

## **New Ruling Exempts Facilities With Air Permits From CERCLA Release Reporting**

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A U.S. District Court has applied the “federally permitted release” exemption from CERCLA release reporting requirements to a facility even where its releases exceeded its emission limits under its air permit. This is the first time a court has interpreted the exemption in this manner, and potentially carves out a broad exemption to CERCLA release reporting and potentially even to CERCLA liability.

Section 103 of CERCLA requires a person in charge of a facility to immediately notify the National Response Center (NRC) when he or she knows that a hazardous substance has been released in quantities equal to or greater than the statutory limit. Congress exempted “federally permitted releases,” as defined in other environmental protection laws, from CERCLA’s reporting requirements. This had been understood to exempt release reporting for releases of air pollutants that were compliant with a valid air permit. This new decision interpreting the exemption to apply to releases to the air even when made in violation of a Clean Air Act (CAA) permit breaks new ground.

The decision was issued in *Clean Air Council v. U.S. Steel Corp.* in the U.S. District Court for the Western District of Pennsylvania. Plaintiff Clean Air Council alleged significant and ongoing violations associated with U.S. Steel’s failure to report to the NRC releases of hazardous substances after fires broke out at one of its plants, which affected certain pollution control equipment and processes and resulted in air emissions not authorized by any air permit. U.S. Steel instead reported the fires and releases to the county health department in accordance with local regulations and its air permits.

U.S. Steel argued that the releases, in this case of coke oven gas, hydrogen sulfide, and benzene, were “federally permitted releases” exempt from CERCLA’s reporting requirements because the facility in question, and the underlying air emissions, are subject to permits issued under the CAA. The Clean Air Council contended the federally permitted releases exemption does not apply to that portion of air emissions that are released in violation of a permit.

The Court held that if Congress had intended that air emissions must be in compliance with a CAA permit in order to be exempt from CERCLA release reporting as “federally permitted releases”, Congress could have and would have simply said so. Such language was in the definition of “federally permitted releases” with respect to other statutes, such as the Clean Water Act. The Court noted the CAA differs from other environmental statutes in that it has detailed requirements for risk management, emergency response, and accident reporting, the latter of which would be duplicative if combined with CERCLA reporting requirements.

This court decision presents interesting implications for CERCLA liability requirements. CERCLA, otherwise known as the Superfund law, is best known for assigning liability for remediation of contaminated sites, on a joint and several and strict liability basis, to owners, operators and other parties associated with releases of hazardous substances. Cases involving liability under CERCLA for air releases have not been common, but are a growing focus of CERCLA litigation. A holding that any facility with air releases can claim the “federally permitted release” exemption even when there have

been air emissions that exceeded permit limits, makes the “federally permitted release” exemption a more valuable defense that could defeat most CERCLA claims based on air emissions.

However, it is important to note that despite the expansive interpretation of this exclusion to CERCLA release reporting, there are other reporting requirements—such as the Environmental Planning and Community Right-to-Know Act (EPCRA) and the new U.S. Chemical Safety Board (CSB) Accidental Release Reporting Rule—that may still apply to facilities that have a release of hazardous substances.



This Environmental Alert is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact Jessica Rosenblatt at 412.566.1911 or [jrosenblatt@eckertseamans.com](mailto:jrosenblatt@eckertseamans.com), David Rockman at 412.566.1999 or [drockman@eckertseamans.com](mailto:drockman@eckertseamans.com), or any attorney at Eckert Seamans with whom you have been working.