

18-2121-ag (L)

Natural Resources Defense Council, Inc. and State of Vermont v. United States Environmental Protection Agency

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2019

Argued: November 20, 2019 Decided: June 5, 2020

Docket Nos. 18-2121-ag; 18-2670-ag

NATURAL RESOURCES DEFENSE COUNCIL, INC., STATE OF VERMONT,

Petitioners,

— v. —

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ANDREW R.
WHEELER, IN HIS CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

Before:

WALKER, LYNCH, and SULLIVAN, *Circuit Judges.*

Petitioners Natural Resources Defense Council, Inc., and the State of Vermont seek review of certain provisions of a rule promulgated by the United States Environmental Protection Agency, pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2607(b)(10), that requires manufacturers to report

information about their use of mercury. In particular, petitioners argue that three exemptions for categories of manufacturers and importers are unlawful. We agree with respect to the exemption from all reporting requirements for those who import products containing a mercury-added component, but reject petitioners' challenges to the other exemptions. Accordingly, we GRANT REVIEW of and VACATE 40 C.F.R. § 713.7(b)(2) but DENY REVIEW of 40 C.F.R. §§ 713.7(b)(3) (exempting manufacturers of products containing mercury-added components from all reporting requirements) and 713.9(a) (exempting manufacturers or importers of large quantities of mercury from certain reporting requirements).

GABRIEL DALY, Natural Resources Defense Council, New York, NY (Katherine Desormeau, Natural Resources Defense Council, San Francisco, CA; Sarah C. Tallman, Natural Resources Defense Council, Chicago, IL, *on the brief*), *for Petitioner Natural Resources Defense Council, Inc.*

Justin E. Kolber, Assistant Attorney General, *for* Thomas J. Donovan, Jr., Attorney General for the State of Vermont, Montpelier, VT, *for Petitioner State of Vermont.*

ANDREW S. COGHLAN, Trial Attorney, Environmental Defense Section, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C. (Jeffrey Bossert Clark, Assistant Attorney General, Jonathan D. Brightbill, Deputy Assistant Attorney General, Erin Koch, U.S. Environmental Protection Agency, Washington, D.C. *on the brief*), *for Respondents.*

Ellen F. Rosenblum, Attorney General of Oregon, Benjamin Gutman, Solicitor General, Oregon, Steven Novick, Special Assistant Attorney General, Oregon, William Tong, Attorney General of Connecticut, Clare E. Connors, Attorney General of Hawaii, Aaron Frey,

Attorney General of Maine, Brian E. Frosh, Attorney General of Maryland, Maura Healey, Attorney General of Massachusetts, Gurbir S. Grewal, Attorney General of New Jersey, Josh Shapiro, Attorney General of Pennsylvania, Peter F. Neronha, Attorney General of Rhode Island, Robert W. Ferguson, Attorney General of Washington, Max Kieley, Assistant Attorney General, Minnesota, *for Amici Curiae* Oregon, Connecticut, Hawaii, Massachusetts, Maine, Maryland, Minnesota (by and through its Minnesota Pollution Control Agency), New Jersey, Pennsylvania, Rhode Island, and Washington.

GERARD E. LYNCH, *Circuit Judge*:

In 2016, Congress amended the Toxic Substances Control Act of 1976 (“TSCA”) to require the U.S. Environmental Protection Agency (“EPA”) to “carry out and publish” a triennial “inventory of mercury supply, use, and trade in the United States.” 15 U.S.C. § 2607(b)(10)(B). In 2018, EPA promulgated the Mercury Reporting Rule (“Reporting Rule”). As relevant here, the Reporting Rule requires “[a]ny person who manufactures (including imports)” mercury or a “mercury-added product” to report information on their products, *see* 40 C.F.R. §§ 713.7(a), (b), 713.9; it also exempts certain categories of manufacturers and importers from various reporting obligations. Three of those exemptions are at issue in this case.

Under § 713.7(b)(2) and (b)(3), importers and manufacturers, respectively, of products that contain a mercury-added product as a component are exempt from all reporting requirements. Under § 713.9(a), persons who manufacture or import elemental mercury or mercury compounds in significantly large amounts are exempt from certain reporting requirements.

Petitioners Natural Resources Defense Council, Inc., (“NRDC”) and the State of Vermont (“Vermont”) (together, “petitioners”) challenge those three exemptions from the Reporting Rule as unlawful agency action. As explained below, we find that the exemption for importers of products containing mercury-added components is an unlawful interpretation of the TSCA, because it lacks a reasoned explanation. We find that the exemption for manufacturers of products with mercury-added components and the exemption for high-volume manufacturers are lawful in light of Congress’s directive to “not require reporting which is unnecessary or duplicative.” 15 U.S.C. § 2607(a)(5)(A). We therefore GRANT REVIEW of and VACATE the exemption codified at 40 C.F.R. § 713.7(b)(2) and DENY REVIEW of the exemptions codified at 40 C.F.R. §§ 713.7(b)(3) and 713.9(a).

BACKGROUND

I. Uses and Dangers of Mercury

Mercury is a naturally occurring element. It is also a potent neurotoxin that does not degrade over time, making it both a significant public health threat and a danger to the environment. One way that mercury enters the environment is through the manufacture, use, and disposal of products that contain mercury. Mercury released through those processes converts biologically into methylmercury, the element's most toxic form, which bioaccumulates in wildlife. Methylmercury exposure in wildlife can cause death, reduced fertility, slowed development and growth, and abnormal behavior that affects survival. Human exposure occurs primarily from the ingestion of mercury through the consumption of fish and shellfish. Elevated methylmercury levels in the bloodstreams of young children and fetuses have been found to adversely affect cognitive development. Studies also suggest that mercury exposure may affect humans' reproductive, renal, cardiovascular, and hematologic health.

Mercury has long been used in a wide range of industrial processes and as an ingredient in many familiar products. Historically, mercury has been used in products including batteries within watches, toys, and cameras; paint; pesticides;

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