CERCLA/EPCRA Reporting Requirements: D.C. Circuit Court of Appeals Invalidates Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste Farms

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

04/12/2017

The United States Court of Appeals for the District of Columbia Circuit ("Court") issued an April 11th opinion invalidating a United States Environmental Protection Agency ("EPA") rule that provided reporting exemptions from the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Emergency Planning and Community Right to Know Act ("EPCRA") for certain releases of hazardous substances from agricultural operations. See *Waterkeeper Alliance, et al. v. Environmental Protection Agency* No. 09-1017.

Waterkeeper Alliance and a number of other groups challenged the exemption arguing that neither CERCLA nor EPCRA authorized such exemptions.

EPA defended the exemptions and the U.S. Poultry and Egg Association intervened in support of the agency's position.

Both CERCLA and EPCRA contain provisions that require parties to notify authorities when certain quantities of hazardous substances are released into the environment (42 U.S.C. § 96.03 [CERCLA] and § 11004 [EPCRA], respectively).

In 2008 the EPA published a final rule denominated:

CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste and Farms

See 73 Fed. Reg. 76,948 ("Final Rule").

The Final Rule generally exempts farms from CERCLA and EPCRA reporting requirements for air releases from animal waste. The exemptions are not applicable to emissions into the water or soil.

The agricultural industry was a key proponent of the promulgation of this exemption. It exempts airborne emissions related to animal production operations (typically during digestion, break-down or decomposition) from animal manure and urine (animal waste) at agricultural facilities. Ammonia and

hydrogen sulfide have arguably been the most recognized hazardous substances emitted from animal waste.

Prior to the Final Rule the release of such hazardous substances could be subject to the notification requirements of Section 103 of CERCLA and Section 304 of EPCRA if their reportable quantity emissions threshold (“RQ”) is exceeded.

A key EPA rationale for promulgation of the exemption was that the “reports are unnecessary because in most cases, a federal response is impractical and unlikely.” See 73 Fed. Reg. 76,948, 76,956/1.

The Court notes that in addressing whether EPA has the authority to carve out these exemptions it:

. . .brings into play our longtime recognition that agencies have “implied de minimis authority to create even certain categorical exemptions to a statute ‘when the burdens of regulation yield a gain of trivial or no value.’”

The Court states that despite the fact that EPA never explicitly invokes the de minimis exception, the agency’s analysis tracks its logic. It further references U.S. Poultry and Egg Association’s incorporation of the agency’s de minimis power for a basis for upholding the Final Rule.

The Court asks whether “the record adequately supports the EPA’s conclusion that these animal-waste reports are truly ‘unnecessary’.” It concludes:

In light of the record, we find that these reports aren’t nearly as useless as EPA makes them out to be. (We do not address the potential questions of whether the reports’ costs outweigh their benefits and whether the exact statutory language. . .authorizes an exception for measures failing a cost/benefit analysis; the EPA makes no claim for such a reading of the statute.)

The Court grants Waterkeeper’s petition and vacates the Final Rule.

A copy of the opinion can be downloaded below.