

NOTE

USING *ALASKA V. EPA* TO UNMASK THE CLEAN AIR ACT

I. INTRODUCTION

The Alaska Department of Environmental Conservation (ADEC) and Teck Cominco Alaska, Inc. (Cominco) sought review of three enforcement orders that were entered by the United States Environmental Protection Agency (EPA) effectively invalidating a Prevention of Significant Deterioration (PSD) permit that the ADEC had issued to Cominco.¹ In granting review, the Ninth Circuit Court of Appeals rejected the ADEC's ability to use its permitting authority so as to reduce total offensive emissions from an operation and enforced the EPA's contrary determination that clarified the relationship between state and federal environmental authorities in the enforcement of the Clean Air Act (CAA).² Alaska further appealed its case and certiorari was granted by the United States Supreme Court. In a five to four decision, the Court affirmed the Ninth Circuit Court of Appeals, finding that the EPA has supervisory authority to review the best available control technology (BACT) determinations and may issue a stop construction order if the determination is found unreasonable.³

II. THE ENFORCEMENT OF THE CAA IN ALASKA

A. *Facts of the Case*

Cominco operates a zinc mine, the Red Dog Mine (the Mine), in such a remote area of Alaska that independent power sources are required. As its source, Cominco uses six diesel fired Wartsila 5000-watt generators labeled MG-1 through MG-6.⁴ Cominco began a project to boost the Mine's output, requiring additional electricity. Subsequently, Cominco applied to the ADEC for a PSD permit to increase the quantity of nitrogen oxides (NOx) emitted from its MG-5 generator. It proposed Low NOx as the best available control technology (BACT) for the new generator.⁵ Low NOx reduces the amount of NOx released into the environment by using high combustion air temperature to atomize toxic particles.⁶ After reviewing Cominco's proposal, the ADEC, instead, found Selective Catalytic Reduction (SCR) to be the BACT.

Cominco then proposed to use Low NOx on all generators, including those not subject to BACT standards, as well as a future seventh generator. The

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1. *Alaska Dep't of Envtl. Conservation v. EPA*, 298 F.3d 814 (9th Cir. 2002).
 2. *Id.*
 3. *Alaska Dep't of Envtl. Conservation v. EPA*, 124 S. Ct. 983 (Jan. 21, 2004).
 4. *Id.* at 994.
 5. *Alaska*, 124 S. Ct. at 994.
 6. *Alaska*, 298 F.3d at 816-817.

ADEC accepted, reasoning that Cominco's alternative proposal would reduce the total NOx output of the Mine to that of a single SCR-equipped generator.⁷ The National Park Service; however, urged the EPA to review the application. After review, the EPA advised the ADEC that it opposed the permit even though the total emissions would be reduced.⁸ Disregarding the EPA's objection, the ADEC issued the permit, finding that SCR was not economically feasible, thereby making Low NOx the BACT. Negotiations to resolve the dispute failed, and the EPA issued a series of orders, including a stop order, that prohibited Cominco from moving forward with its project.⁹

The ADEC and Cominco sought review of the various EPA orders. Both parties claimed that the EPA exceeded its authority when it issued enforcement orders invalidating the issuance of the PSD permit. The ADEC also claimed that it was within its discretion and statutory authority in making the BACT determination for Cominco's generators.¹⁰

B. *Issues*

This case hinges on the EPA's authority to enforce provisions of the CAA's PSD program. In particular, the Court found the pertinent question to be, "may [the] EPA act to block construction of a new major pollutant emitting facility permitted by ADEC when [the] EPA finds ADEC's BACT determination unreasonable in light of the guides § 7479(3) prescribes?"¹¹ The CAA includes two provisions that relate to the EPA's oversight authority. The first provision is a general instruction. When a violation of the CAA has occurred, it authorizes the administrator, in this case the EPA, to issue an order requiring compliance with the State Implementation Plan (SIP) and the CAA, to issue an administrative penalty order, or to bring a civil action.¹² A stop construction order is included among the compliance orders authorized under this section.

The second provision is more specific and is expressly directed to the PSD program within the CAA. It charges the EPA to "take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part[.]"¹³ The requirements of this part refer to the PSD permit portion of the CAA. The Court looked at both of these sections to determine when the EPA has supervisory authority and to what extent it may interfere with the individual SIP and the PSD permit-issuing agency.

III. THE COURT'S DECISION

In deciding this case, the Court relied on the plain language of the CAA, the past and present enforcement role of the EPA, and the legislative history

7. *Alaska*, 124 S. Ct. at 994.

8. *Id.* at 995.

9. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 997 (Jan. 21, 2004).

10. *Id.* at 1002.

11. *Alaska*, 124 S. Ct. at 991 (2004).

12. 42 U.S.C. § 7413(a)(5) (2000).

13. 42 U.S.C. § 7477 (2000).

surrounding the PSD permit requirement. Specifically, *Union Electric Co. v. EPA*, provided helpful insight into why the CAA was enacted.¹⁴ There the Court noted the reasons Congress put forth for enacting the CAA including “dissatisfaction with the progress of existing air pollution programs[,]” and “to guarantee the prompt attainment and maintenance of specified air quality standards.”¹⁵ Congress recognized a gaping need in legislation and filled the void by creating the CAA.

A. Background

The EPA clearly has an oversight role in the enforcement of National Ambient Air Quality Standards (NAAQS), but does that role stretch into becoming a strict enforcement role? Although the states have the option to create their own SIPs in order to maintain the enforcement of NAAQS, the EPA is also vested with that authority should the state forgo its own SIP.¹⁶ However wide the Court has found a state’s discretion to be when formulating its SIP, there are still statutory prescriptions that must be followed by the state.¹⁷ The permit provision in § 7475 is one example of the measures Congress specifically intended to be included in a SIP.¹⁸

It was well known that, prior to 1977, there was a void in legislation concerning rising air pollution in areas where levels were below the NAAQS.¹⁹ There were no provisions in place to ensure that pollutant levels that were below NAAQS would so remain. Only after the air was significantly polluted could measures be taken.²⁰ Congress responded to this void by enacting the PSD program. Before analyzing the Court’s decision, it is important to have an understanding of the CAA and the policy underlying its enactment.

The purpose of the CAA is to establish programs to control and improve air quality standards across the nation.²¹ The CAA works through a system that incorporates both federal and state responsibility in enforcing primary standards of air control in each region.²² The PSD program, contained in the CAA, requires a permit to be obtained before a pollutant-emitting source can be constructed.²³ The purpose of the permit is intended to control any degradation in areas considered to be clean air areas. Northwest Alaska, the area in question, is considered a clean air area, meaning it’s “air quality regions are cleaner than the national standards with respect to ozone and nitrogen dioxide.”²⁴ Because of this classification, all new construction projects must have the PSD permit to prevent significant pollution to the air.

14. *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976).

15. *Id.* at 249.

16. 42 U.S.C. § 7401(a)(1)–(c)(1) (1970).

17. 42 U.S.C. § 7410(a)(2)(A) (1970).

18. 42 U.S.C. § 7475 (1970).

19. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 124 S. Ct. 983, 993 (Jan. 21, 2004).

20. *Ala. Power Co. v. Costle*, 636 F.2d 323, 346–347 (D.C. Cir. 1979).

21. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 298 F.3d 814, 816 (9th Cir. 2002).

22. 42 U.S.C. § 7410(a)(1) (1970).

23. 42 U.S.C. §§ 7470–7492 (1970).

24. *Alaska*, 298 F.3d at 816.

Under Alaska's EPA-approved SIP, the PSD permits are issued through the ADEC.²⁵ The ADEC requires, among many conditions, that the proposed emission control for the pollutant-emitting source represent the BACT before the issuance of a permit,²⁶ thus ensuring compliance with 42 U.S.C. § 7475 (a)(4) which states, in part, that "the proposed facility is subject to the best available control technology for each pollutant subject to [CAA] regulation."²⁷ Under this statutory language, the ADEC, EPA, or the SIP of any other state must determine the BACT based on a case-by-case basis taking into consideration the following factors: environmental and economic impacts, energy, and other costs.²⁸

Looking at Congress's reasoning for implementing the PSD program helps clarify the EPA's supervisory role. There was a concern that states would compete against each other in order to attract large industrial plants or utilities and jobs for its citizens. Thus, industries or developers could force a state to lower its pollutant control standards.²⁹ Furthermore, even if a state did not succumb to such industry pressure to lower its standards, its air could be polluted from a more permissive neighboring state.³⁰ Congress was unwilling to accept the ramifications of this system. By establishing a federal supervisory role for the EPA to oversee BACT determinations, Congress sought to ensure that states and industrial plants could not circumvent the system either to another state's disadvantage or to further environmental degradation.

B. *Holding*

The Court affirmed the Ninth Circuit's holding that the EPA's actions were reviewable by the Court of Appeals as final agency action. *Bennett v. Spear* was used to determine the finality of the EPA's actions for purposes of review.³¹ There, the Court called for a prudential standing rule where the "plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit."³² The Court found, as did the Ninth Circuit, that the EPA's actions "had the requisite finality" and it was clear "that [the] EPA had spoken its 'last word' on whether ADEC had adequately justified its conclusion[.]"³³

Although the reviewability of this matter was an issue for the Ninth Circuit, it was not a serious problem for the Court. The Court's decision revolved around what oversight role the EPA had under specific statutory provisions. The focus was on the extensive terms with which "Congress armed [the] EPA with

25. Approval and Promulgation of Implementation Plans; Alaska, 48 Fed. Reg. 30,623 (July 5, 1983) (to be codified at 40 C.F.R. pt. 52) (amended 1991).

26. ALASKA ADMIN. CODE tit. 18, § 50.310(d)(3) (1997).

27. 42 U.S.C. § 7475(a)(4) (2000).

28. 42 U.S.C. § 7479(3) (2000).

29. H.R. Rep. No. 95-294 (1977), reprinted in 1977 U.S.C.C.A.N 1077.

30. *Id.*

31. *Bennett v. Spear*, 520 U.S. 154 (1997).

32. *Id.* at 162.

33. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 998 (Jan. 21, 2004) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

authority to issue orders stopping construction[.]”³⁴ Based on this broadly deemed statutory authority, under §§ 113(a)(5) and 167 of the CAA, the EPA contended that “it may review permits to ensure that a State’s BACT determination is reasonably moored to the Act’s provision.”³⁵ The Court agreed that where Congress has expressed itself “in reasonably plain terms, ‘that language must ordinarily be regarded as conclusive.’”³⁶ The Court found the language of 42 U.S.C. §§ 7413(a)(5) and 7477 determinative of an agency’s authority under the CAA.

There are strict statutory standards governing the definition of BACT. Any discretion a state has is constrained by this definition. This language includes the PSD permit program and it “authorizes enforcement actions where a State is not acting in compliance with any requirement”³⁷ In order to receive a permit, the applicant must comply with any and all requirements. Here, the facility must have the BACT in place. Although the ADEC has authority to issue a permit, the EPA found that it had not complied with the BACT requirement under the CAA.³⁸ Upon this finding, the lower court held that the EPA was authorized, by the plain language of the statutes, to take action to prohibit the continuance of Cominco’s generator project.³⁹

In holding this way, the Ninth Circuit noted that Congress intended the EPA to have such authority to assure that the requirements of the CAA would be met if the state failed to enforce them.⁴⁰ The Court clarified that the EPA may interfere in the state’s realm of permit issuance only if the BACT is not based on a reasonable analysis.⁴¹ By giving federal agencies power to enforce the standards, pressure is taken off the states, and companies are ensured not to find more lenient standards by relocating to a different state. The EPA was thus doing exactly what Congress intended. The Court upheld the EPA’s finding that the ADEC’s BACT determination was not only subjective, but was contrary to the ADEC’s initial findings that SCR was the BACT.

Although the EPA issued its opinion on ADEC’s BACT determination, it was unclear what weight that opinion should be given in a court of law. In *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, the Court gave deference to the EPA’s interpretation of an ambiguous CAA provision.⁴² However, the interpretive manuals issued by the EPA outlining its oversight authority with regard to the CAA are not afforded this *Chevron* deference.⁴³ Regardless, pursuant to *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, administrative interpretations

34. *Id.* at 999.

35. *Alaska*, 124 S. Ct. at 1000.

36. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

37. *Alaska v. Dep’t of Env’tl. Conservation v. EPA*, 298 F.3d 817, 819 (9th Cir. 2002).

38. *Id.*

39. *Alaska*, 298 F.3d at 819.

40. *Id.* at 820.

41. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 124 S. Ct. 983, 998 (Jan. 21, 2004).

42. *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

43. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

warrant respect.⁴⁴ The Court recognized this principle and afforded the EPA's interpretation of the relevant statutes' significant weight.⁴⁵

After reviewing all the relevant statutes and legislative history, the Court agreed with the Ninth Circuit's final conclusion that, "although the state has discretion to make BACT determinations as the permitting authority, the Act provides for EPA enforcement when the state issues a permit based on an improper determination."⁴⁶ In other words, "the EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP."⁴⁷

At this point, it is important to identify the specific facts that appeared to determine the Court's decision. Although the Court concluded that the plain language of the statutes gave the EPA authority to review state BACT determinations and issue stop orders, the particular facts in this case eased this holding. When the ADEC initially reviewed Cominco's proposal for a PSD permit, it determined that SCR, not Low NO_x, was the BACT. Only after Cominco proposed Low NO_x on all its generators, did the ADEC change its BACT determination. After the EPA looked into the matter, the ADEC again rejected its initial SCR finding; however it now based this decision on its aim "[t]o support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region."⁴⁸

This revised statement issued by the ADEC, to support its determination, had nothing to do with the statutory factors that are supposed to be considered when determining BACT. It instead sounds similar to a declaration of blind faith support in Cominco and its projects without any regard to the prescribed statutory guidelines. This seems to be what Congress was trying to guard against: pressure from industries motivating states to make a BACT determination favoring industrial development instead of a BACT determination solely based on the CAA. Subsequently, the ADEC again declared Low NO_x the BACT, this time based on SCR's disproportionate cost.⁴⁹ This directly conflicted with the ADEC's initial BACT determination that SCR was economically feasible.

The ADEC's flip-flop was not supported by any factual basis nor was there any evidence in the record to show how SCR could suddenly become economically unfeasible. When confronted with this, the ADEC recognized that there was not sufficient evidence to make a determination of SCR's impact on the "cost on the operation, profitability, and competitiveness of the Red Dog Mine."⁵⁰ Furthermore, Cominco did not help its case by providing any relevant financial data to support its own proposed suggestion for BACT. In a late attempt to justify its determination, the ADEC claimed that SCR would threaten

44. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003).

45. Alaska Dep't of Env'tl. Conservation v. EPA, 124 S. Ct. 983, 1001 (Jan. 21, 2004).

46. Alaska Dep't of Env'tl. Conservation v. EPA, 298 F.3d 814, 820 (9th Cir. 2002).

47. *Id.*

48. *Alaska*, 124 S. Ct. at 1007.

49. *Id.*

50. *Alaska*, 124 S. Ct. at 1007.

Cominco's world competitiveness leading to unemployment in an area with limited job opportunities.⁵¹ But there was no evidence backing up this allegation.

The relevant CAA provisions are clear in outlining what factors should be considered when determining the BACT for a PSD permit. Here, the ADEC made its decision by relying on assumptions and suggestions from Cominco, which were not supported by any evidence or facts and were contrary to its own initial research and determination. This did not appear to be how Congress intended the BACT to be determined.

IV. ANALYSIS

The decision in this case does not purport to change the law by overruling prior decisions or interpreting statutory language. It does, however, provide a needed explanation of the EPA's authority under the CAA. It clarifies and reinforces the role of the EPA when dealing with PSD permits when a SIP is in place. In reaching its decision, the Court carefully researched the legislative intent behind the CAA and looked at the plain language of the statute. The ADEC did not help its case by failing to offer any evidence to support its findings and issuing determinations that were in direct conflict with previous issuances. This decision is important in interpreting not only agency authority, but also in balancing the authority of the state against a federal agency.

The statutory language granting agency authority, 42 U.S.C. §§ 7413 (a)(5) and 7477, existed long before this case was decided. This case simply serves to restate a common theme: If it is the intent of Congress, an agency may have authority to review decisions of a state when it is implementing federal acts.⁵² Here, this is expressly what Congress intended to do, and the Court found that the EPA did not overstep its authority by acting arbitrarily or capriciously.⁵³

There were reasons why the CAA was enacted and why the EPA was given oversight authority. By 1970, there was not one state that had implemented a full pollution control program.⁵⁴ Congress acknowledged that air pollution was not being effectively addressed on a state level. It realized that it was difficult for states to implement and enforce a program when businesses could still exert force and pressure to keep air pollution standards lenient. Congress resolved to remedy this situation by making air pollution control a national effort that was overseen by the EPA.⁵⁵ States' responses to air pollution concerns had been disappointing; therefore, Congress increased federal authority over pollution control.⁵⁶

Though courts had plain statutory authority to resolve the authority to resolve the authority of the EPA over the ADEC and the validity of the EPA's

51. *Id.*

52. *Alaska*, 298 F.3d at 821.

53. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 1009 (Jan. 21, 2004).

54. Paul G. Rogers, *The Clean Air Act of 1970*, EPA J. 21, 22 (1990), available at <http://www.epa.gov/history/topics/caa70/11.htm> (last updated June 11, 2002).

55. *Id.*

56. Rogers, *supra* note 54.

order, the Court took this case a step further. It used this case to resolve that authority. It is clear that the Court wanted a proper understanding of the purpose of the CAA, as well as the significant statutes, to be in the decision of this case.⁵⁷ It can only be reasoned that this is because the Court felt it was needed to help applicants and EPA-approved SIPs to understand the purpose of the CAA and the EPA's role within it. By providing a clear review of how this case arose in the first place, the Court allowed for a greater understanding of the CAA's permit process and the role of the state and the EPA within the process. This case, and the Court's reasoned decision, serve to clear up confusion dealing with the fine line between state and federal agency authority.

V. CONCLUDING ALASKA

Alaska provides a judicial assessment of the CAA with regard to state-issued PSD permits.⁵⁸ It also goes into great depth describing when the EPA can prevent a state authority, in this case the ADEC, from issuing a PSD permit. The Court ultimately determined that the EPA has oversight and enforcement authority, and the EPA's orders and findings were not arbitrary or capricious.⁵⁹ The EPA can issue a stop order when it finds that the state's BACT determination is not reasonable.

While the state remains, as before, the initial permitting source under a SIP and the entity that initially must determine the BACT, the state must take care to carefully support its determinations under the CAA. Along with the state's authority, the EPA has statutorily-granted oversight and enforcement authority. As long as the state agency follows the statutory guidelines for determining BACT, the EPA has no incentive to interfere. The EPA told the Court that it has "no prerogative to designate the correct BACT; [it] asserts only the authority to guard against unreasonable designations."⁶⁰

Industries and utility companies are left wondering what cost must be borne in order to comply with a state-issued PSD permit. As stated in § 7479(3), economic impacts and costs are factors to be considered in the case-by-case determination of BACT.⁶¹ However, unlike *Cominco*, evidence will have to be produced supporting an adverse economic effect in choosing one pollutant control method over another as BACT. Utilities and plants may need to take a proactive stance in providing adequate data to assist the state in making a reasoned BACT determination. There is no reason a state would not want to consider all the relevant factors, including costs that ultimately are passed on to consumers in the state.

Energy and the environment go hand in hand. Energy sources come from the environment, and manipulation of those sources into useable forms affects the environment. Pollution control policies, such as the CAA, are meant to protect the environment by ensuring the continuation of the energy industry. By

57. *Alaska*, 124 S. Ct. at 1009.

58. *Id.* at 819.

59. *Alaska Dep't. of Env'tl. Conservation v. EPA*, 298 F.3d 814, 822 (9th Cir. 2002).

60. *Alaska Dep't. of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 1002 (Jan. 21, 2004).

61. 42 U.S.C. § 7479 (2000).

making reasonable BACT determinations, the state and the EPA ensure that the environment is protected and that the energy industry can continue to provide its useful service. A prudent balance is warranted—the energy industry should not be burdened by overly strict BACT determinations; states should not have to succumb to industry pressure to lower pollution control standards; nor should the environment be left to deteriorate. These aims are all met through the implementation of the PSD permit program of the CAA and a reasonable BACT determination that is confirmed by this decision.

Bonnie Bridges

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