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Multiple Emission Sources at Large Farm May Be Treated as Single Facility, Court Says

Uniformly managed animal-farming operations are to be treated as a single facility under superfund reporting requirements, even though those operations may contain multiple emissions sources, a federal appeals court held for the first time Oct. 28 (*Sierra Club v. Seaboard Farms Inc.*, 10th Cir., No. 03-6104, 10/28/04). Reversing a lower court's ruling, the U.S. Court of Appeals for the Tenth Circuit held that, just like in other parts of the Comprehensive Environmental, Response, Compensation, and Liability Act, the term "facility" should be given a broad reading when weighing whether animal farm emissions have to be reported.

In addition to specific individual emission sources, the Tenth Circuit held, a "facility," for superfund reporting purposes, also encompasses as a whole "any site or area where a hazardous waste substance has been deposited or placed, or otherwise come to be located." In this instance, the court's ruling means that all the ammonia emissions from an Oklahoma pig-farming operation, consisting of two separate contiguous farms and numerous buildings and emissions points, will be aggregated together to determine whether those emissions triggered federal reporting requirements.

Sierra Club's Argument:

In July 2002, the U.S. District Court for the Western District of Oklahoma rejected the Sierra Club's argument that the Seaboard Corp., the owner of a pig farming operation known as the Dorman Farm, violated Section 103 of CERCLA because the company failed to report the operation's total emissions of ammonia.

Section 103 requires that those hazardous substances that are knowingly released from a facility beyond a federally established "reportable quantity" level must be reported to the National Response Center.

The Sierra Club argued that Seaboard had breached its reporting duty under Section 103 because its animal operation, a single facility under CERCLA, produced more than 100 pounds of ammonia per day. Ammonia, a listed hazardous substance under CERCLA, is released during the breakdown of animal waste. Its "reportable quantity" level is 100 pounds daily.

In dismissing the Sierra Club's argument, the district court agreed with Seaboard that when it comes to superfund reporting requirements the term facility has a narrow definition. Rather than referring to an entire site, the court held, "facility" means each individual lagoon, barn, or other emission source. Thus, the court held, Seaboard violated Section 103, only if one of those facilities, viewed on its own, produced more than 100 pounds of ammonia daily. Seaboard's farm, which housed some 25,000 pigs, consisted of numerous such individual emissions sources.

In support of this reading, the court cited Part (A) of Section 9601(9) of CERCLA which defines "facility" as "any building, structure, installation, equipment, pipe or pipeline

(including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch landfill, storage container, motor vehicle, rolling stock, or aircraft." The Sierra Club appealed.

Contrary Kentucky Ruling:

The Tenth Circuit's decision to overturn the district court's much narrower reading of CERCLA's reporting mandates brings the sparse federal law on this issue into accord.

A year ago, in the only other on-point decision in this area, a district court in Kentucky ruled similarly that ammonia emissions from an entire chicken production site should be considered together for reporting purposes. The Tenth Circuit cited that lower court ruling, *Sierra Club Inc. v. Tyson Foods Inc.*, 58 ERC 1076, 299 F.Supp.2d 693 (W.D. Ky. 2003), extensively in support of its decision.

In the Tyson Foods decision, a district court in Kentucky sided with the Sierra Club's single facility argument regarding a chicken-production site in Kentucky. In that case, the court held that Tyson Foods' entire production operations, not the site's numerous individual chicken houses, was the relevant "facility" to consider when determining whether Section 103's reporting provision had been triggered.

In Tyson Foods, the Kentucky-based court criticized the contrary Oklahoma ruling, stating the Seaboard Farms district court had failed to take into account the whole definition of facility in Section 9601(9). Specifically, the Kentucky-based court said, the court had failed to take into account Part (B) of that provision. In its entirety, Section 9601(9) states that a facility is, "(A) any building, structure, installation, equipment, pipe, or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."

"The problem with the district court opinion in Seaboard Farms is that the court did not address whether the hog farm, including the lagoons or barns, was any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located," the Kentucky-based court held, a definition broad enough to include a whole animal farming site.

Tenth Circuit Sides With Kentucky Court

Siding with the Tyson Foods opinion, the Tenth Circuit held that Part (B) of Section 9601(9) clearly contains a "catch-all provision" broad enough to require the operator of an animal farm to report its farm's total accumulated emissions.

"Giving 'effect to the unambiguously expressed intent of Congress, it said, citing to *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), "we must hold that the entire contiguous Dorman site is thus included."

In addition to citing the text's plain meaning, the Tenth Circuit also said its decision to interpret facility broadly found support in the overall remedial purposes of CERCLA's reporting requirements.

"The underlying purpose of Section 103, that is, alerting the government officials of a potential hazardous substance release that may require federal and local government response assistance, is best served through treating the Dorman Farm as a single facility," the court said. Barclay B. Rogers and others with the Sierra Club in San Francisco represented the environmental group. Ellen B. Steen and others with Crowell & Moring in Washington, D.C., represented Seaboard.