas, and/or sulfur operations on the Outer Continental Shelf in the Gulf of Mexico and the Atlantic and Pacific Oceans. When facilities on the Outer Continental Shelf (OCS) are being developed and installed, SEMS applies as soon as they touch the seabed. Once the facility touches the seabed, the operator's SEMS program must also cover contractors working on the facility, as well as any contractors on a motor vessel tethered, moored, or attached to the facility. The SEMS effective date was November 15, 2010, and its implementation deadline was November 15, 2011.

The SEMS regulations require systems to be developed and implemented that are similar to (1) the Occupational Safety and Health Administration's Process Safety Management (PSM) program, 29 C.F.R. § 1910.119, which has been in place for

onshore refining and chemical manufacturing facilities since 1992; and (2) the Environmental Protection Agency's Risk Management Programs (RMP), 40 C.F.R. part 68, which have been in place in those same industries since 1996.

According to BSEE, the four principal SEMS objectives are to: (1) focus attention on the influences that human error and poor organization have on accidents, (2) continuously improve the offshore industry's safety and environmental records, (3) encourage the use of performance-based operating practices, and (4) collaborate with industry in efforts that promote the public interests of offshore worker safety and environmental protection.

Before BOEMRE was split and dissolved, it proposed revisions to the original SEMS rule on September 14, 2011, which was dubbed "SEMS II." SEMS II significantly expands the original SEMS rule, as discussed in more detail below. BSEE published the final SEMS II rule on April, 5, 2013. *See* 78 Fed. Reg. 20,423. SEMS II became effective on June 4, 2013, and the implementation deadline is June 4, 2014, except for the auditing requirements.

History of SEMS

Many people believe that the SEMS regulations were promulgated in response to the Deepwater Horizon/BP Macondo incident. In fact, SEMS has its origins going back to the 1990 finding of the National Research Council's Marine Board that the MMS prescriptive approach to regulating offshore operations had forced industry into a compliance mentality. In response to those findings, in May 1993, API, in cooperation with the MMS, developed Recommended Practice 75—Development of a Safety and Environmental Management Program for Outer Continental Shelf Operations and Facilities (the original API RP 75, also called "SEMP").

In 1994, the MMS recognized implementation of API RP 75 as meeting the spirit and intent of a safety and environmental management concept. API RP 75 was updated in July 1998 to focus more on contract operations, including operations on mobile offshore drilling units.

On May 22, 2006, the MMS, published an advance notice of proposed rulemaking (ANPR) in the *Federal Register*, 71 Fed. Reg. 29,277 (May 22, 2006), to seek comments and information on how to improve the regulatory approach to safety and environmental management for operations conducted on the OCS. On June 17, 2009, after a three-year period of information gathering, the MMS published a notice of proposed rulemaking in the *Federal Register*, *see* 74 Fed. Reg. 28,639, based on industry and public feedback from the 2006 ANPR. In response to several requests, the MMS convened a public meeting on September 2, 2009, in New Orleans, Louisiana, to discuss the proposed rule. The Deepwater Horizon/BP Macondo incident did not begin until April 20, 2010. Finally, on October 15, 2010, BOEMRE published the original final rule for the SEMS program. So, in reality, the development of the SEMS program occurred over a 20-year period, which coincidentally concluded shortly after the Deepwater Horizon/BP Macondo incident.

Requirements of SEMS

The original SEMS regulation required OCS operators to develop SEMS programs that contained at least 13 elements: General—principles & scope, safety & environmental information, hazards analysis, management of change, operating procedures, safe work practices, training, mechanical integrity, pre-start-up review, emergency response & control, investigation of accidents, audits and records, and documentation. Unsurprisingly, SEMS contains similar elements as the PSM and RMP programs. The original SEMS rule required operators to have audits performed of their facilities by either independent third parties (I3P) or designated and qualified personnel (DQP) by November 15, 2013. Such audits were to be comprehensive audits of all 13 elements of the operator's SEMS program to determine compliance with the SEMS rule and API RP 75. Thereafter, audits were required every three years. The deadline for submitting audit reports of the audit

findings, observations, deficiencies identified, and conclusions to BSEE was within 60 days of the audit completion date.

While OCS operators are responsible for SEMS compliance, all personnel, which includes contractors, must be trained in accordance with SEMS. Operators must verify that contractors are trained in accordance with SEMS prior to performing a job, and must ensure that contractors have their own written safe work practices, which may include the adoption of appropriate sections of an operator's SEMS program. Further, operators and contractors must document an agreement on appropriate contractor safety and environmental policies and practices before the contractor begins work at an operator's facilities.

The SEMS II regulations added requirements for developing and implementing a stop work authority program, developing and implementing an ultimate work authority designation, requiring an employee participation plan, establishing guidelines for reporting unsafe working conditions, establishing additional requirements for conducting a job safety analysis, requiring that the team lead for an audit be independent and represent an accredited audit service provider, and requiring a corrective action plan to be submitted with the audit findings. Under SEMS II, in addition to the audit report, a corrective action plan (CAP) for addressing the deficiencies identified in the audit must also be submitted to BSEE within 60 days of the audit completion date. The CAP must include the name and job title of the personnel responsible for correcting each of the identified deficiencies.

Civil Enforcement Actions

With regard to SEMS enforcement actions, BSEE will typically issue an "incident of noncompliance" (INC) to the operator, using one of two main enforcement actions: (1) warning INCs or (2) shut-in INCs, depending on the severity of the violation. Warning INCs are issued if the violation is not severe or threatening and typically must be corrected within 14 days. The shut-in INCs will be one of two types: (1) a component shut-in INC, or (2) a facility shut-in INC. For either type of shut-in INC, the violation must be corrected before the operator is allowed to continue the activity in question.

Civil and Other Penalties

As of June 30, 2011, BSEE can assess a civil penalty of up to $40,000 per violation per day for violations of the OCSLA if (1) the operator fails to correct the violation in the reasonable amount of time specified on the INC, or (2) the violation resulted in a threat of serious harm or damage to human life or the environment. 76 Fed. Reg. 38,294 (June 30, 2011). BSEE can also initiate probationary or disqualification procedures directed at an OCS operator if its SEMS program is not in compliance.

BSEE has indicated that it is revising the process by which it determines the imposition of civil penalties. Under its current process, it can take up to a year to determine whether civil penalties should be imposed after the issuance of INCs. BSEE indicated that it is working toward increasing that civil penalty amount, having let it be known that it believed a top fine of $40,000 per day, per incident, is not a meaningful deterrent in an industry in which operators pay over $500,000 per day for their operations.

Appeal of Civil Enforcement Actions or Penalties

If serious enough, shut-in INCs or civil penalties may be appealed to the Interior Board of Land Appeals (IBLA) within 60 days of their receipt. After filing the appeal, the appellant has 30 days to file a statement of reasons for the appeal, if not already filed with the appeal; and BSEE has 30 days to file an answer responding to the statement of reasons. The IBLA will grant one automatic extension, not to exceed 30 days. The appellant may file a reply brief within 15 days of receiving an answer.

Either party may request a hearing to present evidence on an issue of fact. The request must be

filed within 30 days after an answer is due. If the IBLA grants a hearing, the appeal will be referred to an administrative law judge. If the parties agree, they may request that the dispute regarding violations or penalties be administered within the IBLA Alternative Dispute Resolution Program.

Criminal Enforcement Actions

If the SEMS violation is serious enough, and is found to be a knowing and willful violation, BSEE may recommend that the matter be referred to the Department of Justice for criminal prosecution. Under section 24(c) of the OCSLA, 43 U.S.C. § 1350(c), just as with the other major environmental statutes, the federal government may pursue criminal charges for the following: knowing and willful violations of the SEMS regulations; making any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under the OCSLA; falsifying, tampering with, or rendering inaccurate any monitoring device or method of record required to be maintained under the OCSLA; and disclosure of any data or information required to be kept confidential by the OCSLA.

BSEE's Regulatory and Enforcement Team

BSEE's chief of Offshore Regulatory Programs is Doug Morris. He was formerly the director of the Reserves and Production Division for the Energy Information Administration, a member of API's executive staff where he served as the group director for Upstream and Industry Operations, and has worked as a petroleum engineer with the MMS and with private industry. Charles Barbee is the Environmental Enforcement Division chief in Washington. He has more than 20 years of experience with the U.S. Coast Guard and, most recently, was the Coast Guard's program manager for both marine investigations and environmental crime.

Interestingly, the District Field Operations, Regional Field Operations, and Production and Development personnel all report to the regional directors, but the environmental enforcement personnel who are housed at the regional offices and are responsible for conducting SEMS audits, inspections, and investigations report directly to Washington. In addition, the oil spill response personnel housed at the regional offices also report directly to Washington.

Hiring and Training the BSEE Enforcement Team

BSEE developed a new National Offshore Training & Learning Center (NOTLC), at which Chris Barry is the training director. The NOTLC now boasts 30 courses for inspectors and 50 courses for engineers.

Between July 2010 and January 1, 2012, BOEMRE/BSEE increased its inspections corps by close to 80 percent. As of November 2011, BSEE had put two groups of new inspectors through a core curriculum in offshore inspections at its NOTLC. In April 2012, BSEE announced that it would hire 200 additional people that will focus on permitting, spill response plan reviews, inspection of offshore facilities, and ensuring environmental compliance. Many of these new personnel were hired right out of college and required a significant amount of training. Since that time, BSEE has been very quiet about statistics related to hiring and training.

SEMS Audit Triggers

Day-to-day BSEE field inspections are not intended to be SEMS audits. If inspectors performing a normal inspection identify SEMS issues, they are supposed to contact the regional SEMS coordinator about those issues. BSEE has indicated that it will make its decision regarding audit targets based on certain triggers. Some of BSEE's audit triggers include (1) poor performers based on historical enforcement action metrics (e.g., INCs), (2) accident panel investigations for the prior year where one or more SEMS elements were found to be the root cause of the accident, (3) monthly operator compliance, and (4) random selection.

BSEE will conduct both comprehensive and partial SEMS audits. Will operators know when they are to

be targeted for SEMS audit? Typically, (1) full audits will be announced, (2) partial audits can be but do not have to be unannounced, (3) some audits will be done in the field on a platform or in the operator's office and (4) some audits will be performed both in the field and in the operator's office.

When BSEE performs audits, its audit teams are made up of personnel from the regions, districts, and headquarters. BSEE audits can take the form of operator-initiated audits with a DQP or I3P, where BSEE personnel observe the audit and will subsequently review the audit report and corrective action plan. A BSEE audit can also be a BSEE-initiated audit based on the triggers discussed above or they can be a BSEE-directed audit where BSEE actually directs an operator to conduct an unplanned I3P audit.

BSEE's Enforcement of SEMS to Date

While the OCSLA requires BSEE to conduct on-site inspections to assure compliance with lease terms, notices to lessees and approved plans, and to assure that safety and pollution-prevention requirements of the regulations are met, 43 U.S.C. § 1348(c), BSEE has been quiet about performing or participating in SEMS audits. There are reports that BSEE has participated in some operator-initiated audits. Also, BSEE did order two operators to conduct I3P SEMS audits based on their safety records.

Eighty-four operators were subject to the November 15, 2013, audit deadline and 72 of those operators completed an initial audit for submission before the deadline. In November 2013, BSEE directed five companies to halt operations because they failed to provide the Bureau with an audit plan and completed audit report by November 15. The companies were given three days to reach a safe point in their operations before ceasing work. Seven additional operators submitted SEMS audit plans but failed to complete the audits before the November 15 deadline. Those operators were directed to immediately provide BSEE with a copy of their SEMS program and complete their SEMS audit without further delay.

What's Next with BSEE and SEMS?

BSEE received 72 audit reports prior to the November 15, 2013, deadline, another 12 audit reports around the end of 2013, and is currently reviewing and digesting those audit findings. BSEE was disappointed with the brevity and lack of details in the audit reports. It is possible that enforcement follow-up may result from improper, inadequate, or incomplete audits or failure to take proper corrective action.

BSEE is also evaluating the possibility of requiring contractors to have a SEMS program while performing operations on the OCS and may address this concept through future rulemaking. BSEE will be unveiling a reporting system that will enable workers to anonymously report near-misses through the U.S. Bureau of Transportation Statistics. Interestingly, on September 10, 2013, the U.S. Coast Guard published an ANPR, 78 Fed. Reg. 55,230, giving notice of its intent to promulgate regulations that will require vessels engaged in OCS activities to develop, implement, and maintain a vessel-specific SEMS program that incorporates API RP 75. Also, we can expect BSEE Director Brian Salerno to continue to promote a "safety culture" within the industry that goes beyond the minimum standards of the SEMS regulations.

BSEE is expected to finalize the rule it proposed on August 22, 2013, *see* 78 Fed. Reg. 52,240, which will amend and update current regulations regarding production systems and equipment that are used to collect and treat oil and gas from OCS leases. The rule will address recent technological advances involving production safety systems, subsurface safety devices, safety device testing, and life-cycle analysis. The intent of this rule is to reduce the number of production incidents resulting in oil spills, injuries, and fatalities.

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BELL V. CHESWICK GENERATING STATION: A BLOW TO THE CLEAN AIR ACT "PERMIT SHIELD"

David B. Weinstein and
Chelsae R. Johansen

The Supreme Court, in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), held that the Clean Air Act (CAA) preempts *federal* common law claims relating to a CAA permittee's air emissions. *American Electric* expressly left open the question of whether the CAA also preempts state common law claims. District courts relied on the Court's reasoning in *American Electric* to hold that the CAA also preempts all *state* common law claims. Recently, however, the Third Circuit, in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), reversed one of these district court decisions and held that the CAA does not "shield" permittees from state common law claims.

Clean Air Act Preemption Before *American Electric*

Before the Supreme Court's decision in *American Electric*, courts were split as to whether the CAA preempted state common law claims.

In *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992), a class of property owners alleged that an oil company negligently allowed toxic gases to escape from its facility and contaminate the plaintiffs and their property. *Id.* at 1281. The court held that the CAA did *not* preempt state law causes of action. *Id.* at 1285.

The court articulated that the CAA expressly allows the state to enact and enforce more stringent limitations than those specified in the CAA. *Id.* at 1284 (citing 42 U.S.C. § 7412(r)(11)). The state may enact and enforce these more stringent limitations through common law. *Id*. In addition to citing the CAA's reserved role for the states, the court focused on the Act's "citizen suit savings clause," which states that "[n]othing in this section shall restrict *any right* which any person (or class of persons) shall have under any statute or common law to seek enforcement of *any* emission standard or limitation or *to seek any other relief* (including relief against the Administrator or a State agency)." *Id.* at 1283 (citing 42 U.S.C. § 7604(e)) (emphasis in original).

Thus, while the court expressed concern with "the manageability and efficiency of this dual system that Congress has created," it deferred to the clear language of the CAA. *Id.* at 1285. Further, the court reasoned that Congress could not have intended for the CAA to preempt state common law claims because such preemption would "preclude relief for any person who can prove the elements of the common law claims." *Id.* at 1284. The Sixth Circuit held similarly in *Her Majesty the Queen v. City of New York*, 874 F.2d 332 (6th Cir. 1989).

On the other hand, the Fourth Circuit held in *North Carolina v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), that the CAA preempts some state common law claims. North Carolina brought a public nuisance claim against the Tennessee Valley Authority (TVA), alleging that emissions from TVA's plants violated North Carolina's air pollution laws. *Id*. at 296. The Fourth Circuit reversed the district court, holding that the CAA preempted the state nuisance claim. *Id.* at 301–06.

First, the court acknowledged the dangers of authorizing courts to adopt emissions standards to govern nuisance claims. *Id.* at 301–02. Different courts would undoubtedly adopt different standards and could even subject a single emitter to multiple emissions standards. *Id.* at 302.

Next, the court recognized the "considerable potential mischief" in nuisance actions that seek to establish emissions standards that vary from federal and state regulatory laws. *Id.* at 303. Although the court acknowledged the CAA's citizen suit savings clause, it recognized that plaintiffs should not be allowed to use the savings clause to undermine the statute. *Id.* at 304. The court accused the plaintiffs of doing just that—attempting "to replace

comprehensive federal emissions regulations with a contrasting state perspective about the emission levels necessary to achieve those same public ends." *Id.*

Finally, the court articulated a number of reasons why Congress entrusted EPA with setting emissions standards, rather than allowing courts to do so. *Id.* at 304–06. Setting air emissions standards requires scientific expertise. *Id.* at 304–05. Further, if the responsibility was left to the courts, inconsistent emissions standards would encourage forum shopping. *Id.* at 306.

American Electric and District Court Decisions Following *American Electric*

The Supreme Court, in *American Electric*, held that *federal* common law claims for alleged increased risk of harm to public health and welfare stemming from an emitter's greenhouse gas emissions were preempted by the CAA. 131 S. Ct. at 2537. The Court, however, explicitly left open the question of whether the CAA preempts *state* common law claims, noting that the issue would turn "on the preemptive effect of the federal Act." *Id.* at 2540.

Following this decision, district courts faced with the question relied on the reasoning in *American Electric* and *TVA* to hold that the CAA broadly preempts *all* state common law claims.

In *United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274 (W.D. Pa. 2011), Pennsylvania and New Jersey brought public nuisance claims against the owners and operators of a coal-fired plant. *Id*. at 266–67. Citing *TVA* and *American Electric*, the court stated that the CAA represents a "comprehensive statutory and regulatory scheme[]" and held that state common law public nuisance claims were preempted. *Id.* at 297.

Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013), involved a suit by plaintiffs damaged by Hurricane Katrina who alleged that their damages were the result of defendants' greenhouse gas (GHG) emissions. *Id.* at 852. Plaintiffs' state law claims included negligence, public and private nuisance, and trespass. *Id*. The court determined that the CAA preempts a judicial determination that GHG emissions levels were unreasonable because "those determinations had been entrusted by Congress to the EPA" through the CAA. *Id.* at 865.

Bell v. Cheswick Generating Station

In *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012) *rev'd*, 734 F.3d 188 (3d Cir. 2013), a class of more than 1500 people who resided within one mile of a coal-fired plant brought state common law claims for negligence, private nuisance, strict liability, and trespass. *Id.* at 315–16. The plaintiffs alleged that emissions from the plant settled on their property, causing damage and forcing them to constantly clean their property. *Id*. at 315.

Like other district courts after *American Electric*, the district court cited to *TVA* in holding that the CAA established a comprehensive regulatory scheme. *Id.* at 321. The plaintiffs' claims would require the court to establish emission standards in order to provide a remedy to the plaintiffs, thereby encroaching on that regulatory scheme. *Id.* at 322.

Further, the district court found the CAA's savings clause "unpersuasive" because it was "ambiguous as to which state actions were preserved" and could "undermine [the] carefully drawn statute. . . ." *Id.* (citing *TVA*, 615 F.3d at 304). Thus, the district court held that the CAA preempted the plaintiffs' claims. *Id.* at 323.

The Third Circuit, however, reversed. 734 F.3d at 188. The court recognized that the citizen's suit savings clause in the CAA is virtually identical to the one in the Clean Water Act. *Id.* at *195–96. Therefore, the Supreme Court's rationale in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), in which the Court held that the Clean Water Act did *not* preempt state common law claims based on the law of the state where the

source of the pollution is located, extended to the CAA. *Id.* at 198.

Examining the argument that allowing state common law claims would undermine the regulatory framework established by the CAA, the Third Circuit stated that the CAA merely creates a "regulatory floor" and states are free to impose higher standards. *Id.* at 198 (citing *Ouellette*, 479 U.S. at 497–98). One way for a state to impose higher standards on sources of pollution is through its judicial branch. *Id.* In other words, a state's courts could adopt such standards when ruling on source-state common law tort actions. *Id.*

On September 3, 2013, a *Bell* defendant filed a petition for rehearing en banc, arguing that the Third Circuit focused solely on express preemption and failed to examine implied preemption—whether the state common law claims conflicted with the CAA's regulatory scheme. The Third Circuit denied the petition on September 23, 2013. More recently, on February 20, 2014, a petition for a writ of certiorari was filed with the Supreme Court.

CAA Preemption After *Bell*

Bell's holding governs the Third Circuit, and the CAA preemption defense should still be available in other circuits. The *Bell* decision is noteworthy, however, and it should remind permittees that their CAA permits may not serve as a "shield" against state common law claims. District courts outside of the Third Circuit are already relying on *Bell* to hold that the CAA does not preempt state common law claims. *See, e.g.*, *Cerny v. Marathon Oil Corp.*, Civ. A. SA-13-CA-562-XR, 2013 WL 5560483, at *8 (W.D. Tex. Oct. 7, 2013).

Permittees should remember, however, that compliance with CAA regulations may still serve as a defense to negligence claims by, for example, showing that (1) the plaintiffs suffered no injury, or (2) the defendants did not breach their duty of due care. *See, e.g.*, *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Prot., Inc.*, 45 F. Supp. 2d 934 (S.D. Ala.), *aff'd*, 204 F.3d 1122 (11th Cir. 1999) (because there was no evidence that the plaintiffs' systems exceeded the MCL for the herbicide Atrazine, it "cannot be said that either has suffered any actual invasion of a legally protected interest"); *Taco Cabana, Inc. v. Exxon Corp.*, 5 S.W.3d 773 (Tex. App. 1999) (state water code established standard for whether contamination levels were unreasonable).

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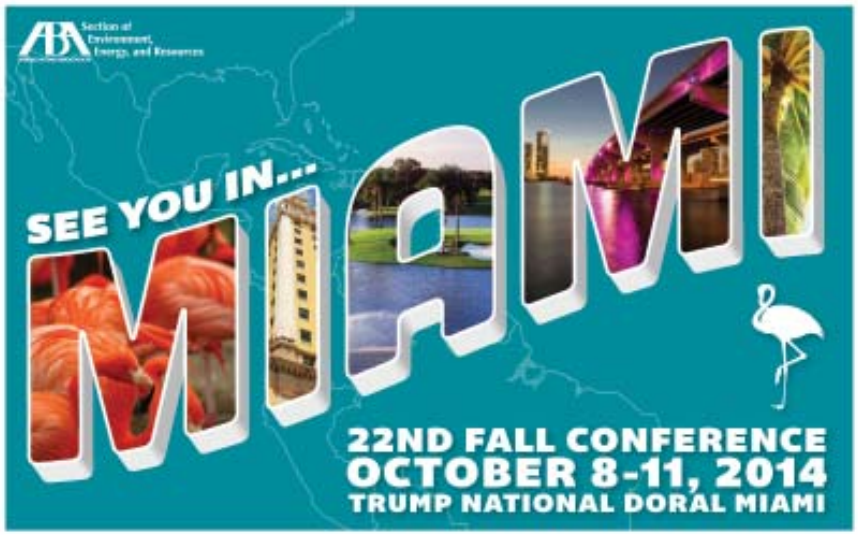

REDUCED EPA ENFORCEMENT BUDGET MAY TEMPER NSPS OOOO ENFORCEMENT RISK

Sandra Y. Snyder

When EPA issued final amendments on September 23, 2013, to the oil and gas new source performance standard (NSPS), 40 C.F.R. part 60, subpart OOOO ("oil and gas NSPS" or "NSPS OOOO"), it raised enforcement and compliance concerns within industry. These amendments revised portions of the oil and gas NSPS, which was originally issued August 16, 2012. NSPS OOOO regulates the volatile organic compound emissions (VOCs) from new sources in the oil and gas sector—meaning those sources that were installed or modified after August 23, 2011, the date of the 2012 rule's proposal. The rule has a broad reach, imposing air emissions controls, certification, notification, reporting and record-keeping requirements for equipment and processes used in the production, gathering, processing, and transmission of natural gas. Equipment covered by the rule includes storage vessels, pneumatic devices, centrifugal compressors, reciprocating compressors, and dehydrators.

Although the September 2013 amendments were issued in response to some of the objections industry raised with the 2012 rule, EPA provided industry a very short deadline to comply with certain requirements, which raises potential enforcement concerns. In particular, one of industry's complaints about the 2012 rule was that EPA had greatly underestimated the number of storage tanks that would be affected by the NSPS. In short, NSPS OOOO requires a 95 percent reduction in VOCs from any vessel in production, gathering, processing, transmission, or storage service that contains hydrocarbons if that vessel's emissions exceed six tons per year (TPY). Industry was concerned that because EPA had underestimated the demand for new control devices (and resources to install them), sources would not be able to comply with the timeline provided in the 2012 rule to reduce their tank emissions.

In response to industry's concern, EPA amended the storage tank requirements. However, EPA provided industry a short window of opportunity to capitalize on an important compliance alternative: obtaining state-issued permits capping their tank emissions. As a result, some companies become subject to the NSPS OOOO requirements despite their best attempts to take timely action to opt out of the rule by voluntarily capping their emissions.

The 2013 NSPS OOOO Storage Tank Amendments

In the 2013 NSPS OOOO amendments, EPA divided storage tanks into two categories: group 1 tanks and group 2 tanks. Group 1 tanks are those that were installed or modified between the date EPA originally proposed the oil and gas NSPS—otherwise known as the applicability date—(August 23, 2011) and the date when the 2013 amendments were proposed (April 12, 2013). Group 2 covers tanks that are newer—meaning those that were installed on April 12, 2013, or thereafter.

The 2013 amendments imposed a short deadline for owners of group 1 tanks to determine whether they were subject to NSPS OOOO. Specifically, the amendments provided owners and operators of group 1 tanks until October 15, 2013, to determine whether the potential to emit (PTE) VOC emissions from each of their group 1 tanks exceeded the six TPY threshold. If so, those tanks would need to install a combustion device in order to reduce VOC emissions by at least 95 percent.

However, the 2013 amendments provided an exception to this requirement. EPA clarified in the 2013 amendments that a vessel's PTE can be based on any "legally and practically enforceable" state or local permit. Therefore, if a source applied for and obtained a permit capping its tank emissions under six TPY, that tank would not be subject to NSPS OOOO and all of its reporting, monitoring, and compliance obligations.

States Unable to Meet Permit Demands

Despite providing industry this option, EPA underestimated whether the deadlines it imposed would realistically enable industry to capitalize on this option. As noted above, the final amendments were published in the *Federal Register* on September 23, 2013. Prior to the formal publication of the amendments, EPA issued a pre-publication copy of the amendments on August 5, 2013. In other words, EPA expected industry to react extremely quickly to the pre-publication copy of the rule if it had any hope of obtaining a state-issued permit before the October 15, 2013, deadline to cap tank emissions from group 1 tanks.

Naturally, some states were overwhelmed with requests to obtain permits capping emissions from group 1 tanks. For example, the state of Oklahoma's Department of Environmental Quality (DEQ) issued a permitting guidance memo advising facilities that it was experiencing "historically high permitting activity" and, therefore, DEQ could not guarantee that it would be able to issue all of the desired permits prior to the October 15, 2013, deadline. More specifically, this guidance document, posted on DEQ's Web site on September 17, 2013, warned that DEQ would not be able to issue permits for those applications that were received after September 13, 2013. Oklahoma Department of Environmental Quality, Permitting Guidance and the Pending October 15, 2013 Tank Enforceability under NSPS Subpart OOOO, http://www.deq.state.ok.us/aqdnew/permitting/oooopermitguide.pdf. Notably, this cutoff was four days *before* the DEQ guidance document was made publicly available *and* ten days *before* EPA even published its final rule in the *Federal Register*. Thus, some companies that planned to comply with the six TPY emissions limit by obtaining a permit from DEQ were likely left without any alternative than to install a combustion device and submit to being regulated under NSPS OOOO if they failed to submit permit applications in Oklahoma prior to the final rule's publication.

Legal Challenges

Several members of industry filed petitions to review the 2013 amendments to the NSPS OOOO. *Am. Petroleum Inst. v. EPA*, No. 13-1289 (D.C. Cir. filed Nov. 22, 2013); *Gas Processors Ass'n v. EPA*, No. 13-1290 (D.C. Cir. filed Nov. 22, 2013); *Tex. Oil and Gas Ass'n v. EPA*, No. 13-1292 (D.C. Cir. filed Nov. 22, 2013); *Indep. Petroleum Ass'n of Am. v. EPA*, No. 13-1293 (D.C. Cir. filed Nov. 22, 2013); *W. Energy Alliance v. EPA*, No. 13-1294 (D.C. Cir. filed Nov. 22, 2013). At this time, those cases are in abeyance pending a decision by EPA on various petitions for administrative reconsideration.

Looking Ahead

Sources that were unable to obtain permits limiting their group 1 tank emissions prior to the October deadline are now required to comply with NSPS OOOO, its reporting and record-keeping obligations, and reduce emissions from their group 1 tanks by April 15, 2015. Therefore, sources that did not get their permits in time still have time to develop procedures, record-keeping systems, and install controls prior to the compliance deadline.

EPA did not provide a similar grace period after the PTE deadline for group 2 tanks (those that were installed or modified after April 12, 2013). For group 2 tanks, EPA set the same deadline—April 15, 2014—for companies to determine the PTE of those group 2 tanks *and* to achieve compliance. Therefore, any company that wants to obtain state-issued permits to avoid triggering NSPS OOOO for group 2 tanks should consider submitting such applications as far in advance of the April 15, 2014, deadline as possible. Doing so will help provide sources certainty prior to the compliance deadline so they will know whether they are regulated under NSPS OOOO or not.

Normally, when EPA issues a new rule, the agency provides a period of compliance assistance where it refrains from enforcement action. Therefore,

companies might anticipate that EPA would grant enforcement discretion in 2014 where companies submitted a permit application to cap emissions from a group 2 tank but the state permitting agency was unable to issue that permit in time for the April 15, 2014, deadline. Given that companies were on notice that some state permitting agencies were unable to issue permits for all of the applications submitted, EPA might not have wanted to provide any compliance assistance. But, realistically, this enforcement risk may be tempered by EPA's scaled-back enforcement goals for 2014–2018. In anticipation of massive budget cuts, the agency has predicted that it will conclude 10,000 civil enforcement cases over the next five years, which is almost half the number of cases the agency anticipated bringing in its plan from three years ago. Law360, *EPA Slashes Enforcement Goals for 2014–18* (Nov. 25, 2013); *see also* www.regulations.gov (Docket ID: EPA-HQ-OA-2013-0555). As a result, EPA may end up having no choice but to provide a period of compliance assistance for NSPS OOOO, in favor of reserving its enforcement resources for higher priority issues.

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