

From: Bruce A. Berson (BAB1), RTI
To: ABB, CDP1 H Beach, RTI C Peterson, RTI
Date: Thursday, January 4, 1996 3:45 pm
Subject: NEORS 12/21/95 ltr to EDO re AMS

I spoke to Tom Blachford in the OIG in the absence of Watkins re the above letter. I briefly summarized the background for him and our preliminary views on the merits. He agreed with our recommendation to respond to the letter in the ordinary course of business and to send him both a copy of the incoming and our response to the sewer district when the response is issued.

Cindy, I'd appreciate it if you can ensure that I receive a copy of our final response if I'm not otherwise on concurrence. Thanks.

cll

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January 5, 1996

Ohio Firm Using Radioactive Cobalt Claims NRC Rules Preempt SERC; SERC Says Both Sets of Regulations Apply for Emergency Planning

A dispute over regulatory authority is at the heart of an ongoing controversy regarding the operations of an Ohio medical supply company that handles cobalt-60, a radioactive substance used for cancer treatment. The Ohio state emergency response commission (SERC) has issued an order to a Cleveland firm requiring it to comply with Section 302 of the Emergency Planning and Community Right-To-Know Act (EPCRA), but the firm has countered, contending that Nuclear Regulatory Commission (NRC) regulations take precedence.

Advanced Medical Systems (AMS) used cobalt-60 until about 1990 to manufacture machines for cancer radiation treatment and is still licensed by NRC to keep supplies on hand to replenish the radiation sources of machines already manufactured, said Dwight Miller, an attorney with the Cleveland law firm of Stavole & Miller, one of two firms representing AMS. AMS is licensed by NRC to store up to 290,000 curies of sealed cobalt-60, according to the SERC order.

In addition, state and local authorities contend that AMS has illegally released water contaminated with cobalt-60 into the municipal water treatment system. AMS, however, had been permitted diluted discharges until January 1994, according to Miller. There have been no "intentional discharges" since 1989, he said.

EPCRA Section 302 requires any facility that handles an extremely hazardous substance (EHS) above the threshold planning quantity to participate in preparation of community contingency plans for hazardous materials accidents and to designate a facility emergency coordinator to work with the local emergency planning committee (LEPC) in developing emergency plans.

Although cobalt-60 is not an EHS under EPCRA Section 302, Ohio Revised Code Sections 3750.04 and 3750.05 allow the SERC to have a company declared an additional planning facility under the pre-planning requirements, said Ken Schultz of the Ohio Environmental Protection Agency (Ohio EPA).

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OSHA's Six-month Regulatory Agenda: Focus on Finalizing Rules, Updating PELs

The U.S. Occupational Safety and Health Administration (OSHA) has issued its semi-annual regulatory agenda (60 FR 59620, Nov. 28, 1995). Many actions outlined in the agenda involve new agency activities that are designed to increase safety or streamline regulatory burdens. Others represent finalizing rules proposed in previous years. The agency plans to issue the following proposed rules (the action date follows in parentheses):

Recordkeeping. Concerns about the reliability and utility of injury and illness data from employer-maintained OSHA records have led OSHA to work toward a proposal to revise recordkeeping requirements and issue new recordkeeping forms and interpretive material (proposal was scheduled for October 1995).

Comprehensive programs. OSHA plans to expand the non-mandatory guidelines of the Voluntary Protection Program by developing a safety and health programs rule (June 1996).

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Reporting on Chemical Disclosure Requirements, Emergency Response Programs, Hazard Communication and Industry Liability

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Regulatory Dispute

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On Oct. 11, 1995, the Ohio SERC issued an order giving the Cuyahoga County LEPC authority to require AMS to provide information needed to add the facility to its county-wide plan for emergency response to hazardous materials incidents, according to a SERC press statement. The Ohio statute gives a facility 30 days to appeal such an order to the state's Environmental Board of Review. However, AMS, which claims NRC regulations preempt state regulation of the facility in health and safety matters, chose instead to file a complaint in federal district court, seeking a declaratory judgment that the SERC lacks regulatory authority.

The Chain of Events

This dispute over regulatory authority arose in 1991 when the Northeast Ohio Regional Sewer District (NEORS) learned that solid waste incineration ash at its facility contained radioactive materials. In May of that year, the NRC had conducted a "fly over" of the Cleveland area to locate radioactive materials in an unrelated matter. Upon passing over the NEORS facility, NRC officials obtained a reading indicating that NEORS ash also contained radioactive materials. "This was the first notion that we had radioactive materials," said Larry English, assistant general counsel at NEORS.

NEORS was able to trace the source of the material back to AMS and in April 1993 sued the company in state court to recover costs associated with the handling of the radioactive ash. As part of the discovery in that case, NEORS investigators found evidence of what they believed to be continuing releases of water contaminated with cobalt-60 by AMS, although "we had been told of nothing that would be generating cobalt now," English said. "We realized at that point that either we were being lied to severely or we were dealing with people who did not know what they were doing," he said.

Until January 1994, NRC permitted certain diluted discharges into the sewage system, said Miller, AMS's

attorney. Both AMS and its predecessor had been discharging radioactive waste since 1958 or 1959, but "there have been no intentional discharges since 1989," he added.

Debate Over NRC Authority

It is the LEPC's position that it should regulate certain aspects of the facility's emergency response plan, while AMS contends that only the NRC has regulatory authority. "AMS has tried to use the NRC as a shield," said Mike Kalstrom, Cuyahoga County LEPC secretary. The committee wants AMS to participate in the local emergency planning process on a routine basis.

Miller, the company's attorney, explained AMS's position: "The NRC requires us to have an emergency plan, and our license requires us not to change that without the express approval of the NRC." (For further details on the NRC emergency planning regulations, see box page 7.) AMS believes that any SERC-required plan would be directly contradictory to the type of emergency plan mandated in the NRC regulations. "We think Congress has made a clear choice that the NRC, with respect to health and safety matters regarding nuclear facilities, preempts the field," Miller said.

"I know there are some [NRC emergency planning] regulations, but they are not to the extent required under EPCRA," said Chris Jones, section chief of the environmental enforcement section at the Ohio Attorney General's office, which is preparing a response to AMS's complaint on behalf of the SERC.

In March 1995, AMS provided a copy of its NRC plan to the Cleveland Fire Department, the SERC and the LEPC. According to English of NEORS, the company's NRC plan contained "an appalling lack of realistic emergency planning." Among other things, neither the LEPC nor the SERC 24-hour emergency numbers were listed in the emergency contact section for

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Industry Urges OSHA Workgroup to Adopt Standardized Format For MSDSs, Develop Comprehensive MSDS Compliance Strategy

Representatives from a range of major industries said the Hazard Communication Standard (hazcom) is generally an effective tool for protecting worker health and safety. It may require modifications, they said, sounding a consistent theme, but not a fundamental reworking.

Their collective testimony before a workgroup of the National Advisory Committee on Occupational Safety and Health (NACOSH) in December differed from an earlier panel that represented small business and labor, which focused more on the high cost of compliance (see *R-T-K News*, Nov. 17, 1995.) The hazcom workgroup faces an April deadline for delivering a formal report to NACOSH on how to revise the standard.

Adopt the ANSI Standard

The need to adopt the uniform material safety data sheet (MSDS) format developed by the American National Standards Institute (ANSI) was voiced by almost every speaker. Steve Killiany, a health and safety advisor with Exxon Co. USA, contended that the use of MSDSs by a more comprehensive audience has heightened the need for a standardized format. "Imposing limitations on the length of MSDSs would be impractical," said Killiany, who also testified on behalf of the American Petroleum Institute (API). "The information contained in these sheets serves as a primary data sheet for employees, customers, local communities, local emergency planning committees, medical personnel, health and safety professionals, firefighters, regulators and others. Suppliers cannot realistically customize a MSDS for each user and every application."

API believes the U.S. Occupational Safety and Health Administration (OSHA) should encourage the use of a standardized format, such as the ANSI Z400.1 1993, Killiany said. "The ANSI guidelines include an order of information and standardized headings that enhance communication and understanding. Information of most concern to employees and non-technical users is located at the beginning of the data sheet, including composition, emergency overview, hazard identification and first-aid measures. Other more technical information, such as toxicological data, appears later in the document," Killiany said.

The marketplace is supporting and pushing for the use of the ANSI format, both domestically and internationally, he said. The order of information and standardized headings now are required in Europe and permitted by other countries (Canada, Mexico, Japan, Australia and New Zealand), Killiany said.

Allow an Electronic Format

Handling the sheer volume of MSDSs is a significant challenge, and many companies have turned to

electronic storage and retrieval systems as an alternative. At Reynolds Metals Co., the high price of maintaining a traditional paper-based system—about \$2.5 million a year due to extensive labor costs—drove the company to consider electronic alternatives, according to Laurie Shelby, manager of industrial hygiene programs and regulatory compliance at Reynolds.

Shelby described the challenge of implementing the company's conversion project, which it estimates will cost a little over \$1 million: "Reynolds Metals has over 44,000 MSDSs for products used in our domestic locations. These sheets vary in completeness, accuracy and readability. Since there currently is not a single 'paper-based' or 'electronic' format for MSDSs, developing an electronic storage and retrieval system involves either re-typing MSDSs or imaging MSDSs and indexing key sections of data sheets for searching capability. [Reynolds has chosen the latter option.] ... If there were a standard format, the timeline for this project would have been expedited and most importantly, the cost dramatically reduced. ... OSHA needs to begin the education process on the requirements for electronic MSDSs because in the years to come, more and more data will be sent over the Internet and by electronic data interchange."

Rethink Compliance

Frank White, vice president of Organization Resources Counselors Inc., an occupational safety and health consulting firm, expressed his opinion of the agency's current approach to hazcom compliance: "Unfortunately, through the administrative magic of compliance directive, interpretation and enforcement policy and strategy, OSHA has effectively converted what many consider to be the prototype performance standard into a particularly onerous traditional specification standard. ... OSHA must rethink its entire approach to hazcom enforcement ... and start over again using a 'holistic,' performance-oriented approach. It is not necessary, for example, to require that a written program contain the three pages of detailed elements described on pages 11 to 13 of the directive, e.g., elements of the training program At this point in the evolution of the standard, OSHA should not, in general, be citing ... for isolated cases of missing labels or deficient MSDSs where the overall program and its implementation are otherwise found to be sufficient."

"Designing an objective compliance strategy that recognizes the holistic nature of a good hazcom program is one of the toughest issues we face," said Michael Wright, a member of the hazcom workgroup and the director of health, safety and environment for the United Steelworkers of America. "If an OSHA inspector asks 10 representative employees do you understand this regulation, one says 'no' and you cite the company, well that's not going to fly." ♦

'Critical Mass' of Members Important for LEPC Effectiveness; Well-defined Operating Procedures, Job Descriptions Also Key

Part two of a two-part series.

According to the authors of a recent report on the effectiveness of local emergency planning committees (LEPC), "there are some structures and strategies that are likely to significantly improve the success of all LEPCs regardless of context—and especially without significant expense." Both the number of committee members and the range of government agencies and community organizations they represent have a strong bearing on how well an LEPC functions, their research found.

The report, "Organizational Characteristics of Effective LEPCs," was developed for Michigan State University's Community Emergency Preparedness Program by Michael Lindell, David Whitney, Christina Futch and Catherine Clause. Their findings were based on their ongoing, three-year study of LEPCs in Illinois, Indiana and Michigan, funded by the National Science Foundation (see *R-T-K News*, Dec. 8, 1995, p. 3).

LEPC effectiveness, the authors say, is more strongly linked to: "the number of attendees, than with the rate of attendance, which suggests LEPCs need to attain a 'critical mass' for accomplishing business. That is, an LEPC with 30 members and a 50 percent average attendance rate is likely to be more effective than an LEPC with eight members having a 100 percent attendance rate." They recommend that small LEPCs consider recruiting additional members, "because their effectiveness would be expected to increase even if the rate of attendance drops." However, turnover among committee members was not a factor, for it was "universally low," across all LEPCs in the sample.

OSHA Agenda

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PELs. Permissible exposure limits for air contaminants originally were developed in 1971. In 1989, OSHA updated the PELs, but in 1992, a federal court vacated the rule and forced the agency to return to the earlier limits. OSHA now plans to update existing air contaminant limits and establish new ones (July 1996).

OSH Act. OSHA has identified three standards that need to be revised and updated: flammable and combustible liquids; spray finishing using flammable and combustible materials; and dip tanks containing flammable or combustible materials (April 1996).

OSHA plans to finalize the following rules.

Butadiene. In 1985, the Environmental Protection Agency (EPA) referred 1,3-butadiene (BD) to OSHA for possible regulatory action under the Toxic Substances Control Act (TSCA). OSHA concluded that BD poses a risk to the occupationally exposed population at the current PEL and

Another commonality was the length of meetings. Almost all LEPCs reported an average meeting time of one to two hours. "By contrast, there was substantial variation in the number of LEPC meetings ... per year, a variable that had a significant correlation with effectiveness. Even more important were the establishment of a subcommittee structure, a new member orientation program and a formalized procedure for defining members' roles, conducting meetings and setting goals within the LEPC."

Frequent contacts with the regional staff of federal agencies (e.g., the Environmental Protection Agency and the Federal Emergency Management Agency), state emergency management and environmental agencies and with other LEPCs can have a very positive influence, the authors state. They provide opportunities to share ideas and resource options.

Emergency planning resources—such as computerized data bases for tracking hazard data, videos and training courses from the federal government and state planning manuals—were regarded as highly useful according to the authors' data. The presence of paid staff assigned to an LEPC also was linked with effectiveness, the authors found, "probably because paid staff serve as a focal point for LEPC activities." Many jurisdictions have responded to the lack of federal funding for such resources by developing other means of financial support, including allocations from state and local funds and grants from local industry. ♦

that the risk could be reduced or prevented by revising the standard (action was scheduled for December 1995).

Glycol Ethers: 2-Methoxyethanol, 2-Ethoxyethanol and their Acetates. In 1986, EPA referred four glycol ethers to OSHA for possible regulation under TSCA. OSHA concluded that occupational exposures to the subject glycol ethers at current PELs may present significant risks to workers' health. In 1993, OSHA published a proposal, incorporating information received in response to a notice of proposed rulemaking, that would reduce PELs for the four glycol ethers (September 1996).

Methylene Chloride. In 1985, the United Auto Workers petitioned OSHA to issue a hazard alert and develop a new permanent standard for methylene chloride (MC). OSHA issued guidelines for controlling occupational exposure to MC but did not issue an emergency temporary standard. OSHA published a proposal in 1991 and subsequently held a series of public hearings (April 1996). ♦

Corporate 'Participation' Necessary to Prove Transporter Liability; Third Circuit Appeals Court Wants More Than 'Day-to-Day' Involvement

Officers and sole stockholders of businesses that transport hazardous waste to contaminated sites cannot be held liable for cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) unless evidence shows they actually participated in the decision on where to send the wastes, according to a recent U.S. Court of Appeals opinion.

In a case where there was no clear precedent (*U.S. v. USX Corp.*, CA 3, No. 94-5681), the U.S. Court of Appeals for the Third Circuit held that Section 107(a)(4) of CERCLA does not impose liability solely on the basis of an officer's or shareholder's active involvement in the corporation's day-to-day affairs.

In reversing and remanding a federal district court's (D.N.J.) decision to hold Alvin White and Charles Carite (principal shareholders of Atlantic Disposal Service Inc., [ADS]) liable under CERCLA, the court of appeals ruled that there must be a showing that the person sought to be held liable actually participated in the liability-creating conduct (41 ERC 1396).

Liquid Waste Transported

During the 1970s, one of the ADS industrial accounts was a plant operated by USX Corp. in Camden, N.J., according to court documents. ADS hauled 55-gallon drums of liquid waste from the USX facility to a landfill in Gloucester County, N.J. When the Gloucester County landfill refused to accept the waste, arrangements were made to dispose of the USX drums on a one-acre wooded parcel in Tabernacle, N.J., leased by Robert Ware, an ADS mechanic. Ware's understanding was that ADS would pay him a fixed amount for each drum dumped at the Tabernacle site, court documents indicate.

In 1982, investigators of the Burlington County, N.J., health department discovered 193 barrels and containers at the Tabernacle site. Attached to at least one of the drums were USX shipping documents, court documents said. Under orders from the Environmental Protection Agency (EPA), ADS removed all drums and related waste from the site. Analyses of the contents of the drums revealed a number of hazardous substances. Soil sampling disclosed a release of the hazardous substances to the environment, and sampling from monitoring wells confirmed the existence of groundwater contamination, court documents state.

In 1985, EPA performed a remedial investigation and feasibility study (RI/FS). As a result of the RI/FS, "special notice letters" were issued in July 1988 to ADS and USX, affording them the opportunity to negotiate an agreement to perform the remedial design and remedial action (RD/RA) proposed by EPA for the Tabernacle site. The negotiations resulted in an agreement by USX

to perform the RD/RA; however, ADS refused to participate in the environmental remediation work, court documents indicate.

The federal district court held White and Carite liable based upon a finding that they exercised control over the activities of ADS in 1976 and 1977, when the drums were deposited at the Tabernacle site. The court also found that there was "even greater support" for its conclusion in light of the fact that White and Carite were principals of a waste disposal company. The district court reasoned that "the likelihood is greatly diminished that the owners and operators of the company would be unaware of improper dumping" (41 ERC 1397).

Control of Company Not Enough

While the court of appeals agreed that the federal district court established, as a matter of law, the liability of ADS as a transporter under Section 107(a)(4) of CERCLA, it disagreed with the potential liability of White and Carite. The court said that under CERCLA, control of a corporation, in and of itself, is not a basis for imposing liability on a corporate officer for the actions of other corporate officers or employees. Instead, actual participation in the wrongful conduct is a prerequisite for imposing liability. The U.S. Court of Appeals concluded that liability may not be imposed under CERCLA Section 107(a)(4) solely on the basis of an officer's or shareholder's active involvement in the corporation's day-to-day affairs.

"Although there was substantial evidence that White and Carite were actively involved in the day-to-day affairs of ADS at the time of the disposal of waste drums at the Tabernacle site, there was also countervailing evidence that White and Carite were not 'hands on' managers during the relevant time period. The evidence by the United States was not so overwhelming as to render White and Carite's denial of knowledge completely implausible," the court said (41 ERC 1397).

Corporate Officers Not Immune

The Third Circuit Court of Appeals warned that its application of Section 107(a)(4) does not immunize officers and directors who personally participate in liability-creating conduct. "It is not necessary that the officer participate in the selection of the disposal facility. Liability may be imposed where the officer is aware of the acceptance of materials for transport and of his company's substantial participation in the selection of the disposal facility. An officer who has authority to control disposal decisions should not escape liability under Section 107(a)(4) when he or she has actual knowledge that a subordinate has selected a disposal site and, effectively, acquiesces in the subordinate's actions," the court reasoned (41 ERC 1396). ♦

Improved Controls, Systems for Tracking Hazardous Waste Called For

The manifest system for controlling the movement of hazardous waste does not always ensure that generators, the Environmental Protection Agency (EPA) or states track waste from generation to disposal, according to a recent report by EPA's Office of Inspector General (OIG). The other central findings were: the notification process regarding hazardous waste activity is inadequate and inspections were not always prioritized or properly documented.

OIG is required to initiate reviews and other activities, such as audits, to promote economy and efficiency and to detect and prevent fraud, waste and mismanagement in agency programs and operations. Hazardous waste is one of several areas where the department is focusing its efforts.

A core provision of the Resource Conservation and Recovery Act is the establishment of a "cradle to grave" framework for managing hazardous waste from generation to disposal. EPA has a manifest system for tracking waste from its generation site to its final disposition at a permitted treatment, storage and disposal facility (TSDF), although there is no federal requirement for manifests to routinely be sent back to EPA or state agencies.

According to the report: "The hazardous waste manifest system is self-initiated and self-monitored with only limited oversight by Federal and state authorities. Additionally, there are economic incentives for generators to avoid the high costs of compliance with regulations for hazardous waste shipped off-site. The system is less effective when: (1) wastes are commingled at transfer facilities; (2) shipments are rejected by TSDFs; (3) residues are left in hazardous waste containers; or (4) hazardous residues are shipped out after treatment. Under

these conditions, a new manifest is often created. Since there is no requirement to link original and new manifests, the generators do not have the ability to track the disposition of their wastes."

OIG issued the following recommendations, to be carried out under the authority of the Assistant Administrator for Solid Waste and Emergency Response:

- Original generators and manifest numbers must be referenced on any new manifests, and generators must be informed or consulted when waste is commingled or rejected.
- The hazardous waste notification form and its accompanying instructions must be changed to state that new EPA hazardous waste identification numbers must be obtained when generators change location, and EPA must be notified when generators go out of business or cease being generators.
- A standard must be developed for generators in documenting their facility processes when using "knowledge of process" for waste determination.

In addition, the following mandates were recommended, to be issued to all EPA regions: assess the rate of repeat inspections at compliant facilities to ensure that inspection resources are being used effectively; and annually sample and evaluate inspection reports for quality assurance and control.

For a copy of "Office of Inspector General Semiannual Report to Congress," contact: EPA, OIG, 401 M St., SW (2441), Wash., D.C. 20460; phone: (202) 260-3137. ♦

Federal Register Index

Selected Federal Register Notices on Chemical Hazard Information and Community Right-to-Know Issues.

12/7/95—60 FR 62847—Notice of Availability of Pollution Prevention Grants and Announcement of Financial Assistance Programs Eligible for Review. EPA is announcing the availability of approximately \$5 million in fiscal year 1996 for grants and cooperative agreements under the Pollution Prevention Incentives for States (PPIS) grant program. The purpose of this program is to support state, tribal and

regional programs that address the reduction or elimination of pollution across all environmental media: air, land or water.

12/15/95—60 FR 64407—Toxic Chemical Release Reporting; Community Right-to-Know; Reopening of Public Comment Period. EPA is reopening the comment period on its decision to grant an administrative stay of the reporting requirements under Section 313 of the Emergency

Planning and Community Right-to-Know Act (EPCRA) and Section 6607 of the Pollution Prevention Act for 2,2-dibromo-3-nitropropionamide (DBNPA) (CAS No. 10222-01-2). The administrative stay also requested comment on EPA's review of a petition to delete DBNPA from the EPCRA Section 313 list of toxic chemicals. (Administrative stay first published 10/27/94, 60 FR 53371.) Comment submittal deadline: Jan. 29, 1996. ♦

Regulatory Dispute

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that plan, the SERC order states. "These things would only be violations if the NRC was willing to enforce its own regulations. They have regulations about emergency planning, but they're ignored," English said.

A summary of the SERC order states that the LEPC's requests "are not an attempt to preempt the authority of the [NRC]. On the contrary, the LEPC is aware of no conflicts between this petition and NRC regulations, and believes that the establishment of the local authority outlined above would supplement the efforts of the NRC, by helping to improve the information provided by AMS. The LEPC also believes that the NRC should welcome and encourage this kind of local initiative, which should enhance its performance and provide assurance that the local community is prepared to respond to emergency incidents."

"If we have to face two regulators and one is saying one thing and one is saying another, we have a problem," Miller said. "Having an emergency plan does not bother us. Having two does, especially if they're competing plans. You can't serve two masters," he said.

English argues that the company already has spent more money in litigation than if AMS had simply complied with the original SERC request. Miller, however, maintains that "the SERC request would have been onerous on a cost basis." According to Kalstrom, state and local officials were not "asking for anything that wasn't already being done at chemical facilities."

Threat to the Community

In response to their discovery that radioactive ash was found at the sewer facility, NEORSD in November 1994 obtained a temporary restraining order from the state court allowing it to place two compression plugs in AMS's sewer connections, which stopped the flow of all sewage from AMS, English said. These flows did not contain "levels that would cause a health and safety risk, but would pose problems with our operations. We are not allowed to treat, ship or incinerate [radioactive waste]," English said.

A small portion of AMS's facility has a basement, Miller said. Due to the plugs, "there was no way to relieve the ground water pressure and within a couple of weeks there was a heavy storm, resulting in a flood of 30 inches of water in the basement," he said. NEORSD prefers not to link the basement flooding directly to the plugs, however. The flooding resulted "from a failure to take prudent measures to prevent a water buildup. They knew the sewer service had been terminated and deliberately allowed their basement to fill up with water," English said.

Soon, the clean water entering the basement became contaminated with cobalt, Miller said, because certain "rad waste" was stored there. Rad waste consists of items used for cleanup inside the building or by personnel within restricted areas. "The level of contamination in the basement water was quite high," Miller said, adding that the flooding caused an imbalance in the hydrostatic pressure between the inside and outside of the basement wall. "There was a fear that the wall would collapse, resulting in a discharge to the neighborhood," he said.

AMS hired contractors to stabilize the pressure and the water gradually was drained into tanks, where it then was processed to remove the cobalt. The contractors also replaced the outside sewer system, which was damaged by the flooding and contaminated by cobalt from the basement.

In December 1994, the state court granted AMS's motion to dismiss the original lawsuit filed by NEORSD, which sought recovery of the costs associated with handling radioactive ash. This decision had the additional effect of overturning the temporary restraining order that NEORSD received to allow it to install the plugs. Within 48 hours, however, NEORSD obtained a temporary restraining order in federal court, allowing it to keep the plugs installed. Since that time, NEORSD successfully appealed the state court dismissal and AMS then filed a notice of removal to

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NRC's Approach To Emergency Planning

The Nuclear Regulatory Commission's emergency planning regulations (10 CFR 30.32) state that certain facilities must have emergency plans and that those plans must include, among other things:

- identification of each type of accident involving a radioactive material for which protective actions may be needed;
- identification of the means of detecting each type of accident in a timely manner;
- a brief description of the responsibilities of licensee personnel should an accident occur, including identification of personnel responsible for promptly notifying offsite response organizations and the NRC;
- provisions for conducting quarterly communications checks with offsite response organizations, including reviewing all necessary telephone numbers; and
- biennial onsite exercises to test response to simulated emergencies. ♦

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federal court. Recently, AMS obtained permission from federal court to discharge the tanks holding the treated water from the basement into the facility's back yard. Even though the company's sewer connection remains plugged, some of this water likely will enter the system as runoff through other connections, Miller said.

By the time the basement had flooded, "it became obvious to the [local emergency responders] that this place was phenomenally dangerous," English said. The facility is located within 75 feet of a residential area, containing over 5,900 people within a half-mile radius, and two schools, the SERC order states.

SERC Issues Order

Based on the fact that the facility handles radioactive materials, the flooding incident, and the facility's proximity to a residential neighborhood and schools, the SERC determined that participation by AMS in the emergency planning process was necessary. In July 1995, the SERC notified the public, as required by statute, of its intent to issue an order. The public then had 45 days to submit written comments to the SERC. According to the order, the only comments not in favor of designation were submitted by representatives of the facility.

The SERC order states that AMS is required to participate in the LEPC's planning process until "the amount of non-sealed cobalt-60 within [AMS's] possession is less than 10 curies." Ten curies is the reportable quantity of

cobalt-60 under the Comprehensive Environmental Response, Compensation and Liability Act, said Schultz of Ohio EPA.

Miller believes the fundamental difference of opinion between AMS and the emergency responders is "what level of risk is involved by our presence in the community." All but 30 to 40 curies of cobalt-60 are in a hot cell, a vault-like room, or the facility's waste holdup tank (WHUT) room, Miller explained. "It is not dispersible by any risk reasonably imaginable," he said. The hot cell has five-and-one-half-foot-thick reinforced concrete walls and the WHUT room has three-and-one-half-foot walls. "Most cobalt is in sealed sources—welded stainless steel containers," he said.

The remaining cobalt-60 is contained in the rad waste, which was involved in the basement flooding. AMS's facility contains air filters so that no cobalt escapes through the heating, ventilating and cooling system, Miller said. Although Miller said NRC has determined that the sealed cobalt-60 is not readily dispersible, he does concede that direct contact with the substance "would be dangerous or even fatal." He also conceded in an interview that the rad waste would be potentially dispersible if there were a major fire at the facility.

At press time, the Ohio state attorney general had not yet filed an answer to AMS's lawsuit seeking declaratory relief. ♦

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