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Oil Pollution Act - Oil/CERCLA - Hazardous Substance: Federal Appellate Court Addresses Which Statute Governs When the Substances are Mixed and Released

11/02/2023

The United States Court of Appeals for the Fifth Circuit (“5th Circuit”) addressed in an October 27th Opinion an issue arising out of the Oil Pollution Act of 1990 (“OPA”) and Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) see *MUNOZ v. Intercontinental Terminals, L.L.C.* No. 22-20456.

The question addressed was which statute governs when OPA oil mixed with CERCLA hazardous substances are released.

Intercontinental Terminals Company (“ITC”) operates a chemical-storage facility in Deerpark, Texas. A fire occurred in 2019. In an effort to exert control, various tank products, firewater, and firefighting foam were placed and accumulated in ITC’s secondary containment area.

Damage to the secondary containment wall caused it to partially collapse resulting in the discharge of an estimated 475,523 barrels of the following products:

- Firewater
- Firefighting aqueous film forming foams
- Benzene
- Ethylbenzene
- Naphtha
- Xylene
- Toluene
- Pyrolysis gas
- Refined oils

These substances entered the Houston ship channel.

The government agencies involved in the spill clean-up determined that of the 50 chemicals released:

- 17 constitute CERCLA hazardous substances
- Five constitute OPA oils

Subsequent sampling determined that the spill consisted of oil mixed with hazardous substances. Therefore, the United States Environmental Protection Agency (“EPA”) and Coast Guard determined that the spill was a CERCLA incident.

Texas Aromatics filed OPA claims against ITC. ITC and Texas Aromatics and other Plaintiffs agreed that resolving the threshold issue of the OPA’s applicability would save time and expense.

ITC argued that OPA did not apply as a matter of law because the spill contained a mixture of both oil and CERCLA hazardous substances. It asserted that these substances were therefore covered exclusively by CERCLA. Texas Aromatics argued that both CERCLA and OPA can apply to a mixed spill of oil and CERCLA hazardous substances.

The United States District Court concluded that a spill containing both oil and hazardous substances does not fit within the scope of OPA’s definition of oil.

The 5th Circuit affirms.

Citing the OPA definition of oil, it notes that the term CERCLA regulated substances seem to be carved out by a hazardous substance exclusion. Further referenced is CERCLA’s explicit exclusion of “petroleum, including crude oil of any fraction thereof which is not otherwise specifically listed or designated as hazardous substances” from the definition of hazardous substance.

Additional citations to both caselaw and EPA interpretations of the petroleum exclusion leads the 5th Circuit to believe that when oil contains a hazardous substance, not indigenous to the refining process, the comingled mixture is itself a hazardous substance covered by CERCLA. It states in part:

“... And when Congress exempted CERCLA-regulated hazardous substances from OPA’s coverage, it did so in light of these interpretations. To the point: Congress intended to exclude hazardous substances including oil that has been comingled with hazardous substances – from the OPA’s coverage. “

The 5th Circuit also rejected an argument that interpreting CERCLA and OPA as mutually exclusive liability regimes would lead to an absurd result. The alleged result was the incentivization of the intentional reckless comingling of oil with hazardous substances so that those responsible may not be sued for economic losses under the OPA. In response the 5th Circuit stated that such parties would still be liable under CERCLA for their equitable share of the clean-up cost.

The 5th Circuit therefore upholds the United States District Court’s interpretation that OPA’s definition of oil excludes a comingled mixture of oil and CERCLA hazardous substances.

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