Clean Air Council v. U.S. Steel: Cooperative Federalism or Regulating in the Dark?

INTRODUCTION

When must polluters inform the federal government of hazardous emissions released into the atmosphere? Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), facilities that release hazardous substances must notify[1] the federal government under threat of penalty.[2] But CERCLA exempts facilities engaged in "federally permitted" releases—including air emissions "subject to" the Clean Air Act (CAA)—from this mandatory reporting.[3]

In *Clean Air Council v. U.S. Steel*, the Third Circuit enlarged this carve-out, ruling that exempted emissions "subject to" the CAA include emissions in violation of the CAA.[4] Under this rule, the federal government will have less information about air pollution, possibly including greenhouse gas releases, which will undermine its ability to regulate air emissions. However, the CAA potentially gives the Environmental Protection Agency (EPA) statutory authority to bypass this CERCLA reporting carveout and effectively institute mandatory reporting by challenging states' CAA implementation plans or state-issued permits.

I. BACKGROUND

A. The CAA and CERCLA

In regulating air pollution, the CAA operates according to "cooperative federalism" whereby the "federal government develops baseline standards that the states individually implement and enforce."[5] The Act's congressional findings state "that air pollution prevention . . . and air pollution control . . . [are] the primary responsibility of States and local governments."[6] For instance, states are responsible for creating State Implementation Plans (SIPs), which govern

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1. 42 U.S.C. § 9603(a).
2. *Id.* § 9609.
3. *Id.* § 9601(10)(H).
4. Clean Air Council v. U.S. Steel Corp., 4 F.4th 204, 207 (3d Cir. 2021).
5. Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013).
6. 42 U.S.C. § 7401(a)(3).

how each state will enforce the CAA within its borders.[7] But, EPA has the power to approve or reject each state's SIP.[8] Similarly, states have the authority to issue standardized permits under Title V of the CAA to "major" sources of air pollution pursuant to their individual SIPs.[9] However, EPA has the authority to "terminate, modify, or revoke and reissue" these state-issued Title V permits.[10]

Under CERCLA, any person in charge of an onshore facility with knowledge of a release, other than a "federally permitted release," of hazardous substances in an amount greater than a quantity specified by the administrator of EPA must immediately report the release to the Coast Guard's National Response Center.[11] Federally permitted releases include "any emission into the air *subject to* a permit or control regulation [. . .] in accordance with section 110 of the Clean Air Act" (emphasis added).[12]

B. Clean Air Council and U.S. Steel

In *Clean Air Council v. U.S. Steel Corporation*, the Third Circuit undermined federal reporting requirements by taking an expansive interpretation of "federally permitted releases."[13] U.S. Steel is a national steel manufacturer and operates Mon Valley Works, a steel facility near Pittsburgh, Pennsylvania.[14] In December 2018 and January 2019, fires shut down two control rooms at Mon Valley Works.[15] As a result, U.S. Steel was unable to fully process coke-oven gas containing benzene, hydrogen sulfide, and other pollutants before it entered the atmosphere.[16] As required under Pennsylvania's CAA SIP, which delegates notification to county health departments, U.S. Steel timely notified the Allegheny County Health Department.[17] However, U.S. Steel did not also notify the National Response Center.[18] Clean Air Council (CAC), a Philadelphia-based environmental nonprofit, filed a citizen suit in the United States District Court for the Western District of Pennsylvania.[19] CAC alleged that U.S. Steel violated CERCLA by not notifying the Coast Guard's National Response Center of its coke-gas releases.[20] The District Court granted U.S. Steel's motion to dismiss for failure to state a claim upon which relief could be granted under Rule

7. *Id.* § 7407(a).
8. *See id.* § 7410.
9. *Basic Information About Operating Permits*, EPA, https://www.epa.gov/title-v-operating-permits/basic-information-about-operating-permits (last visited Jan. 8, 2022).
10. 42 U.S.C. § 7661d(e).
11. *Id.* § 9603(a).
12. *Id.* § 9601(10)(H).
13. Clean Air Council v. U.S. Steel Corp., 4 F.4th 204, 212 (3d Cir. 2021).
14. *Id*. at 207.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 206.
19. Clean Air Council v. U.S. Steel Corp., No. 2:19cv1072, 2020 U.S. Dist. LEXIS 84927, at *3–4 (W.D. Pa. 2020).
20. *Id.* at *4.

12(b)(6), finding that U.S. Steel had no duty to report to federal regulators.[21] While the emissions violated CAA regulations, the simple fact that the emissions were "subject to" CAA regulations at all meant they fell under the "federally permitted releases" exemption.[22]

The Third Circuit concurred with U.S. Steel that the phrase "subject to" in CERCLA's exemptions means "governed or affected by," not "obedient to," the CAA.[23] As a result, the CAA's exemption from CERCLA reporting applied to U.S. Steel's emissions even though they violated the CAA.[24] The court noted that both CERCLA and the CAA repeatedly distinguish between the phrases "subject to" and "comply with" as evidence that the two are not synonymous.[25] The court also found its interpretation better suited the CAA's "scheme of cooperative federalism."[26] If emissions violative of the CAA were exempted from CERCLA mandatory reporting to the federal government, then greater responsibility would fall to local regulators.[27]

Although the Third Circuit's interpretation of CERCLA appears straightforward, it bucks long-standing assumptions about CERCLA's scope.[28] Previously, EPA interpreted "federally permitted releases" "subject to" the CAA as only those compliant with the CAA.[29] The Environmental Appeals Board, an appellate tribunal operated by EPA,[30] held in *In re Mobil Corp* that "a release 'subject to' Clean Air Act regulatory requirements must be in conformance with those requirements."[31] EPA subsequently adopted the *In re Mobil Corp* interpretation,[32] which it continues to follow outside of the Third Circuit. *Clean Air Council* also brought the Third Circuit out of step with its sister circuits. The Ninth Circuit, for example, continues to hold that "subject to" means "compliant with"; *United States v. Freter* says "'federally permitted' discharges include those authorized under [. . .] the Clean Air Act."[33]

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21. *Id.* at *14–15.
22. *Id.* at *14.
23. Clean Air Council v. U.S. Steel Corp., 4 F.4th 204, 209 (3d Cir. 2021).
24. *Id.* at 213.
25. *Id.* at 209.
26. *Id.* at 210.
27. *Id.*
28. *See* Melissa Horne & Randy Brogdon, *Appeals Court Upholds Expansive Interpretation of Clean Air Act Exemption from CERCLA Release Reporting*, ENV'T L. & POL'Y MONITOR (Jun. 24, 2021), https://www.environmentallawandpolicy.com/2021/06/appeals-court-upholds-expansive-interpretation-of-clean-air-act-exemption-from-cercla-release-reporting/.
29. *See* In re Mobil Oil Corp. (Mobil Oil II), 5 E.A.D. 490, 508 (EAB 1994).
30. *About the Environmental Appeals Board (EAB)*, EPA, https://www.epa.gov/aboutepa/about-environmental-appeals-board-eab (last updated May 3, 2022).
31. *In re Mobil Oil Corp.*, 5 E.A.D. at 508.
32. *See* Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions, 67 Fed. Reg. 18899, 18904 (Apr. 17, 2002).
33. United States v. Freter, 31 F.3d 783, 788 (9th Cir. 1999).

II. ANALYSIS

A. Federal Impairment

Clean Air Council will impair federal efforts to regulate air emissions, especially if adopted beyond the Third Circuit. The CAA's congressional findings declare the act's intent to "protect and enhance the quality of the Nation's air resources,"[34] a nationwide objective in tension with another finding that air quality control is "the primary responsibility of States and local governments."[35] Under *Clean Air Council*, this tension is intensified. Polluting facilities are now not obligated to directly report hazardous air emissions that violate the CAA to the National Response Center under CERCLA.[36] As a result, the federal government has no mechanism to directly learn of these air pollution events. Although polluters may voluntarily report their releases to the federal government, they are not obligated to do so.[37] This fractured information access makes EPA's job harder and also likely hampers Congress's ability to promulgate air quality legislation, since federal regulators may underestimate air pollution. President Biden's Executive Order 13990 directed EPA and other federal agencies to review and promulgate regulations to "hold polluters accountable."[38] Yet, EPA cannot hold polluters accountable if it is unaware that they have polluted.

The *Clean Air Council* decision may also have spillover effects into federal efforts to reduce national carbon emissions. The federal government cannot meet its goals to reduce greenhouse gas emissions if it underestimates the amount of pollutants, including greenhouse gasses, entering the air. In 2007, the Supreme Court ruled in *Massachusetts v. Environmental Protection Agency* that EPA had the authority to regulate greenhouse gasses under the CAA, since "greenhouse gases fit well within the Act's capacious definition of 'air pollutant.'"[39] It is therefore possible that, under *Clean Air Council*, unlawful releases of greenhouse gasses would nonetheless be "subject to" CAA regulation and thus exempted from mandatory reporting under CERCLA.

B. Environmental Justice

Clean Air Council's devolution of air pollution reporting for releases that violate the CAA to states also implicates environmental justice concerns. EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to

34. 42 U.S.C. § 7401(b)(1).
35. *Id*. § 7401(a)(3).
36. Clean Air Council v. U.S. Steel Corp., 4 F.4th 204, 208 (3d Cir. 2021).
37. *Id.*
38. Exec. Order No. 13,390: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7037 (Jan. 25, 2021).
39. Mass. v. EPA, 549 U.S. 497, 504 (2007).

the development, implementation and enforcement of environmental laws, regulations and policies."[40] Without informed federal oversight, states will likely regulate air pollution in a less equitable manner. Pennsylvania's SIP, for example, delegates enforcement of air quality control regulations to individual counties.[41] Allegheny County—where U.S. Steel's coke-gas releases occurred—has a health department with the power to promulgate air quality regulations.[42] These county regulations are subsequently incorporated into Pennsylvania's SIP, and, as a consequence, become binding federal law under the CAA.[43]

This regulatory devolution—exacerbated by *Clean Air Council*—could potentially lead to more unequal outcomes across communities, depending on each state's or county's regulatory stringency, resources for enforcement, and political capital. Allegheny County had a per-capita income of $68,777 across 1,250,578 residents in 2020.[44] Clinton County, by contrast, had a per-capita income of only $46,338 across just 38,632 residents.[45] Allegheny County received an "F" grade from the American Lung Institute (ALI) for particle pollution, but Clinton County did not receive a grade at all.[46] Instead, the ALI gave Clinton County a "DNC" for "data not collected," since there is "no monitor collecting data in the county."[47] Especially since Clinton County's single largest employment sector is manufacturing,[48] a complete absence of countywide data on particle pollution is concerning. In total, thirty-four of sixty-seven Pennsylvania counties provided no data on particle pollution at all, and four reported incomplete data.[49] The fact that Pennsylvania's SIP can delegate authority to counties that vary substantially in population, pollution generation, wealth, and state capacity provides cause for concern. Since devolution to the states under *Clean Air Council* may result in unequal outcomes, the federal government will need to look at other strategies to ensure that polluting facilities directly report air pollution releases.

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40. *Learn About Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last updated Jan. 8, 2022).

41. 40 C.F.R. § 52.2020(c)(2) (2005).

42. *Clean Air Council*, 4 F.4th at 208; Grp. Against Smog & Pollution, Inc. v. Shenango Inc., 810 F.3d 116, 120 (2016) ("In Allegheny County, the Commonwealth of Pennsylvania delegates the authority for enforcing air pollution laws to the Allegheny County Health Department ("ACHD"). (App. 4). The ACHD has promulgated emissions standards that are incorporated in the Pennsylvania SIP and are thereby binding federal law under the Clean Air Act.") (citing ACHD Rules and Regulations Art. XXI).

43. *Grp. Against Smog & Pollution, Inc.*, 810 F.3d at 120.

44. *Per Capita Personal Income by County, Annual Pennsylvania*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/release/tables?rid=175&eid=268396 (last visited Jan. 8, 2022); *QuickFacts Allegheny County, Pennsylvania*, U.S. CENSUS, https://www.census.gov/quickfacts/fact/table/alleghenycountypennsylvania/POP010220#POP010220 (last visited Mar. 15, 2022).

45. *Id.*

46. *Report Card Pennsylvania*, AM. LUNG ASS'N, https://www.lung.org/research/sota/city-rankings/states/pennsylvania (last visited Jan. 8, 2022).

47. *Id.*

48. *Clinton County, PA*, DATA USA, https://datausa io/profile/geo/clinton-county-p (last visited Jan. 8, 2022).

49. *Report Card Pennsylvania*, *supra* note 47.

C. The Federal Government's Options

First, Congress could remove CAA-covered emissions from the list of "federally permitted releases" exempted from CERCLA reporting.[50] If politically achievable, this amendment would require only a simple line edit to delete 42 U.S.C. § 9601(10)(H).[51] Then, all CAA-covered air pollution releases would have to be reported both to state governments pursuant to their CAA SIPs and to the federal government as "hazardous substance[s]"[52] under CERCLA. Second, Congress could amend the text of the CAA to rebalance power between federal and state regulators such that the federal government retains greater authority over emissions monitoring.[53] This is unlikely to occur. Although the CAA has previously been revised in 1977 and 1990, the SIP system has endured since it was first established 1970.[54]

Although Congress is unlikely to intervene, EPA can more assertively exercise its powers under the current CAA to work around *Clean Air Council* and remain informed about air emissions releases. To start, EPA may be able to pressure polluters to directly report releases by exercising its power over CAA Title V permits. Under the CAA, the administrator of EPA can "terminate, modify, or revoke and reissue" Title V permits issued by state governments to polluting facilities. To do so, the administrator must only find "that cause exists," provide a window to cure, and act "in accordance with fair and reasonable procedures."[55] The scope of this power depends largely on what constitutes satisfactory "cause" and "fair and reasonable procedures." It is imaginable that EPA could, as a matter of course, require that all Title V facility permits specifically include mandatory reporting of air emissions releases to the federal government, bypassing CERCLA altogether. A court might view this as fairly within the administrator's "cause" to reject or modify a Title V permit. On the other hand, a court could determine this condition to be an impermissible end-run around the CAA's "cooperative federalism."

EPA could potentially achieve the same result by attacking SIPs in Third Circuit states instead of individual Title V permits. Under 42 U.S.C. § 7410, EPA's administrator may require that submitted SIPs include "periodic reports on the nature and amounts of emissions and emissions-related data" from stationary sources as a condition for approval.[56] Under this language, the administrator might be able to require that SIPs mandate that state regulators themselves regularly report emissions releases to EPA. Further, when the administrator disapproves a SIP, mandatory reporting under CERCLA reopens;

50. *See* 42 U.S.C. § 9601(10)(H).
51. *See id.*
52. *Id.* § 9603(a).
53. *Evolution of the Clean Air Act*, EPA, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act (last visited Jan. 8, 2022).
54. *See id.*
55. 42 U.S.C. § 7661d(e).
56. *Id*. § 7410(a)(2)(F)(ii).

"federally permitted release[s]" only include emissions under SIPs "not disapproved by the Administrator of the Environmental Protection Agency."[57] Therefore, in order to maximize the information it receives, EPA may choose to challenge SIPs that lack mandatory reporting to the federal government. If EPA chooses this course, either the state will comply with mandatory reporting or the plan will be disapproved and CERCLA governs without exemptions.

CONCLUSION

Clean Air Council is a victory for both states chafing under federal regulatory oversight and polluters seeking to reduce their compliance burdens. However, the decision creates new hurdles for the federal government's efforts to mitigate air pollution and climate change. Working with incomplete information about air pollution, federal regulators will have much harder jobs. Ultimately, *Clean Air Council* invites more questions than it answers, though EPA has tools at its disposal to ensure that it retains access to air pollution data. How will EPA and other circuits react to the Third Circuit's reinterpretation of CERCLA exemptions? What does the case portend for the Clean Air Act's "cooperative federalism"? What is certain is that if the federal government wants to effectively control air pollution across the United States, it cannot regulate in the dark without up-to-date knowledge of emissions events.

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57. *Id.* § 9601(10)(H).