Federally Permitted Releases/CERCLA: Federal Appellate Court Addresses Whether a Clean Air Act Permit Notification Qualifies

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

06/28/2021

The United States Court of Appeals for the Third Circuit ("Third Circuit") in a June 21st Opinion interpreted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") or ("Superfund") phrase "federally permitted releases." See *Clean Air Council v. United States Steel Corporation*, 2021 WL 2521588.

The Court addressed whether unpermitted emissions associated with a steel mill fire were "federally permitted" if addressed by a Clean Air Act permit notification.

The importance of the question is driven by the fact that if such emissions are "federally permitted" as defined by CERCLA, they are exempt from the statutes' hazardous substances release reporting requirement.

Section 101(10) of CERCLA defines "federally permitted releases" in terms of releases permitted under a number of other environmental statutes. Releases that are federally permitted are exempt not only from the CERCLA Section 103 reporting requirements but also the Emergency Planning and Community Right-to-Know Act ("EPCRA") Section 304 notification requirements.

Section 103(a) of CERCLA requires the person in charge of a vessel or facility to immediately notify the National Response Center ("NRC")if there is a release of hazardous substances in an amount equal to or greater than the reportable quantity ("RQ") for that substance. Section 304(a) of EPCRA also requires facilities to notify state emergency response commissions and local emergency planning committees of releases of hazardous substances and extremely hazardous substances when the release equals or exceeds the RQ.

The five specific conditions that must be met to trigger the CERCLA requirement for notifying the NRC include that must be a:

- release
- of a hazardous substance
- that equals or exceeds a reportable quantity
- from a vessel or facility
- within a 24-hour period.

The CERCLA terms "facility" and "release" are broadly defined.

A key exception to the reporting requirement is for “federally permitted releases.” This exemption from notification addresses a number of scenarios where releases are regulated under other environmental programs. However, the scope of this phrase has not been defined by EPA regulations and has been the subject of litigation.

The Third Circuit’s Opinion describes a situation in which two fires occurred at a Pennsylvania United States Steel Corporation (“U.S. Steel”) plant. Certain air pollutants (i.e., emissions) apparently were released because of the fires. Such emissions were reported to the Allegheny County Health Department (“Allegheny”) (which had been delegated certain Pennsylvania Clean Air Act authorities).

The reports were undertaken as required by the U.S. Steel plant’s Clean Air Act Title V permit. Such reports were required to be provided in the event pollution control equipment breaks down and a source is substantially likely to emit air contamination.

The Clean Air Council (“CAC”) filed a CERCLA citizen suit action arguing that the emissions should have been reported to the NRC pursuant to Section 103 of that statute. The organization argued that the emissions (i.e., coke oven emissions, benzene, and hydrogen sulfide) were not federally permitted releases because they were not subject to the plant’s Clean Air Act permits. This was based on the argument that the emissions were not subject to “the relevant permits” because they violated the plant’s Title V permits.

The United States District Court disagreed, holding that the emissions were federally permitted releases. Its rationale was the plant was “governed by” and therefore “subject to” the Clean Air Act permit.

The Third Circuit agreed with the District Court.

The federal appellate court undertook an analysis of what it viewed as the phrase’s plain meaning. It noted:

Dueling dictionary definitions support either side. In isolation, “subject to” could have meant either “governed or affected by,” as U.S. Steel argues, or “obedient to,” as the Council urges. Subject to, Black's Law Dictionary (5th ed. 1979). Those are the only two definitions that could fit. But any ambiguity melts away in context: Congress meant the former, not the latter.

The remainder of the Third Circuit’s Opinion provides its analysis of why in this context “subject to” does not mean “obedient to” (i.e., the release cannot constitute a Clean Air Act violation). As a result, the Third Circuit upholds the United States District Court’s conclusion that the emissions, even though in violation of the Clean Air Act permit, were federally permitted releases.

A copy of the Opinion can be downloaded here.