

Recycling Defense/CERCLA: U.S. District Court Addresses Applicability of Superfund Recycling Equity Act



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09/01/2023

A United States District Court (Central District of California) (“Court”) addressed in an Order an issue arising under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). See *California Department of Toxic Substances Control et al. v. NL Industries, Inc., et al.*, Case No. 2:20-cv-11293-SVW-JPR.

The question addressed was whether two companies that sent either spent lead-acid batteries or battery tops to a Superfund site were exempt from CERCLA arranger liability because of the recycling defense provided by the Superfund Recycling Equity Act (“SREA”).

The United States Congress enacted what is SREA to amend CERCLA a number of years ago to exempt certain recyclers from liability for cleanup costs. Further, such recyclers could be awarded costs and fees if they were found to have been improperly sued for contribution under CERCLA. Former United States Senator Blanche Lincoln of Arkansas was one of the key architects of this recycling exemption.

The rationale for the exemption were scenarios at a number of Superfund sites in which sellers of steel, metals, or other recyclable commodities were held liable under the “generator” or “arranger” provisions of CERCLA. See 42 U.S.C. § 9607(a)(3). The argument was made that virgin materials with the same characteristics were not encompassed by Superfund simply because they were deemed “products.”

In view of the United States’ interest in promoting the use of recyclables to save energy and natural resources the application of such liability to these materials was deemed counterproductive. Recyclers of a number of types of scrap commodities that meet certain eligibility requirements are protected from CERCLA liability provisions. The recyclable materials potentially encompassed by the exemption include scrap paper, plastic, glass, textiles, rubber (other than whole tires), metal, spent lead-acid, nickel, cadmium, and batteries.

The recycling exemption is found in Section 127 of Superfund. See 42 U.S.C. § 9627.

A number of states have adopted an exemption to their analogous Superfund statutes.

Arkansas was one of the first states to do so. It amended the Arkansas Remedial Action Trust Fund Act shortly after the enactment of the CERCLA recycling exemption to exempt such transactions. See Ark. Code Ann. 8-7-524. Arkansas’s exemption utilizes language very similar to the federal CERCLA provision.

United States District Judge Stephen V. Wilson addressed in the Order whether Quemetco and International Metal (“Ekco”) were exempt from CERCLA liability because of the SREA exemption. Ekco and

Quemetco had sent spent lead-acid batteries to the former Exide Technologies Superfund Site in Vernon, California. Ekco was stated to also have sent battery tops.

The Court in its Order found that:

Ekco and Quemetco were differently situated from the other defendants because the Court found that all they sent to the Plant were spent lead-acid batteries. The Court found that they met their burden in meeting SREA's requirements and that Plaintiffs did not meet their burden in showing an exception to the SREA exemption applied. Therefore, these defendants had a complete defense to CERCLA and HSAA liability.

As to the battery tops, the Court stated that:

. . . those were useful products as to Ekco. In the alternative, they were scrap metal and qualified for SREA protection. In any event, the Court found persuasive that Ekco did not break the batteries themselves to obtain those tops and instead that the tops would have been sent by Ekco's customers.

A copy of the Order can be downloaded [here](#).