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Wake up and Smell the Smog: The Third Circuit Provides Clarity on CERCLA's Federally Permitted Release Reporting Exemption in Clean Air Council v. United States Steel Corp.

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WAKE UP AND SMELL THE SMOG: THE THIRD CIRCUIT PROVIDES CLARITY ON CERCLA'S FEDERALLY PERMITTED RELEASE REPORTING EXEMPTION IN *CLEAN AIR COUNCIL V. UNITED STATES STEEL CORP.*

I. Let's Clear the Air: An Introduction to Reporting Requirements After CAA-Governed Air Pollutant Releases in Steel Production Process

Coke-oven emissions from steel production pose substantial public health concerns.[1] In the initial stages, steel production requires processing raw coal into coke, which produces coke-oven gas as a by-product.[2] Burning raw, uncleaned coke-oven gas emits benzene and other hazardous pollutants into the air.[3] These emissions pose carcinogenic and other health risks to humans.[4]

To protect the public from harmful airborne contaminants, the Clean Air Act (CAA) requires states adopt state implementation plans (SIPs) to achieve National Ambient Air Quality Standards (NAAQS).[5] SIPs consist of control measures and regulations a state must use to meet and maintain NAAQS.[6] Pennsylvania's SIP specif-

1. *See Coke Oven Emissions*, Nat'l Cancer Inst. (Feb. 1, 2019), https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/coke-oven (defining coke-oven gas emissions and their effect on public health); *see also What Is Coke?: Greenhouse Gas Emissions from Coke Oven Facilities*, Clean Air Council, https://pacokeovens.org/what-is-coke/greenhouse-gas-emissions/ (last visited Sept. 6, 2021) (emphasizing significant public health concerns associated with coke-oven air pollutants).

2. *See Coke Making Process*, U.S. Steel Mon Valley Works, https://monvalley.uss.com/uss/portal/monvalley/monvalleyworks/cokemakingprocess/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfIjo8ziLQ0MnB2dDB0NDFx9HQ0Cgw0NLd0CwgxdXEz0w_Ep8DYy0I8iRr8BDuBIhP4ofEp8gkzwKwA7EawAjxsKckMjDDI9FQEEH33r/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (last visited Sept. 6, 2021) (explaining coke-oven gas is by-product of igniting "bituminous" coal).

3. *See What Is Coke?: Nature and Extent of Air Emissions*, Clean Air Council, https://pacokeovens.org/what-is-coke/nature-and-extent-of-air-emission/ (last visited Mar. 19, 2022) (detailing implications of burning coke-oven gas).

4. *See* U.S. Dep't of Health and Human Servs., 15th Report on Carcinogens: Coke-Oven Emissions 1 (2021), https://ntp.niehs.nih.gov/ntp/roc/content/profiles/cokeovenemissions.pdf (finding coke-oven emissions are cancerous).

5. *See Basic Information About Air Quality SIPs*, U.S. Env't Prot. Agency, https://www.epa.gov/sips/basic-information-air-quality-sips (Jan. 25, 2022) (defining SIPs). The EPA established NAAQS for six "criteria" pollutants harmful to public health and the environment, including: carbon monoxide, lead air, nitrogen oxide, ozone pollution, particulate matter, and sulfur dioxide. *Id.* (listing common air pollutants with NAAQS).

6. *Id.* (explaining goal of SIPs).

ically leaves the enforcement of emissions and reporting standards to local authorities.[7] In Allegheny County, Pennsylvania, the relevant authority is the Allegheny County Health Department (ACHD).[8]

If an Allegheny County-based "major source" breakdown has a "substantial likelihood of causing the emission of air contaminants in violation of [the] [Pennsylvania SIP]" the source must submit a detailed notice to the ACHD.[9] Federal law also requires the polluting source to report those incidents to the U.S. Coast Guard's National Response Center (NRC).[10] Such federal reporting requirements, however, are subject to certain exemptions.[11]

In *Clean Air Council v. U.S. Steel*,[12] the Third Circuit directly addressed these federal reporting requirements and exemptions following a pollution event in Allegheny County.[13] The environmental watchdog group Clean Air Council (CAC) sued U.S. Steel alleging the corporation did not comply with its federal reporting obligations after emitting high levels of raw coke-oven gas.[14] The Third Circuit held that because U.S. Steel operated under a CAA permit, its emissions were exempt from federal reporting.[15] The opinion ultimately provides federal courts with a

7. *See* 40 C.F.R. § 52.2020(c)(2) (2022) (stating local regulators handle SIP violations).

8. *Id.* (outlining entity managing SIP violations in Allegheny County, Pennsylvania).

9. *See* County of Allegheny, Pa., Ordinance No. 16782, and Allegheny County Health Department (ACHD) Rules and Regulations, Art. XXI Air Pollution Control, § 2108.01(c)(1), (2) (1994) (summarizing reporting requirements for pollution control equipment breakdowns that have substantial likelihood of air contaminant emissions); *see also Summary of the Clean Air Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/laws-regulations/summary-clean-air-act (Sept. 28, 2021) (categorizing sources of hazardous air pollutants). According to the EPA, a major source is "a stationary source or a group of stationary sources that emit or have the potential to emit 10 tons per year or more of a hazardous air pollutant or 25 tons per year or more of a combination of hazardous air pollutants." *Id.* (defining major source).

10. 42 U.S.C. § 9603(a) (describing NRC reporting requirements for onshore facilities emitting hazardous substances in quantities prohibited under § 9602(a)).

11. *See id.* (stating "federally permitted release[s]" are exempt from reporting requirements).

12. 4 F.4th 204, 207 (3d Cir. 2021) (evaluating reporting requirements and exemptions).

13. For a discussion of *Clean Air Council*'s facts, see *infra* notes 23-42 and accompanying text.

14. *Clean Air Council*, 4 F.4th at 206 (outlining basis of lawsuit).

15. *Id.* at 211 (summarizing court's holding).

clearer picture of a major source's compliance obligations after a pollution event.[16]

This Note examines the Third Circuit's decision and the potential impact of less stringent reporting requirements.[17] Part II discusses the facts and procedural history of *Clean Air Council*.[18] Part III provides the dispute's legal background.[19] Part IV outlines the Third Circuit's reasoning in arriving at its holding.[20] Part V offers a critical analysis of the Third Circuit's opinion.[21] Lastly, Part VI examines the potential impact *Clean Air Council* will have on pollution reporting requirements, accountability for polluting sources, and air quality in Allegheny County.[22]

II. AIR POLLUTION PROBLEM IN WESTERN PENNSYLVANIA: THE FACTS OF *CLEAN AIR COUNCIL*

U.S. Steel operates Mon Valley Works, which consists of three steel facilities located throughout Allegheny County, near Pittsburgh, Pennsylvania.[23] The three Mon Valley Works facilities—the Clairton Plant, the Edgar Thomson Plant, and the Irvin Plant—each play a specific role in the steel production process.[24] The Clairton Plant first processes raw coal into coke, the Edgar Thompson Plant then uses the coke to make steel, and the Irvin Plant finishes the steel.[25]

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16. *See* Melissa Horne & Randy Brogdon, *Appeals Court Upholds Expansive Interpretation of Clean Air Act Exemption from CERCLA Release Reporting*, TROUTMAN PEPPER: ENV'T L. AND POL'Y MONITOR (June 24, 2021), https://www.environmentallawandpolicy.com/2021/06/appeals-court-upholds-expansive-interpretation-of-clean-air-act-exemption-from-cercla-release-reporting/ (concluding Third Circuit opinion clarifies reporting requirement for facilities subject to requirements under CAA and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)).

17. For a discussion of *Clean Air Council*'s impact, see *infra* notes 183-99 and accompanying text.

18. For a discussion of the facts and procedural history of *Clean Air Council*, see *infra* notes 23-42 and accompanying text.

19. For a discussion of the legal framework underlying the *Clean Air Council* opinion, see *infra* notes 43-128 and accompanying text.

20. For a discussion of a step-by-step analysis of the Third Circuit's holding in *Clean Air Council*, see *infra* notes 129-56 and accompanying text.

21. For a critical analysis of the Third Circuit's reasoning in *Clean Air Council*, see *infra* notes 157-82 and accompanying text.

22. For a discussion of the potential impact of *Clean Air Council* on environmental law moving forward, see *infra* notes 183-99 and accompanying text.

23. Clean Air Council v. U.S. Steel Corp., 4 F.4th 204, 207 (3d Cir. 2021) (noting facility at issue).

24. *Id.* (summarizing three plants of Mon Valley Works near Pittsburgh).

25. *Id.* (explaining steel making process at Mon Valley Works).

When the Clairton Plant processes raw coal into coke, it produces coke-oven gas as a by-product.[26] If raw coke-oven gas is burned without undergoing a cleaning process, it "belches benzene, hydrogen sulfide, and other pollutants into the air."[27] To prevent the belching of such pollutants, the Clairton Plant cleans the raw coke-oven gas before the other plants subsequently use it.[28]

In December 2018 and June 2019, the Clairton Plant's control rooms were shut down and offline for months due to fires.[29] Despite the offline control rooms, U.S. Steel continued to burn raw coke-oven gas as fuel for steel production.[30] Pollutants were subsequently emitted into the air.[31] U.S. Steel reported the emissions and control room fires to the ACHD in compliance with its CAA Title V permits and regulations.[32]

CAC sued U.S. Steel in the U.S. District Court for the Western District of Pennsylvania.[33] It argued U.S. Steel should have reported the pollution to the NRC pursuant to CERCLA.[34] CAC also asserted that the emissions were not "federally permitted releases" under 42 U.S.C. § 9603(a).[35] In response, U.S. Steel claimed the releases were federally permitted under CERCLA because the emissions were "governed by" its CAA Title V permits.[36]

The district court granted U.S. Steel's motion to dismiss, holding that under CERCLA "the emissions were 'federally permitted

26. *Id.* (introducing where coke-oven gas is produced in steel making process).

27. *Id.* (describing how coke-oven gas can pollute atmosphere).

28. *See Clean Air Council*, 4 F.4th at 207 (addressing process Mon Valley Works uses to prevent coke-oven gas pollutants from entering atmosphere); *see also* U.S. STEEL, MON VALLEY WORKS CLAIRTON PLANT OPERATIONS AND ENVIRONMENTAL REPORT 16 (2019), https://www.ussteel.com/documents/40705/71641/U.+S.+Steel+Clairton+Plant+2019+Report.pdf (detailing Clairton Plant's emissions control process). The Clairton Plant "operates a state-of-the-art by-products plant that recovers tar, ammonia, light oil (benzene, toluene, and xylene), and elemental sulfur from the coke oven gas . . . ." *Id.* (outlining by-products removed from coke-oven gas).

29. *Clean Air Council*, 4 F.4th at 207 (stating why control rooms at Mon Valley Works were offline and inoperable for months).

30. *Id.* (referencing how coke-oven gas pollutants were emitted at Mon Valley Works).

31. *Id.* (describing pollution from burning un-cleaned coke-oven gas).

32. *Id.* (outlining U.S. Steel's compliance with its SIP CAA reporting obligations).

33. *See id.* at 206 (noting CAC filed suit against U.S. Steel).

34. *Clean Air Council*, 4 F.4th at 208-09 (arguing U.S. Steel's emissions did not qualify for CERCLA reporting exemption).

35. *Id.* at 208 (declaring only emissions compliant with CAA permits and regulations are eligible for exemption).

36. *Id.* at 209 (providing emissions "governed by" CAA permits are subject to reporting exemption).

releases' because they were *governed by*" the facility's CAA permits.[37] CAC appealed, and on June 21, 2021, the Third Circuit affirmed the district court's ruling, utilizing the same CAA Title V permit and CERCLA reasoning as the district court.[38] U.S. Steel, therefore, was exempt from reporting the pollution to the NRC.[39]

In support of U.S. Steel's position, the Chamber of Commerce of the United States of America, American Chemistry Council, National Mining Association, American Coke and Coal Chemicals Institute, and Pennsylvania Chamber of Business and Industry appeared as amici.[40] The amicus curiae brief argued the district court correctly held that CERCLA is clear because the "'federally permitted release' exception is 'unambiguous and does not require that air emissions comply with a Clean Air Act permit in order to be exempt.'"[41] The brief also stressed that imposing a federal reporting requirement is "unnecessarily duplicative" and poses unnecessary regulatory burdens.[42]

III. AIR POLLUTION IS A BAD SOLUTION: A STATUTORY, ADMINISTRATIVE, AND JUDICIAL BACKDROP

A. Clean Air Act

In 1970, Congress enacted the CAA to address dense levels of smog plaguing cities and industrial centers around the U.S.[43] The CAA implements four major regulatory components.[44] First, it requires the EPA to establish NAAQS "for pollutants that are common in outdoor air, considered harmful to public health and the

37. *Id.* (describing district court's holding and reasoning).

38. *Id.* at 206, 213 (noting appeal from district court and Third Circuit's holding).

39. *Clean Air Council*, 4 F.4th at 206, 213 (highlighting reporting implications of court's holding).

40. *See generally* Brief of Amici Curiae Chamber of Commerce of the United States of America, American Chemistry Council, National Mining Association, American Coke & Coal Chemicals Institute, and Pennsylvania Chamber of Business & Industry Supporting Appellee at 1, Clean Air Council v. U.S. Steel Corp., 4 F.4th 204 (3d Cir. 2021) (No. 20-2215) (supporting U.S. Steel's position).

41. *Id.* at 3 (quoting Clean Air Council v. U.S. Steel Corp., No. 2:19-CV-1072, 2020 WL 2490023, at *4 (W.D. Pa. May 14, 2020)) (asserting CERCLA's language clearly supports U.S. Steel's argument that it meets federal reporting exemption).

42. *See id.* (contending pollution event reports to both local and federal authorities would be onerous).

43. *See Clean Air Act Requirements and History*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history (Aug. 12, 2021) (outlining CAA's purpose).

44. *See Evolution of the Clean Air Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act#caa70 (Dec. 7, 2021) (detailing core tenets of 1970 CAA).

environment, and that come from numerous and diverse sources."[45] Next, the CAA establishes New Source Performance Standards (NSPS) that authorize the EPA to develop technology-based standards for certain classifications of sources.[46] Third, the CAA implements National Emission Standards for Hazardous Pollutants (NESHAPs).[47] Finally, the CAA requires states to develop SIPs, which are subject to approval by the EPA, to achieve NAAQS.[48] In 1977, Congress revised the CAA to prevent air quality deterioration in areas attaining NAAQS.[49] In 1990, Congress made additional revisions instituting new regulatory programs to control acid rain and issue stationary source operating permits.[50]

The EPA's role in setting NAAQS is a foundational aspect of the CAA.[51] The EPA sets air quality standards for six main pollutant categories known as "criteria pollutants": particulate matter (also known as particle pollution), ozone, sulfur dioxide, nitrogen dioxide, carbon monoxide, and lead.[52] Additionally, the CAA contains specific provisions to address hazardous air pollutants (HAPs).[53] These pollutants can cause cancer and birth defects in

45. *See Reviewing National Ambient Air Quality Standards (NAAQS): Scientific and Technical Information*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/naaqs (Aug. 18, 2021) (stating purpose of NAAQS).

46. *See Demonstrating Compliance with New Source Performance Standards and State Implementation Plans*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/compliance/demonstrating-compliance-new-source-performance-standards-and-state-implementation-plans (Feb. 2, 2022) (describing NSPS).

47. *See National Emission Standards for Hazardous Air Pollutants Compliance Monitoring*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/compliance/national-emission-standards-hazardous-air-pollutants-compliance-monitoring (Mar. 1, 2022) (defining NESHAPs as "stationary source standards for hazardous air pollutants"); *see also Evolution of the Clean Air Act*, *supra* note 44 (referring to NESHAPs as one of four main components of CAA).

48. For a discussion of SIPs and their objectives, see *supra* notes 5-7 and accompanying text.

49. *See Evolution of the Clean Air Act*, *supra* note 44 (summarizing 1977 CAA amendments).

50. *Id.* (describing 1990 CAA amendments).

51. *See* EELP Staff, *Modifying the Air Quality Standards Review Process*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, https://eelp.law.harvard.edu/2018/06/subverting-the-process-of-setting-health-based-air-quality-standards-eelp-interviews-janet-mccabe/ (Dec. 10, 2019) (discussing NAAQS as bedrock of America's advancement towards cleaner air).

52. *See Clean Air Act Requirements and History*, *supra* note 43 (listing six criteria pollutants).

53. *Id.* (describing other pollutants CAA provisions address).

addition to detrimental environmental impacts.[54] The EPA also regulates benzene, a toxic pollutant found in coke-oven gas.[55]

The CAA relies on a system of "cooperative federalism" to achieve NAAQS set by the EPA.[56] This system requires states to submit comprehensive SIPs, subject to EPA approval.[57] A SIP is "a collection of regulations and documents used by a state . . . or local air district to implement, maintain, and enforce . . . NAAQS, and to fulfill other requirements of the Clean Air Act."[58]

Pennsylvania implements the CAA through its approved SIP.[59] The SIP primarily leaves the enforcement and standard-setting functions in Allegheny County to the ACHD.[60] Accordingly, the ACHD adopted its own "emissions standards, monitoring standards, permitting programs, and reporting requirements," known as Article XXI.[61] Pennsylvania's SIP implements these local regulations and gives them the effect of "binding federal law."[62] Article XXI also provides that the operator of an Allegheny-based source must notify the ACHD if the source emits air contaminants in violation of the Pennsylvania SIP.[63] In this notification, the operator must detail: the equipment that broke down; the potential cause of the breakdown; the estimated length of time; the "specific material(s) which are being, or are likely to be, emitted . . . ."; the estimated

54. *See What Are Hazardous Air Pollutants*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/haps/what-are-hazardous-air-pollutants (Jan. 5, 2022) (stating effects of HAPs on environment and human health).

55. *See Initial List of Hazardous Air Pollutants with Modifications*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/haps/initial-list-hazardous-air-pollutants-modifications (Jan. 5, 2022) (listing 188 HAPs EPA regulates); *see also* MICK PLATTS, THYSSENKRUPP ENCOKE USA, THE COKE OVEN BY-PRODUCT PLANT (2021), https://accci.org/wp-content/uploads/2021/07/the-coke-oven-by-product-plant-07-22-2021.pdf (listing benzene as one contaminant found in coke-oven gas).

56. *See* Clean Air Council v. U.S. Steel Corp., 4 F.4th 204, 207 (3d Cir. 2021) (explaining federal government sets national standards but states implement them).

57. *See* 42 U.S.C. § 7410(a)(1) (requiring SIPs achieve federal NAAQS).

58. *See Basic Information About Air Quality SIPs*, *supra* note 5 (defining SIPs).

59. *See EPA Approved Regulations in the Pennsylvania SIP*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/sips-pa/epa-approved-regulations-pennsylvania-sip (Sept. 7, 2021) (detailing Pennsylvania SIP provisions).

60. *See Clean Air Council*, 4 F.4th at 208 (noting ACHD's role in implementing Pennsylvania SIP).

61. *See id.* (discussing ACHD's role in setting local air pollution standards); *see also EPA Approved Regulations in the Pennsylvania SIP*, *supra* note 59 (specifying EPA-approved Article XXI regulations).

62. *See Clean Air Council*, 4 F.4th at 208 (stating ACHD regulations are given effect of federal law under CAA); 40 C.F.R. § 52.2020(c)(2) (2022) (providing regulation implementing ACHD Art. XXI).

63. *See* ACHD Art. XXI § 2108.01(c)(1) (detailing reporting requirements for events resulting in high likelihood of emitting air contaminants).

quantity of materials; and the "[m]easures . . . taken or to be taken to minimize the length of the breakdown, the amount of air contaminants emitted, or the ambient effects of the emissions . . . ."[64]

The CAA also requires that all major sources receive Title V operating permits.[65] State and local agencies typically issue Title V permits, which are also called "Clean Air Act part 70" permits.[66] These permits are comprehensive and consolidate all the source's requirements under its respective SIP.[67] They must also include "enforceable emission limitations and standards" and provide "inspection, entry, monitoring, compliance certification, and reporting requirements . . . ."[68]

B. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Congress enacted CERCLA, commonly known as "Superfund," on December 11, 1980.[69] CERCLA provides a response program for remediation of abandoned, contaminated sites.[70] More specifically, "CERCLA provides a Federal 'Superfund' to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment."[71]

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64. ACHD Art. XXI § 2108.01(c)(2)(A)-(F) (summarizing specific disclosure requirements).

65. 42 U.S.C. § 7661a(a) (requiring major sources have operating permits); *see also Basic Information About Operating Permits*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/title-v-operating-permits/basic-information-about-operating-permits (Feb. 11, 2022) (summarizing important aspects of Title V operating permits).

66. *Basic Information About Operating Permits*, *supra* note 65 (noting issuer of operating permits).

67. *See* § 7661c(a) (explaining Title V permits in greater detail).

68. *See* § 7661c(a),(c) (providing contents of Title V operating permits).

69. *See* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (outlining CERCLA provisions); *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Overview*, PACE L. LIBR. (May 26, 2021, 3:56 PM) [hereinafter *CERCLA: Overview*], https://libraryguides.law.pace.edu/CERCLA (discussing creation of CERCLA).

70. *See CERCLA: Overview*, *supra* note 69 (discussing primary goals of CERCLA).

71. *See Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV'T PROT. AGENCY [hereinafter *Summary of CERCLA*], https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act#:~:text=the%20Comprehensive%20Environmental%20Response%2C%20Compensation%2C%20and%20Liability%20Act%20%2D%2D%20otherwise,and%20contaminants%20into%20the%20environment (Sept. 28, 2021) (detailing pollution incidents CERCLA seeks to alleviate).

These remediation efforts are made possible by a congressionally appropriated Superfund that acts as a trust.[72] In the Superfund's first five years, Congress raised over $1.6 billion from taxes on the chemical and petroleum industries.[73] Funding rose to $8.5 billion in 1986 after Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA).[74] These amendments provide "site specific amendments, definitions clarifications, and technical requirements . . . including additional enforcement authorities."[75]

Another goal of CERCLA is to impose Superfund liability on parties responsible for hazardous releases at contaminated sites.[76] This liability is retroactive, joint and several, and strict.[77] Liability is retroactive in that a party can be held liable for its involvement in polluting a site before CERCLA's 1980 enactment.[78] Additionally, liability is joint and several, meaning any "one potentially responsible party (PRP)" can be held liable for the entire cost of the cleanup.[79] Finally, liability is strict in that it holds a party responsible if it contributed in any way to hazardous waste at a site.[80]

In addition to the reporting requirements under the CAA, CERCLA mandates federal reporting in certain circumstances.[81] If a facility releases more than a set threshold of pollutants, CERCLA requires the facility operator to "immediately notify the National Response Center," a division of the U.S. Coast Guard.[82] Not all releases, however, require such notification.[83] In relevant part, Congress exempts facilities from reporting any "federally permitted

72. *See Superfund: CERCLA Overview*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/superfund/superfund-cercla-overview (Feb. 14, 2021) (characterizing Superfund as trust).

73. *See id.* (describing primary source of Superfund's initial funding).

74. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (amending CERCLA); *see also The Superfund Amendments and Reauthorization Act (SARA)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/superfund/superfund-amendments-and-reauthorization-act-sara (Mar. 15, 2021) (noting Superfund size increase).

75. *See Summary of CERCLA*, *supra* note 71 (explaining purpose of SARA).

76. *See Superfund Liability*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/superfund-liability (June 8, 2021) (discussing CERCLA liability).

77. *Id.* (analyzing extent and characteristics of CERCLA liability).

78. *Id.* (defining retroactive nature of CERCLA liability).

79. *Id.* (discussing CERCLA joint and several liability).

80. *See id.* (explaining CERCLA strict liability).

81. 42 U.S.C. § 9603(a) (providing reporting requirements when releasing prohibited amounts of hazardous substances).

82. *Id.* (outlining reporting requirements).

83. *See* § 9603(f) (detailing reporting exemptions built into statute).

release."[84] This exemption includes air emissions subject to a permit or regulation under the CAA or state plans implementing the CAA.[85] Failure to comply with CERCLA's reporting requirements may result in a penalty in excess of fifty-five thousand dollars per day depending on the date of assessment.[86]

C. Administrative Guidance

A 1992 EPA administrative decision, *In re Mobil Corp.*,[87] provides administrative guidance on the "subject to" language in CERCLA's "federally permitted release" exemption.[88] In 1991, the Regional Administrator of the EPA issued three complaints against Mobil Oil Corporation (Mobil).[89] The complaints stated that Mobil failed to comply with CERCLA's reporting requirements after three air releases of hazardous substances occurred at one of its facilities.[90]

Mobil argued that because it had a CAA permit, it qualified for CERCLA's "federally permitted release" exemption.[91] Mobil claimed, therefore, it was not subject to CERCLA's federal reporting requirements.[92] The EPA, however, found CERCLA's "subject to" language in the "federally permitted release" exemption to be "inherently ambiguous" and ruled the exemption precluded emissions that violate CAA permits.[93]

D. Statutory Interpretation Framework

In dealing with questions of statutory interpretation, courts first construe the plain meaning of the provision's words at the time

84. § 9603(a) (stating federally permitted releases are exempt from reporting).

85. *See* 42 U.S.C. § 9601(10)(H) (defining "federally permitted release" in context of CERCLA).

86. *See* 42 U.S.C. § 9609(b)(1) (outlining penalty for failure to comply with reporting requirements); *see also* Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2,056, 2,059 (Feb. 6, 2019) (detailing inflation-adjusted CERCLA civil monetary penalties).

87. 1992 EPA ALJ WL 293133, at *8–10 (providing guidance on similar CERCLA provision at issue in *Clean Air Council*).

88. *See id.* (discussing CERCLA reporting exemption).

89. *Id.* at *1 (describing administrative actions against Mobil).

90. *Id.* (stating basis for initial EPA complaints against Mobil).

91. *Id.* at *6 (outlining Mobil's argument that exception is not limited to CAA permit-compliant emissions).

92. *In re Mobil Corp.*, 1992 EPA ALJ WL 293133, at *6 (describing further Mobil's argument).

93. *Id.* at *8, *17 (noting EPA's administrative holding that only CAA permit-compliant emissions qualify for "federally permitted release" exemption).

of the statute's enactment.[94] If the language of the provision is clear and unambiguous, the court's analysis generally stops there.[95] When the plain meaning of the text is ambiguous, however, courts interpret the provision's meaning within its broader statutory context.[96] If the ambiguity is resolved under the plain meaning or broader statutory context methods, the inquiry ends without the need to pursue a legislative history analysis.[97] When a court resolves ambiguity, deference should not be granted to a prior administrative branch decision.[98]

1. Statutory Context

In *Russello v. United States*,[99] the United States Supreme Court interpreted a provision based on its broader statutory context.[100] In 1977, a grand jury indicted petitioner Joseph Russello for racketeering, conspiracy, and mail fraud in violation of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime and Control Act of 1970.[101] The district court entered a judgment against Russello, ordering him to forfeit the proceeds of his illicit acts under 18 U.S.C. § 1963(a)(1).[102] The RICO provision maintains that a person convicted under RICO shall forfeit to the government "any interest . . . acquired or maintained in violation of section 1962."[103] The issue then turned to whether profits and proceeds derived from illicit racketeering constitute an "interest" under § 1963(a)(1).[104]

94. *See Statutory Construction*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/statutory_construction (last visited May 10, 2022) (discussing plain language analysis as starting point in statutory construction).

95. *See* Steven Wisotsky, *How to Interpret Statutes - Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 325 (2009) (articulating how plain meaning of words in statutes generally controls).

96. *See* Russello v. United States, 464 U.S. 16, 23 (1983) (viewing statutory provision in its greater statutory context to eliminate ambiguity).

97. *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (establishing legislative history should not complicate judicial analysis when plain meaning and statutory context eliminate ambiguity).

98. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (emphasizing partial holding regarding judicial deference to administrative decisions).

99. 464 U.S. 16, 23 (1983) (discussing Supreme Court's holding that statutory context eliminated ambiguity surrounding provision at issue in case).

100. *Id.* (referencing basis of Supreme Court's opinion).

101. *Id.* at 17 (noting indictments).

102. *Id.* at 18 (addressing district court's holding ordering Russello to turn over illegal money).

103. 18 U.S.C. § 1963(a)(1) (outlining RICO's statutory provision requiring forfeiture of illegally obtained funds).

104. *See Russello*, 464 U.S. at 17 (summarizing foundational issue in case).

Russello argued § 1963(a)(1) only covered interests "in an enterprise" and "not profits and proceeds."[105] As such, he proposed that some of his money was exempt from forfeiture.[106] In its analysis, the Supreme Court read § 1963(a)(1) within the full context of RICO.[107] The Supreme Court averred that if Congress meant to restrict § 1963(a)(1) to only "interests in an enterprise," Congress would have done so as it did in the following subsection.[108] The Court, therefore, concluded that when Congress includes or excludes specific language in one part of a statute and not in another, it is presumed that Congress acted intentionally.[109]

2. Legislative History

Courts have established that statutory interpretation should not consider legislative history when reading a provision in its statutory context or when analyzing its plain meaning provides a clear answer.[110] In *Food Marketing Institute v. Argus Leader Media*,[111] a South Dakota newspaper filed a Freedom of Information Act (FOIA) request for data held by the U.S. Department of Agriculture (USDA) regarding the annual Supplemental Nutrition Assistance Program (SNAP) redemption data from 2005 to 2010.[112] The USDA did not disclose all the information, only granting a partial request to the newspaper.[113] The newspaper subsequently sued the USDA for a more comprehensive data release.[114]

The issue in *Food Marketing Institute* dealt with whether FOIA's Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," applied to the SNAP data withheld by the USDA.[115] The Supreme Court ultimately classified the information as "confidential" under Exemption 4.[116] The Court found that the data fit

105. *Id.* at 20 (providing Russello's argument).

106. *See id.* (discussing Russello's defense against RICO forfeiture provision).

107. *See id.* at 23 (explaining Court interpreted § 1963(a)(1) in context of other RICO provisions).

108. *Id.* (stating evaluation of full statutory context eliminated ambiguity).

109. *See Russello*, 464 U.S. at 23 (referencing Court's holding).

110. *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (establishing when legislative history should play role in judicial analysis).

111. 139 S. Ct. 2356, 2361 (2019) (discussing plaintiff's data request denied by USDA).

112. *Id.* (outlining facts of lawsuit).

113. *Id.* (reiterating USDA's denial of SNAP data to plaintiff).

114. *Id.* (describing basis of lawsuit).

115. *Id.* (stating predominant issue in case regarding Exemption 4 as applied to SNAP data).

116. *Food Mktg. Inst.*, 139 S. Ct. at 2366 (providing holding).

within the plain meaning of the word "confidential" at the time of FOIA's enactment.[117] Although legislative history supported an interpretation of "confidential" beyond its plain meaning, the Supreme Court asserted that legislative history can never "muddy" the meaning of "clear statutory text."[118]

3. Administrative Deference

When a court's application of "traditional tools of statutory construction" resolves statutory ambiguity, deference to administrative guidance should not factor into the court's analysis.[119] In *Epic Systems Corp. v. Lewis*,[120] the Supreme Court resolved three substantively similar cases.[121] The Supreme Court specifically referenced the facts of *Morris v. Ernst & Young, LLP*,[122] in which an accountant entered into an employment agreement with Ernst & Young requiring arbitration for all employment-related disputes.[123] The accountant later filed suit against the firm alleging wage violations under the Fair Labor Standards Act (FLSA) and sought to litigate under the FLSA's collective action provision.[124] The Supreme Court granted certiorari and reviewed whether the National Labor Relations Act (NLRA) and Arbitration Act (AA) prohibited enforcement of the employment contract's arbitration agreement.[125]

The employee-plaintiffs supported their argument by referencing administrative agency interpretations of the NLRA and AA favorable to their cause.[126] In holding that the arbitration agreements must be enforced, the Supreme Court stated that "deference

117. *Id.* at 2363 (finding "confidential" meant "private" or "secret" at time of FOIA's enactment and SNAP data fell within definition).

118. *Id.* at 2364 (explaining legislative history serves no purpose in resolving unambiguous statutory text).

119. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (holding under Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43 (1984), administrative agency decisions should not receive deference if "traditional tools of statutory construction" eliminate ambiguity).

120. 138 S. Ct. at 1619 (2018) (detailing case in which Supreme Court did not defer to administrative guidance).

121. *Id.* (noting opinion resolved three separate cases).

122. 834 F.3d 975, 979-80 (9th Cir. 2016) (explaining one case for review before Supreme Court in *Epic Systems Corp.*), *rev'd sub nom.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018), and *vacated*, 894 F.3d 1093 (mem.) (9th Cir. 2018).

123. *Epic Sys. Corp.*, 138 S. Ct. at 1619-20 (stating parties involved in lawsuit entered into employment contract containing arbitration clause).

124. *Id.* at 1620 (describing basis of lawsuit).

125. *Id.* at 1620-21 (discussing relationship between AA and NLRA and resulting effect on enforcement of arbitration agreements at issue in case).

126. *See id.* at 1629 (noting employee's request to defer to 2012 National Labor Relations Board opinion suggesting NLRA supersedes AA).

is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity."[127] The Court found no unresolved ambiguity, stating that "[w]here, as here, the canons supply an answer, '*Chevron* leaves the stage.'"[128]

IV. UP IN THE AIR NO MORE: THE THIRD CIRCUIT'S ANALYSIS

In *Clean Air Council*, the Third Circuit predominantly focused on the meaning of "subject to" in the context of CERCLA's "federally permitted release" exemption in 42 U.S.C. § 9601(10)(H).[129] The court first established that the phrase "subject to" has only two possible interpretations: "governed or affected by" as U.S. Steel argued, or "obedient to" or "in compliance with" as CAC argued.[130] Given CERCLA's entire context, the court concluded Congress only intended the phrase to mean "governed or affected by."[131]

The Third Circuit first acknowledged that according to *Black's Law Dictionary*, "subject to" could mean either "governed or affected by" or "obedient to."[132] Given this plain language ambiguity, the court proceeded to read the "federally permitted release" exemption in CERCLA's broader statutory context.[133] The court explained that in other sections of § 9601, Congress explicitly used the language "in compliance with" a permit when discussing pretreatment standards or injection control programs.[134] Congress did not, however, choose to use that specific language in

127. *Id.* at 1630 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 n.9 (1984)) (stating circumstances under which deference to administrative agency decision is appropriate).

128. *Epic Sys. Corp.*, 138 S. Ct. at 1630 (2018) (highlighting inapplicability of *Chevron* deference, or deference to administrative agency decisions, in this case).

129. *See* Clean Air Council v. U.S. Steel Corp., 4 F.4th 204, 207 (3d Cir. 2021) (stating focal point of Third Circuit's analysis).

130. *See id.* at 209 (describing two dueling interpretations of § 9601(10)(H)'s "subject to" language).

131. *Id.* (concluding Congress meant "subject to" to mean "governed or affected by" based on contextual analysis).

132. *Id.* (finding *Black's Law Dictionary* supported both CAC's and U.S. Steel's interpretations of phrase "subject to").

133. *See id.* (describing next step in court's reasoning after plain language analysis left unresolved ambiguity).

134. *See* 42 U.S.C. §§ 9601(10)(F),(J) (referencing definition of "federally permitted release" and its mention of provisions requiring compliance with permits or standards); *see also Clean Air Council*, 4 F.4th at 209 (arguing Congress purposefully specified compliance with certain permits or regulations in other sections of CERCLA).

§ 9601(10)(H) when discussing CERCLA's "federally permitted release" exemption.[135]

To bolster its reasoning, the Third Circuit cited the Supreme Court's holding in *Russello*.[136] In relevant part, the opinion provided that the court presumes Congress acts intentionally when it includes specific language in one section of a law but not in another section of the same law.[137] If Congress meant to condition the reporting exemption on compliance with a CAA Title V permit, it would have done so as it did in other sections of CERCLA.[138]

The court further supported its contextual argument by citing specific CERCLA provisions differentiating the phrase "subject to" from "in compliance with."[139] For example, the court referenced 42 U.S.C. § 9620(a)(1), stating "each department, agency, and instrumentality of the United States . . . shall be *subject to*, and *comply with*, this chapter."[140] If Congress intended "subject to" to mean the same as "comply with," the two phrases would be redundant in that provision.[141]

Proceeding from its statutory interpretation analysis, the court determined that reading "subject to" as "governed or affected by" is logical within CERCLA's greater framework.[142] The Third Circuit held that "reading 'subject to' as 'governed or affected by' makes sense," as it supports CERCLA's "cooperative federalism" scheme.[143] The court concluded that reporting to both state and federal authorities would be duplicative and run antithetical to

135. *See Clean Air Council*, 4 F.4th at 209 (drawing distinction between language of § 9601(10)(H) and other CERCLA provisions).

136. *Id.* (citing Russello v. United States, 464 U.S. 16, 23 (1983)) (relying on *Russello* to support argument that Congress excluded phrase "in compliance with" purposefully from § 9601(10)(H)).

137. *Id.* (citing Russello v. United States, 464 U.S. 16, 23 (1983)) (supporting contention that Congress purposefully excluded language specifying compliance with CAA permit from § 9601(10)(H)).

138. *Id.* (asserting Congress purposefully included and excluded language in CERCLA).

139. *Id.* (emphasizing Congress did not intend for "subject to" to mean "in compliance with," as CAC argued).

140. *Clean Air Council*, 4 F.4th at 209 (providing example of CERCLA provision that differentiates "subject to" phrase from language mentioning compliance with permits or regulations).

141. *Id.* (illustrating Congress's purpose for including and excluding certain language).

142. *See id.* at 210 (suggesting "governed or affected by" interpretation fits within CERCLA's context).

143. *Id.* (concluding Third Circuit's interpretation of "subject to" fits CERCLA's theme of "cooperative federalism").

CERCLA's foundational principle of "cooperative federalism," which produces implementation autonomy.[144]

The court continued its analysis by addressing both the CAC's citation to a Senate committee report and a Senate committee chairman's comments suggesting pollution accidents should be federally reportable under CERCLA.[145] The Third Circuit stated the report did not specifically discuss the interpretation of "subject to" within CERCLA's context.[146] Even if it did, the court relied on the proposition in *Food Marketing Institute* that legislative history should not obscure clear statutory text.[147] After finding the statutory text to be clear, the Third Circuit did not give weight to CERCLA's legislative history.[148]

The court also directly addressed CAC's citation to the EPA administrative decision *In re Mobil Corp.*, which held that the CERCLA phrase "subject to" was ambiguous and read it to exclude emissions that violate CAA permits.[149] Citing this opinion, CAC asked the court to grant deference to its holding.[150] Although the decision in *In re Mobil Corp.* favors CAC's argument, the Third Circuit concluded it should not be afforded deference.[151] In making this decision, the Third Circuit adhered to Supreme Court precedent supporting not deferring to an administrative decision when "traditional tools of statutory construction" resolve statutory ambiguity.[152] Given that CERCLA's context resolved the meaning of "subject to," there was no ambiguity for the EPA to settle.[153]

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144. *See id.* at 207 (noting additional connection between Third Circuit's decision and its alignment with CERCLA's "cooperative federalism" structure).

145. *Clean Air Council*, 4 F.4th at 210 (addressing CAC's argument favoring legislative history).

146. *Id.* (describing Senate materials cited by CAC and their irrelevance to contested issue).

147. *Id.* (citing Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019)) (discussing precedent that legislative history should not obscure clear meaning of statutory text).

148. *See id.* (dismissing need for legislative history analysis).

149. *See In re Mobil Corp.*, 1992 EPA ALJ WL 293133, at *8 (noting conclusion of EPA's decision).

150. *Clean Air Council*, 4 F.4th at 210 (outlining CAC's request that Third Circuit defer to 1992 EPA administrative decision).

151. *Id.* at 210-11 (stating administrative deference is unapplicable in this case).

152. *Id.* at 211 (quoting Chevron, U.S.A., Inc. v. Nat'l Res. Def. Counsel, 467 U.S. 837, 843 n.9 (1984)) (noting court's reliance on principles discussed in *Chevron* to support assertion that administrative deference comes into play with unresolved statutory ambiguity).

153. *Id.* (rejecting need for administrative deference).

In its conclusion, the Third Circuit addressed CAC's argument that the district court was wrong to grant U.S. Steel's motion to dismiss because it was an affirmative defense to contend that hydrogen sulfide, benzene, and coke-oven emissions were federally permitted releases.[154] In response, the Third Circuit stated courts sometimes consider affirmative defenses on a motion to dismiss and may dismiss a complaint when "an unanswered affirmative defense appears on its face."[155] The federally permitted release exemption applied on the face of the complaint, showing U.S. Steel's emissions were subject to its Title V CAA permits and ultimately exempt from federal reporting.[156]

V. A BREATH OF FRESH AIR, BUT MAYBE A STEP IN THE WRONG DIRECTION: A CRITICAL ANALYSIS OF THE THIRD CIRCUIT'S OPINION IN *CLEAN AIR COUNCIL*

The Third Circuit applied traditional rules of statutory interpretation to arrive at a pointed conclusion.[157] According to the Third Circuit: "[w]hen Congress writes, context matters," and context also clarifies.[158] Relying on Supreme Court precedent, the Third Circuit established clear and concise reasons why the contextual language of CERCLA cleared up any ambiguity surrounding the meaning of "subject to" in § 9601(10)(H).[159] By resolving the issue on contextual grounds and avoiding a murky legislative history analysis, the court arrived at the proper legal outcome.[160]

Despite the court's intuitive statutory interpretation analysis, the opinion was perhaps misguided on some important aspects.[161] Specifically, the court mischaracterized the notion that reporting to the NRC is duplicative and threatens CERCLA's "cooperative feder-

154. *Id.* (addressing whether U.S. Steel's affirmative defense barred district court from granting motion to dismiss).

155. *Clean Air Council*, 4 F.4th at 211 (outlining grounds for affirming motion to dismiss).

156. *Id.* (finding U.S. Steel's CAA Title V permits cover hydrogen sulfide, benzene, and coke-oven gas).

157. For a discussion of the Third Circuit's step-by-step analysis, see *supra* notes 129-56 and accompanying text.

158. *Clean Air Council*, 4 F.4th at 206 (outlining foundation of Third Circuit's reasoning that statutory context matters).

159. For a discussion of the Third Circuit's reasoning, see *supra* notes 129-56 and accompanying text.

160. *Clean Air Council*, 4 F.4th at 206 (suggesting court's analysis provided clear and structured reasoning without diving into convoluted inquiry).

161. For a discussion on shortcomings in the Third Circuit's reasoning, see *infra* notes 162-82 and accompanying text.

alism" spirit.[162] Such an assertion implies that by reporting to the NRC, federal intervention will threaten the local response authority granted to the ACHD under CERCLA and Pennsylvania's SIP.[163] Additionally, this reasoning suggests the Third Circuit perceived the reporting requirement as jeopardizing the spirit of "cooperative federalism" inherent in CERCLA.[164]

This reasoning does not align with federal response functions in the aftermath of air pollution events.[165] The NRC website states it is not a response agency.[166] Instead, it primarily serves as an emergency call center resource.[167] Emergency call centers field initial reports of pollution events and forward the information to requisite state and local authorities for proper response action.[168] The NRC does not assume response efforts or relieve local regulators of their duties.[169] Instead, the NRC supports state and local authorities by forwarding information to assist them.[170]

Although the NRC does not handle response efforts itself, reports to the NRC activate a National Contingency Plan and federal government response capabilities.[171] The federal government's response effort, however, is generally to "promote coordination among the hierarchy of responders and contingency plans."[172] An

162. For a discussion of federal response functions after pollution events and legitimate public purposes served by CERCLA reporting, see *infra* notes 165-82 and accompanying text.

163. For a discussion of the Third Circuit's analysis, see *supra* notes 129-56 and accompanying text.

164. For a discussion of the Third Circuit's determination that its holding fits within CERCLA's "cooperative federalism" scheme, see *supra* notes 142-44 and accompanying text.

165. For a discussion on shortcomings in the Third Circuit's reasoning and functions of federal authorities responding to pollution events, see *infra* notes 165-82 and accompanying text.

166. *See Welcome to the National Response Center*, U.S. COAST GUARD NAT'L RESPONSE CTR., https://nrc.uscg.mil/ (last visited Oct. 8, 2021) (stating NRC is not response agency).

167. *Id.* (establishing NRC primary function as call center).

168. *Id.* (reiterating call center and information distributing functions of NRC).

169. *See id.* (demonstrating absence of information on NRC website suggests it does not assume response effort responsibilities).

170. *See id.* (highlighting true function of NRC).

171. *See National Response Center*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/emergency-response/national-response-center (Nov. 19, 2021) (defining federal response functions after reporting to NRC).

172. *See National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Overview*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview (Mar. 30, 2021) (stating main focus of federal response efforts in addressing hazardous pollution event).

on-scene coordinator in the impacted region integrates the local on-site authorities with the potentially responsible party to determine the appropriate response plan.[173] Federal assistance may not be required if state and local government agencies have the proper resources to handle the pollution event.[174] Given federal response efforts focus on promoting coordination with local authorities and providing support where needed, the Third Circuit's suggestion that NRC reporting threatens "cooperative federalism" is overstated.[175]

Additionally, the Third Circuit's conclusion that CERCLA reporting would be duplicative and serve no public purpose misses the mark.[176] It is true that reporting similar pollution information to local Allegheny County authorities and the NRC may be repetitive on its face.[177] This conclusion, however, overlooks the fact that dual reporting can theoretically serve a legitimate public purpose.[178] Requiring potential polluters to face the additional hurdles of dual reporting and corresponding financial repercussions for non-compliance contribute to an overall stricter regulatory environment for polluters.[179] Most Americans support stricter environmental laws and regulations, and research suggests a tighter regulatory environment results in fewer domestic carbon dioxide (CO_2) emissions.[180] The Third Circuit's assertion, therefore, fails

173. *See National Response System Flowchart*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/emergency-response/national-response-system (May 17, 2021) (describing response function of federal on-scene coordinator).

174. *See id.* (noting federal assistance may not be required in some instances).

175. For a discussion of federal response functions following hazardous pollution events, see *supra* notes 165-75. For a discussion of *Clean Air Council*, see *supra* notes 129-56 and accompanying text.

176. For a discussion on shortcomings in the Third Circuit's reasoning about NRC reporting serving no public purpose, see *infra* notes 176-82 and accompanying text.

177. For a discussion of the Third Circuit's analysis, see *supra* notes 129-56 and accompanying text.

178. For a discussion of the purpose of NRC reporting, see *supra* notes 171-75 and accompanying text.

179. For a discussion on CERCLA's reporting requirements, see *supra* notes 81-86 and accompanying text.

180. Kristen Bialik, *Most Americans Favor Stricter Environmental Laws and Regulations*, PEW RSCH. CTR. (Dec. 14, 2016), https://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations/ (explaining Americans' view that environmental regulations are worthwhile); Itzhak (Zahi) Ben-David, Stefanie Kleimeier & Michael Viehs, *Research: When Environmental Regulations Are Tighter at Home, Companies Emit More Abroad*, HARV. BUS. REV. (Feb. 4, 2019), https://hbr.org/2019/02/research-when-environmental-regulations-are-tighter-at-home-companies-emit-more-abroad (finding companies that are biggest contributors of CO_2 emissions emit less when domestic environmental regulations are tighter). Companies, however, typically produce more emissions

to recognize the positive domestic environmental effects that an additional reporting requirement on sources may have.[181] As sources face greater accountability for their actions, extra reporting may likely incentivize them to take greater precautionary measures in the future.[182]

VI. LOWERING ACCOUNTABILITY FOR POLLUTERS: POTENTIAL IMPACT OF *CLEAN AIR COUNCIL*

The Third Circuit's decision represents a significant victory for U.S. Steel and other potential polluters within the jurisdiction.[183] The opinion clarifies CERCLA's federal reporting exemption as applying solely to air emissions governed by a Title V CAA permit.[184] Only unregulated air emission releases not governed by CAA permits are subject to the NRC reporting requirements and subsequent non-compliance fines.[185] In practical effect, *Clean Air Council* provides clearer pollution reporting obligations for all sources.[186]

The most significant impact of the Third Circuit's decision, however, is that sources governed by CAA permits may now avoid potentially serious financial penalties for non-compliance with CERCLA's NRC reporting requirements.[187] CERCLA levies fines in excess of fifty-five thousand dollars per day against any source that fails to comply with its requirements.[188] As a result of the Third

abroad in countries with less stringent environmental obligations. Ben-David et al., *supra* (describing tradeoff of tighter domestic environmental regulations).

181. *See* Ben-David et al., *supra* note 180 (noting tighter environmental regulations produce positive domestic environmental effects).

182. *See Economic Incentives*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmental-economics/economic-incentives (Sept. 29, 2021) (explaining role liability assignment plays to incentivize polluters to make cautious and "socially conscious" decisions).

183. For a discussion of the Third Circuit's step-by-step analysis, see *supra* notes 129-56 and accompanying text.

184. For a discussion of how the Third Circuit's holding clarifies the CERCLA reporting exemption, see *supra* notes 157-60 and accompanying text.

185. For a discussion of *Clean Air Council*'s implications regarding who the reporting requirements apply to, see *supra* notes 129-56 and accompanying text.

186. For a discussion of how *Clean Air Council* clarifies reporting requirements, see *supra* notes 157-60 and accompanying text.

187. For a discussion of CERCLA penalties, see *supra* notes 69-86 and accompanying text.

188. For a discussion of CERCLA's NRC reporting requirements and related financial penalties for non-compliance, see *supra* notes 81-86 and accompanying text.

Circuit's decision, polluting sources can avoid this additional layer of CERCLA reporting and corresponding financial penalties.[189]

Clean Air Council serves to lower accountability for sources that cause pollution events in violation of the CAA.[190] By eliminating added potential financial penalties and reporting requirements, it is less costly for polluters such as U.S. Steel to continue polluting.[191] Even in the event of hazardous air pollutant emissions, the Third Circuit's decision eliminates a form of potential liability for sources.[192]

Allegheny County ranks among the worst in the nation on various air quality metrics.[193] Specifically, the Liberty-Clairton non-attainment area, which is inside the greater Pittsburgh non-attainment area, contains high levels of particulate matter pollution.[194] U.S. Steel's Clairton Coke Works plant produces a majority of that area's pollution.[195] Research has also shown that cancer

189. For a discussion of how this decision allows CAA permit-governed sources to avoid CERCLA reporting penalties, see *supra* notes 187-89 and accompanying text.

190. For a discussion of the decision's impact on reducing reporting obligations and eliminating associated non-compliance penalties, see *supra* notes 183-89 and accompanying text.

191. For a discussion of *Clean Air Council*'s favorable cost implications for U.S. Steel and other sources, see *supra* notes 183-89 and accompanying text.

192. For a discussion of *Clean Air Council*'s elimination of CERCLA reporting liability for CAA permit-governed sources, see *supra* notes 183-89 and accompanying text.

193. *See Allegheny County Air Quality*, ALLEGHENY CNTY. HEALTH DEP'T, https://www.alleghenycounty.us/Health-Department/Programs/Air-Quality/Air-Quality.aspx (last visited Oct. 10, 2021) (noting air quality among county's most pressing public health challenges); *see also 10 Health Facts You Need to Know*, BREATHE PROJECT, https://breatheproject.org/resources/public-health/#health-facts (last visited Oct. 10, 2021) (highlighting Allegheny County's air quality problem).

194. *See* Michael Reilly, Dynamics of US Steel's Clairton Coke Works Emissions Affecting the Liberty-Clairton Non-Attainment Area 1, 19 (Apr. 15, 2013) (unpublished MPH thesis, University of Pittsburgh) (on file with University of Pittsburgh institutional repository) (referencing high levels of particulate matter pollution in various areas in Greater Pittsburgh); *see also* Michael Machosky, *The Mon Valley Has Some of the Dirtiest Air in the Country – Again*, NEXT PITTSBURGH (Apr. 7, 2021), https://nextpittsburgh.com/latest-news/the-mon-valley-has-some-of-the-dirtiest-air-in-america-again/ (noting high levels of particulate matter in Liberty-Clairton area of Allegheny County, ranking among worst areas for air quality in nation); *Mon Valley Sees 55th H2S Exceedance, Liberty-Clairton Air Quality Again Worst in Nation Friday Morning*, GASP (Nov. 5, 2021), https://gasp-pgh.org/2021/11/05/mon-valley-sees-55th-h2s-exceedance-liberty-clairton-air-quality-again-worst-in-nation-friday-morning/ (stating Liberty-Clairton achieved worst air quality index in nation for period on Nov. 5, 2021).

195. *See* Reilly, *supra* note 194, at iv (establishing link between U.S. Steel and high levels of particulate matter surrounding Clairton Coke plant).

risks are higher for residents living in the Liberty-Clairton area encompassing U.S. Steel's Clairton Coke Works.[196]

Ultimately, stricter air control requirements in Allegheny County may be needed to solve the pressing air quality issue, but the Third Circuit's decision in favor of U.S. Steel cuts back on reporting obligations for polluters.[197] Greater reporting requirements and exposure to additional financial penalties can set a strong precedent for holding sources accountable for causing hazardous pollution events and associated adverse public health effects.[198] Stricter requirements are necessary to prevent sources, such as U.S. Steel's Clairton Coke Works, from vastly contributing to air pollution and causing harmful public health implications in surrounding areas.[199]

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196. *See id.* at 35 (finding health-outcome risk for cancer is significantly higher for residents of Liberty-Clairton area than other parts of Allegheny County); *see also* Kristina Marusic, *Western Pennsylvania Environmental Groups Seek More Monitoring of Cancer-Causing Benzene*, ENV'T HEALTH NEWS (Apr. 14, 2020), https://www.ehn.org/western-pennsylvania-air-pollution-2645706392/particle-2 (describing air pollution from U.S. Steel putting residents at greater risk of cancer and discussing Allegheny County's poor air quality and resulting greater cancer risks); *see also* Debra Smit, *Future Needs Clean Air, Healthy Communities*, PITTSBURGH POST-GAZETTE (May. 27, 2021, 12:00 AM), https://www.post-gazette.com/opinion/2021/05/27/Future-needs-clean-air-healthy-communities/stories/202105270023 (stating Allegheny County ranks in top one percent nationally of counties for cancer risk from air pollution); *see also Allegheny County's Air Monitors Comply with Federal Standards for the First Time. What Does This Mean for the Air We Breathe?*, NEXT PITTSBURGH (Feb. 5, 2021), https://nextpittsburgh.com/features/allegheny-countys-air-monitors-comply-with-federal-standards-for-the-first-time-what-does-this-mean-for-the-air-we-breathe/ (referencing 2018 study ranking Allegheny County as one of top counties with highest risk of cancer from air pollution).

197. For a discussion of the pressing air quality issue in Allegheny County, see *supra* notes 193-96 and accompanying text. For a discussion of less strict compliance obligations and lessened accountability for polluters resulting from this decision, see *supra* notes 183-92 and accompanying text.

198. For a discussion of less strict compliance obligations and lessened accountability for polluters resulting from this decision, see *supra* notes 183-92 and accompanying text.

199. For a discussion of how the Third Circuit's decision may not set a strong enough precedent to adequately deal with pressing air quality issues in Allegheny County, see *supra* notes 183-92 and accompanying text.

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