Federally Permitted Releases/CERCLA: Federal Court Addresses Status of Emissions from Shipped Lead-Acid Batteries Covered by Smelter's Clean Air Act Permit

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A United States District Court (C.D. California) ("Court") addressed in a March 22nd Order an issue arising out of the Comprehensive Environmental Response, Conservation, and Liability ("CERCLA") exemption for federally permitted releases. See *California Department of Toxic Substances Control et al. v. NL Industries, Inc., et al*., 2023 WL 2780361.

The question addressed was whether a company that allegedly arranged or transported spent lead-acid batteries to a smelter was exempt from the cost recovery provisions of CERCLA because any associated air emissions were encompassed by a Clean Air Act permit.

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 from the CERCLA cost recovery provisions.

Certain plaintiffs alleged that Quemetco was liable as an arranger or transporter under CERCLA because it shipped spent lead-acid batteries to a lead smelter located in Vernon, California (i.e., "the Vernon Plant"). CERCLA cleanup costs were incurred at the Vernon Plant.

Quemetco argued in a motion for summary judgment that it could not be liable for such response cost because the cost recovery provisions of CERCLA do not apply to federally permitted releases. It further argued that any air emissions from the Vernon Plant that could be connected to its spent lead-acid batteries transported to the Vernon Plant were subject to the facility's Clean Air Act Title V permit.

The permit was stated to cover both stack and fugitive emissions. Therefore, Quemetco argued that all of its emissions after May 9, 2000 (when the Title V permit was issued) were federally permitted.

The Court notes that federally permitted releases are defined to include:

- any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections ....

Quemetco had the burden to establish that the release was federally permitted because it is an affirmative defense to CERCLA liability.

The plaintiffs conceded that aerial releases from the Vernon Plant made between May and June 2021, were federally permitted. Quemetco cited a lack of evidence in the record indicating that it made any non-permitted release during such period. Therefore, the Court identified as the primary question whether plaintiffs raised a genuine issue of material fact through a 1995 uniform hazardous waste manifest that Quemetco made a non-permitted release.

Plaintiffs argued that the hazardous waste manifest had a U.S. Environmental Protection Agency number belonging to the Vernon Plant and indicated Quemetco had sent dross to the facility. Quemetco responded that the address on the manifest did not list the Vernon Plant's address but instead referenced another location. Further, it argued regardless, that a 1995 shipment was also federally permitted because the Vernon Plant had a permit to operate issued by the South Coast Air Quality Management District.

The Court denied the motion for summary judgment because of its identification of two issues of fact:

- Dispute whether the hazardous waste manifest indicated that the dross was headed for the Vernon Plant
- Dispute over meaning of the 1995 permit issued by the South Coast Air Quality Management District (i.e., lack of explanation as to what that air permit actually covered)

A copy of the decision can be downloaded here.