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EPA, Outer Continental Shelf Sources, and Deference Resisting Environmental Destricution on Indigenous Lands, The

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The EPA, Outer Continental Shelf Sources, and Deference Resisting Environmental Destruction on Indigenous Lands

REDOIL v. U.S. E.P.A[1]

I. INTRODUCTION

The Environmental Protection Agency ("EPA") receives much criticism.[2] There are people and groups who think the agency puts too many unnecessary restrictions on businesses, an argument that is more charged than usual during the current strained economic situation in the United States.[3] Conversely, there are those who believe the EPA does not go far enough.[4] Rather than make much-needed improvements to the environment, some would say, the EPA is more concerned with politics and how its decisions will affect businesses.[5]

However, at times it must be wondered if the EPA gets more than its fair share of negativity. *Resisting Environmental Destruction on Indigenous Lands, REDOIL v. U.S. E.P.A.* (hereinafter *REDOIL v. E.P.A.*) has great potential to be another controversial decision.[6] In the instant case, the EPA granted two permits to Shell Gulf of Mexico and Shell Offshore (hereby collectively referred to as "Shell"), which would allow them to drill in the Chukchi and Beaufort Seas off the coast of Alaska.[7]

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[1] 704 F.3d 743 (9th Cir. 2012).
[2] *See, e.g.,* JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RESEARCH SERV., R41561, EPA REGULATIONS:
TOO MUCH, TOO LITTLE, OR ON TRACK? 1-3 (2013), *available at* http://www.fas.org/sgp/crs/misc/R41561.pdf.
[3] *Id.* at 1-2.
[4] *Id.* at 2-3.
[5] *Id.*
[6] *See, e.g.,* Purna Nemani, *EPA Defends Rules for Drilling Vessel Emissions*, COURTHOUSE NEWS SERVICE (Aug. 30, 2012), http://www.courthousenews.com/2012/08/30/49811.htm.
[7] Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A.,

Environmentally conscious groups appealed to the Environmental Appeals Board ("EAB"), where the complaints were dismissed.[8] Before the case went before the Ninth Circuit, environmental groups were rallying, arguing the EPA went too easy on Shell. [9] Under the permits, environmentalists feared, ninety percent of its polluting emissions would go unregulated.[10] On the other side of the issue were those with an economic interest in the EPA's decision, such as the state of Alaska.[11] Alaska submitted an amicus brief in support of Shell's permits, specifically citing its economic interest in allowing Shell to drill for oil in the Chukchi and Beaufort Seas.[12] The court held that the EPA was due *Chevron* and *Auer* deference in its decision-making, and as such its permits were upheld.[13]

Now, judicial deference to federal agency decisions receives much criticism.[14] The *Chevron* deference test leaves room, especially in step two, for judges to insert their own bias. *Auer* deference too has many detractors, including a Supreme Court Justice.[15] Not only does *Auer* deference allow the EPA to

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704 F.3d 743, 746 (9th Cir. 2012).

[8] *Id.* at 747.

[9] Nemani, *supra* note 6.

[10] *Id.*

[11] *See* Amicus Brief for State of Alaska, Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A., 704 F.3d 743 (9th Cir. 2012) No. 12-70518, 2012 WL 1943747.

[12] *Id.* at *1-2.

[13] Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A., 704 F.3d 743, 46 (9th Cir. 2012).

[14] *See* James Christman, David S. Harlow & Craig Harrison, *Courts Should Not Defer to Agencies' Interpretations of Their Own Rules*, 15 LEGAL BACKGROUNDER 29, 1 (2000), *available at* http://www.hunton.com/files/Publication/4e498b6e-69c5-4dff-bd6d-cbb1d9b0fe44/Presentation/PublicationAttachment/80e98178-d09c-48ab-9a75-ee045dab0303/wlf.pdf.

[15] Talk America, Inc. v. Michigan Bell Telephone Co., 131 S. Ct. 2254, 2265 (2011).

intrude upon Congress's lawmaking power, but, like the *Chevron* deference test, it allows judges reviewing agency decisions to shape the outcome of a trial based upon their own political beliefs. So perhaps the EPA should not get blamed when a pro-business or pro-environment decision is made. Instead, maybe the deferential standards under which its actions are reviewed should be reexamined for flaws that let in political agendas.

II. FACTS AND HOLDING

Authority to regulate Outer Continental Shelf ("OCS") sources was delegated to the EPA by Congress in 1990.[16] *REDOIL v. E.P.A.* involved a conflict over permits issued to Shell in its oil and gas exploration off the coast of Alaska, in the Chukchi and Beaufort Seas.[17] Shell sought to acquire permits required by the EPA to emit pollutants in its drilling activities as required by the 1977 amendments to the Clean Air Act.[18] As part of the Prevention of Significant Deterioration Program ("PSD program"), those who wish to build new sources of pollution must obtain a permit through a New Source Review process.[19] In order to be granted a permit, Shell must meet two statutory requirements: (1) it must conduct air quality analyses which must show that its operations will not significantly contribute to air pollution, and (2) Shell must use the best available control

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[16] 42 U.S.C. § 7627 (2006). The statute states in part, "Not later than 12 months after November 15, 1990, following consultation with the Secretary of the Interior and the Commandant of the United States Coast Guard, the Administrator, by rule, shall establish requirements to control air pollution from Outer Continental Shelf sources located offshore of the States along the Pacific, Arctic and Atlantic Coasts (other than Outer Continental Shelf sources located offshore of the North Slope Borough of the State of Alaska), and along the United States Gulf Coast off the State of Florida..." *Id.*

[17] *REDOIL*, 704 F.3d at 746.

[18] *Id.* at 746-748; 42 U.S.C. § 7471 (stating, "each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality.").

[19] *REDOIL*, 704 F.3d at 748.

technology ("BACT").[20] The EPA granted the permits and upheld their issuance in two administrative appeals to the EAB, which is the first appeals body to review EPA decisions.[21]

The plaintiffs were environmentally conscious groups, including Resisting Environmental Destruction on Indigenous Lands (plaintiffs hereby referred collectively as "REDOIL").[22] Two permits were the source of contention in this case, one for each of the two seas Shell wishes to explore: the Chukchi and Beaufort Seas.[23] The permits allow Shell to use its drillship each year between July 1 and November 30.[24] Through the notice and public comment periods of each permit, the EPA determined Shell must use BACT to limit pollution in accordance with the Clean Air Act.[25] In the case of the *Discoverer*, Shell's drillship, BACT is only required to be used when that ship is anchored to the seabed, or when another vessel is attached to the drillship.[26] Aside from those instances, BACT does not have to be used for the *Discoverer*'s supporting vessels.[27]

REDOIL first appealed to the EAB, arguing BACT must be employed by Shell's entire fleet whenever those vessels are operating within twenty-five feet of the drillship, even if the support vessels are not physically tied to it.[28] The EAB denied review on that issue, but remanded back to the EPA for reasons not important to the case at hand.[29] Thereafter, the EPA granted

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[20] *Id.* (citing 42 U.S.C. § 7475(a)(3)-(4)).
[21] *REDOIL*, 704 F.3d at 747.
[22] *Id.* at 746.
[23] *Id.* at 746-47.
[24] *Id.* at 746.
[25] *Id.* at 747.
[26] *Id.*
[27] *Id.* The *Discoverer*'s supporting vessels consisted of ice breakers, oil spill response vessels, and a supply ship. *Id.*
[28] *Id.*
[29] *Id.* The court did not go into specifics in its opinion, but the EAB wanted the

a five hundred meter radius exemption that exempted Shell from ambient air standards[30] as long as a safety zone that restricted public access to the exploratory areas was imposed.[31] REDOIL again appealed to the EAB, alleging the exemption did not comport with the EPA's definition of "ambient air standards," which the EAB dismissed.[32] REDOIL then sought review in the Ninth Circuit regarding the dismissal of its two prior appeals to the EAB.[33]

Before it reached its holding, the Ninth Circuit set out the standard of review for the EAB's decisions.[34] The permits were entitled to *Chevron* deference, because the EPA was interpreting its own statute,[35] and the ambient air exemption was entitled to *Auer* deference, because the EPA was interpreting its own regulation.[36] Using *Chevron* deference, the Ninth Circuit held that the Clean Air Act was ambiguous as to when BACT must be applied regarding OCS sources because Congress's intent was not specific.[37] The EPA's interpretation of what the permits required under the Clean Air Act is controlling unless plainly inconsistent with the regulation.[38] Therefore, the EPA's interpretation was upheld because the interpretation of the OCS statute was reasonable and consistent with the Clean Air Act's

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EPA to clean up some administrative matters. *Id.* (citing In re Shell Gulf of Mexico, Inc., OCS Appeal Nos. 10–01 through 10–04, 15 E.A.D. ——, (Dec. 30, 2010)).

[30] Ambient air standards, formerly referred to as National Ambient Air Quality Standards, or "NAAQS"), are pollution levels that the air must remain below for health and safety concerns. 40 CFR § 50.1-50.18 (1990).

[31] ,*REDOIL*, 704 F.3d at 747.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 749.

[35] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).

[36] *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 359 (1989)).

[37] *REDOIL*, 704 F.3d at 750.

[38] *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 359 (1989)).

regulations.[39] The EPA's interpretation of the OCS statute does not require BACT to be used if the OCS source's support vessels are not physically attached to the OCS source.[40] The court also held the ambient air exemption was permissible because it was conditioned on restricting public access, which conformed to the EPA's prior treatment of ambient air standards in its regulations.[41]

III. LEGAL BACKGROUND

A. The Clean Air Act

In 1970, Congress passed the Clean Air Act with the intention to prevent air pollution to "promote public health and welfare."[42] Amendments to the Act were first issued in 1977, which were significant in that the PSD program was promulgated.[43] This new component of the Clean Air Act requires preconstruction permits to be issued for sources of air pollution, with the condition that BACT will be used to prevent or reduce emissions.[44] The BACT to be used in a given situation is determined by the EPA, which requires implementation of the technology that results in a significant reduction in emissions of air pollutants.[45] These requirements therefore furthered the Clean Air Act's goal of protecting human health.[46]

In 1990, more amendments to the Clean Air Act were passed, which had the effect of extending the EPA's jurisdiction

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[39] *REDOIL*, 704 F.3d at 752.
[40] *Id.*
[41] *Id.* at 753.
[42] 42 U.S.C. § 7401 (2006).
[43] *Id.* § 7475.
[44] *Id.*
[45] *Id.* § 7479(3).
[46] See *id.* §. 06)3).

to OCS sources.[47] There was growing concern during the first Bush administration that oil drilling offshore was becoming a problem.[48] Resources were being depleted and the air was suffering just as much as it did over factories on land, and thus, some thought, those ships should be regulated as if they were on land.[49] These potential sources of air pollution could be regulated by the EPA if located offshore in the Pacific, Arctic, and Atlantic Oceans, and some areas off the Gulf of Mexico.[50] An "OCS source" is defined as "any equipment, activity, or facility" that "(i) emits or has the potential to emit any air pollutant, (ii) is regulated or authorized under the Outer Continental Shelf Lands Act, and (iii) is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf."[51] This definition further states that emissions from the OCS sources and any of its associated vessels shall be considered direct emissions of the OCS source, when those secondary vessels are within twenty-five miles of the OCS source.[52] The agency's jurisdiction, however, is limited to "the subsoil and seabed of the outer Continental Shelf and . . . all installations and other devices permanently or temporarily attached to the seabed."[53] The 1992 regulations concerning the OCS portion of the Clean Air Act added to the definition of "OCS source" to include vessels when they are attached to the seabed or physically attached to the OCS source itself.[54] The Clean Air Act's provisions regarding OCS sources not only had environmental underpinnings, but also represented federal interests.[55] Federal

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[47] *Id.* § 7627(a)(1).

[48] Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 75, 77-78 (1992).

[49] *See* 42 U.S.C. § 7627(a)(1).

[50] *Id.*

[51] *Id.* § 7627(a)(4)(C).

[52] *Id.* § 7627(a)(4)(C)(iii).

[53] 43 U.S.C. § 1333(a)(1) (2006).

[54] 40 C .F.R. § 55.2 (2014).

[55] David W. Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's*

jurisdiction was exerted over "all submerged lands lying seaward and outside of the area of lands beneath navigable waters"[56] in order to make sure it had control over the resources the shelf contained.[57]

Section 7627, which extended the EPA's jurisdiction to OCS sources, was enacted after *Natural Resources Defense Council, Inc. v. U.S. E.P.A.* [58] In that case, the EPA was challenged for its decision to subject the Clean Air Act's requirements onto vessels unloading at marine terminals and not attributing any of the emissions to those terminals.[59] The EPA had earlier decided it had no authority over the terminals and revoked the vessel emissions requirements.[60] The court held that the EPA had come to the improper understanding of Congress's intent and should still attribute emissions to those marine terminals, even if it would be difficult to do so.[61] Thus, the issue was remanded to the EPA to come up with a way to determine liability for terminal owners.[62] However, the D.C. Circuit agreed with the EPA that emissions from ships moving to and from the terminal were "secondary emissions" that should be attributed to the terminals, even if the EPA lacked the proper guidelines to do so.[63] This case was decided before *Chevron*,[64] and in the opinion

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Mistakes, 38 J. MAR. L. & COM. 487, 493 (2007).

[56] 43 U.S.C. § 1331(a).

[57] Robertson, *supra* note 55, at 497.

[58] The case was decided in 1984. Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 725 F.2d 761, at 761 (D.C. Cir. 1984). The statute was enacted in 1990. 42 U.S.C. § 7627(a)(1).

[59] *Natural Res. Def. Council, Inc.*, 725 F.2d at 763.

[60] *Id.*

[61] *Id.* at 763-64.

[62] *Id.*

[63] *Id.* at 764.

[64] *Natural Res. Def. Council Inc.* was decided January 17, 1984. *Natural Res. Def. Council, Inc.*, 725 F.2d at 725. *Chevron* was decided June 25, 1984.

the court struggled to determine how much deference should be given to the EPA.[65] There were two ways of thinking the court could follow: (1) courts should defer to an agency's interpretation as long as it is "reasonable," or (2) courts have the final say regarding statutory meaning.[66] The court of appeals ultimately dodged the issue of how much deference the EPA was due, instead ruling that it did not matter in this case because the EPA did not at all follow its administrative obligation in regulating marine terminals.[67] Soon after, the Supreme Court would set out the proper deference standard in *Chevron*.[68]

B. STANDARD OF REVIEW

1. Chevron Deference

Federal agencies were given their decision-making authority from Congressional statutes.[69] Under the Administrative Procedure Act[70] and the Supreme Court's test in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*,[71] when an agency interprets a statute that it is responsible for administrating, courts will, under certain circumstances, defer to that interpretation. The issue in *Chevron* involved the Clean Air Act's 1977 amendments' definition of "source."[72] The EPA argued its interpretation of its own statute should be given deference.[73] The Supreme Court laid out the process courts should undertake when reviewing a federal agency's decision,

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Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, at 837 (1984).

[65] *Natural Res. Def. Council, Inc.*, 725 F.2d at 767-68.

[66] *Id.* at 767.

[67] *Id.* at 767-68.

[68] *See Chevron*, 467 U.S. at 865.

[69] 40 C.F.R. § 1505.1.

[70] 5 U.S.C. § 701 (2011).

[71] *Chevron*, 467 U.S. 837, 842-43.

[72] *Id.* at 842.

[73] *Id.* at 844-45.

which gives the agency substantial deference.[74] The first step in the two-part test is to determine if Congress has clearly spoken on the issue.[75] If so, that intent controls the interpretation of the statute, and both the agency and the court must honor that intent.[76] If the agency has not given effect to Congress's clear intent, the Court will not defer to the agency's interpretation.[77] In the second step, if Congress has not specifically addressed the question before the court, the court should defer to the agency's interpretation if it is reasonable.[78]

The *Chevron* deference test has been implemented in many environmental law cases. For example, it was referenced in a case cited in *Resisting Environmental Destruction on Indigenous Lands, REDOIL v. U.S. E.P.A.,* from the District of Columbia Appellate Court, *Santa Barbara County Air Pollution Control Dist. v. U.S. E.P.A.*[79] At issue in that case was the EPA's refusal to regulate maritime vessels in transit.[80] The court resolved the case using the first step in the *Chevron* test, finding that Congress had clearly spoken on the issue and as such its intention must be followed.[81] The Clean Air Act, the court determined, expressed Congress's intent that vessels in transit should be regulated.[82] An example of an environmental case that featured the court using step two in *Chevron* is *Rapanos v. U.S.*[83] In that case, the court had to decide if the EPA's definition of "navigable waters" as used in the Clean Water Act was

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[74] *Id.* at 843-44.
[75] *Id.* at 842.
[76] *Id.*
[77] *Id.* at 843.
[78] *Id.* at 843-44.
[79] 31 F.3d 1179, 1180 (D.C. Cir. 1994).
[80] *Id.*
[81] *Id.* at 1181.
[82] *Id.*
[83] 547 U.S. 715, 757 (2006).

reasonable under the statute.[84] Congress's intent was found to be vague because it had not provided a definition of "navigable waters" in the Clean Water Act.[85] Moving to *Chevron* step two, the court analyzed the issue by looking at the statutory language and held that the agency's interpretation was impermissible.[86] Though it is true the EPA is allowed deference in its interpretations, courts have found the EPA to be wrong under the *Chevron* deference test.[87]

2. Auer Deference

In addition to *Chevron* deference towards agency interpretations of ambiguous statutes, courts also give deference to agencies in interpreting their own ambiguous regulations, commonly referred to as *Auer* deference.[88] The rationale behind such deference is articulated in the *Auer* case, where it is written that "[a] rule requiring [an agency] to construe [its] own regulations narrowly would make little sense, since [it] is free to write the regulations as broadly as [it] wishes, subject only to the limits imposed by the statute."[89] *Auer* deference has lately come under attack for giving agencies leeway in promulgating their own regulations.[90] This argument was recently articulated by Supreme Court Justice Scalia in his concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*[91] Justice Scalia wrote, "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law

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[84] *Id.* at 740.
[85] *Id.* at 731.
[86] *Id.* at 731-32.
[87] *Id.* at 732.
[88] Auer v. Robbins, 519 U.S. 452, 462 (1997).
[89] *Id.* at 463.
[90] Jon Robinson, *Justice Scalia Questions Validity of Deference to Agency Interpretations*, NAVWATERS.COM (June 10, 2011), http://navwaters.com/2011/06/10/justice-scalia-questions-validity-of-deference-to-agency-interpretations/.
[91] Talk America, Inc. v. Michigan Bell Telephone Co., 131 S. Ct 2254, 2265 (2011).

to interpret it as well."[92] Rather, he argued, the processes of lawmaking and promulgating those laws should be kept separate.[93] The EPA enjoys special deference now, but problems have been identified with giving them so much authority that the tide could soon turn against it.

IV. INSTANT DECISION

A. The BACT Issue

REDOIL petitioned the Ninth Circuit to review the EAB's dismissal of its argument alleging BACT should apply to Shell's entire fleet.[94] Before ruling on that issue, the Ninth Circuit studied the Clean Air Act's 1977 amendments, which called for the PSD program that would ensure all new construction projects for major sources of air pollution could not be constructed without a permit.[95] REDOIL's argument centered on the second requirement of a PSD program—that BACT must be applied.[96]

The court had to determine whether the statute required the PSD program to be applied to support vessels operating within twenty-five miles of an OCS source.[97] The EPA argued the statute was ambiguous, and therefore its interpretation must

[92] *Id.* at 2266 (Scalia, J., concurring).
[93] *Id.*
[94] Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A., 704 F.3d 743, 747 (9th Cir. 2012).
[95] *Id.* at 748. Recall that PSD permits involve two conditions: (1) the applicant must conduct air quality analysis showing its emissions will not violate air quality standards, and (2) BACT must be applied. *Id.*
[96] *Id.*
[97] *Id.* at 749.

be given deference.[98] The court first began by determining whether the *Chevron* deference test should be applied.[99]

Both parties agreed the *Discoverer* must comply with the BACT requirement when it is anchored to the seabed and when its support vessels are attached.[100] However, the parties disagreed about whether the BACT requirement applied when support vessels are not attached to the drillship.[101] The EPA determined support vessels are not considered an OCS source under the Outer Continental Shelf Lands Act, and thus not required to use BACT.[102] Though the analysis would seem to end there, REDOIL pointed out a contradictory regulation, which stated pollutant emissions from support vessels are to be considered emissions from the OCS vessel if they are within twenty-five miles of the OCS source.[103]

Because Congress inserted two conflicting provisions, one maintaining support vessels are not OCS sources and the other stating emissions from those vessels can be aggregated to the OCS's emissions, the court looked at the entire Clean Air Act to try to parse out what should be done.[104] The Ninth Circuit looked to how the Act was structured, and specifically how Title I required stationary sources to participate in the PSD program.[105] Congress specifically stated that the EPA should "control air pollution from Outer Continental Shelf sources" by ensuring sources of pollution comply with the PSD program requirements.[106] Section 7627, the conflicting provision, stated, "[f]or purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions

[98] *Id.*
[99] *Id.*
[100] *Id.* at 750.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] 42 U.S.C. § 7627(a)(1) (2006).

while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source."[107] REDOIL contended that based upon this provision, BACT must be applied to all support vessels within twenty-five miles of the OCS source.[108] However, the court found that was not necessarily true, because this clause does not explicitly define "OCS source."[109] The court studied the language of § 7627 closely, and found that "the direct emissions clause maintains a distinction between an OCS source, to which all PSD requirements apply, and vessels servicing an OCS source, to which unspecified requirements apply because their emissions must be considered direct emissions from the OCS source."[110] The statute did not require potential sources of air pollution within twenty-five miles of the OCS source to also be considered OCS sources.[111]

Besides reviewing the language of the OCS statute, the court also looked at the structure of the Clean Air Act as a whole.[112] Title I contained the PSD program requirements for stationary sources of air pollution, while Title II covered mobile sources.[113] Regulations define "marine engine" as "a nonroad engine that is installed or intended to be installed on a marine vessel."[114] The court compared this definition to the one for "stationary source," which did not include "emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle."[115]

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[107] *Id.* § 7627(a)(4)(C)(iii).
[108] *REDOIL*, 704 F.3d at 750.
[109] *Id.*
[110] *Id.* at 751.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] 40 C.F.R. § 89.2.
[115] *REDOIL*, 704 F.3d at 751 (citing 42 U.S.C. § 7602(z) (2006)).

Reading all of these PSD provisions together, the court held BACT should only apply to stationary OCS sources.[116] The court concluded that if Congress intended otherwise its intention was ambiguous.[117]

REDOIL, in an effort to avoid ambiguity, maintained that the legislative history of § 7627 demonstrated that Congress intended to treat support vessels as OCS sources because the section was enacted after *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*[118] was decided.[119] However, the Ninth Circuit dismissed this contention and pointed out that legislative history is only needed when there is ambiguity and cannot be used to show a lack of ambiguity.[120] Nonetheless, the fact that § 7627 was passed by Congress after *Natural Resources Defense Council, Inc. v. U.S. E.P.A,* was not determinative of Congress' intended treatment of pollution from support vessels even though the court in that case chose to uphold the EPA's decision to treat emissions from support vessels as "secondary emissions."[121] The statute remained ambiguous.[122]

When a statute is ambiguous, a court can only reject an agency's interpretation if it is unreasonable.[123] Here, the EAB, who first handled the appeal, dealt with the Act's ambiguity by first determining the total emissions from the entire fleet, including the drillship and the support vessels.[124] That number was then used to see if PSD requirements should be imposed on Shell.[125] The Ninth Circuit found this method reasonable because it complemented the OCS regulations, which accounted for

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[116] *REDOIL*, 704 F.3d at 751.
[117] *Id.*
[118] 725 F.2d 761 (D.C. Cir. 1984).
[119] *REDOIL*, 704 F.3d at 751.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 752.

excluding secondary vessel emissions by including that figure in its initial PSD determination.[126] Next, the EAB resolved the statutory ambiguity by concluding the EPA took into account the total emissions when issuing the permits.[127] The EPA determined that when the supply vessels are not attached to the *Discoverer*, the BACT does not need to apply to them, because under those circumstances those vessels are not considered OCS sources under the statute.[128] Thus, the Ninth Circuit found the EPA's interpretation of the ambiguous statute reasonable, and agreed with the EAB.[129] Therefore, BACT did not apply to support vessels not attached to the OCS source.[130]

B. The Ambient Air Exemption Issue

Even though the permits were allowed to stand, REDOIL hoped to restrain Shell's operations in its second argument. It challenged the EPA's decision to grant Shell an ambient air exemption with a conditional safety zone requirement.[131] Both parties and the court agreed that a letter from a former EPA administrator, Douglas Costle, provided the longstanding interpretation of what qualified as an ambient air exemption.[132] An ambient air exemption is only allowed in cases where the atmosphere is over an area controlled by the OCS source and is restricted to the public; that is, the area is accessible only to those working for the company that has the permit and is otherwise restricted to other non-employees.[133] Using the established rule that an agency's interpretation of its own regulations controls,

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 747.
[132] *Id.* at 753.
[133] *Id.*

known as *Auer* deference, the court stated it cannot overturn the EAB's determination unless the EPA's interpretation was clearly erroneous.[134]

The court did concede that the exemption does not follow the statutory language in that this situation did not involve the atmosphere over land, but rather the atmosphere over water.[135] However, the Ninth Circuit decided it did not make the EPA's determination unreasonable.[136] Here, the EPA linked the exception with the restriction of public access, which was consistent with the agency's regulations.[137] The Clean Air Act itself does not provide a definition of "ambient air," but the EPA defined it in its regulation as "that portion of the atmosphere, external to buildings, to which the general public has access."[138] The court found the EPA's decision to grant an exemption for air over water was not inconsistent with the regulation.[139]

REDOIL's second argument regarding the ambient air exemption also failed.[140] REDOIL claimed the EPA departed from its longstanding definition of "ambient air" without reason.[141] The court conceded the definition dealt with situations that involved atmosphere over land and required fences.[142] Furthermore, the EPA did have the authority to regulate air over OCS sources, and the EAB's assertion that giving the EPA leeway in deciding exemptions in those instances made sense to the Ninth Circuit.[143] The court gave significant weight to a

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* (citing 40 C.F.R. § 50.1(e) (1992)).
[139] REDOIL, 704 F.3d at 753.
[140] *Id.*
[141] *Id.*
[142] *Id.* (citing *In re* Shell Gulf of Mexico, Inc., 15 E.A.D. -----, 60 (Jan. 12, 2012)).
[143] REDOIL, 704 F.3d at 753 (citing *In re* Shell Gulf of Mexico, Inc., 15 E.A.D. -----, 60 (Jan. 12, 2012))The court states that requiring Shell to build a

previous EPA determination, in which the agency recognized a safety zone implemented by the Coast Guard as sufficient to restrict public access because it created a boundary of control.[144] Thus, the EPA in granting the exemption to Shell did not deviate impermissibly from its prior definition of "ambient air" because it involved control and restriction to the public.[145] The EAB's dismissal of REDOIL's second complaint was therefore upheld.[146] As such, REDOIL lost both of its appeals, first on the issue of the permits not requiring BACT to be used for support vessels, and secondly on its challenge regarding the ambient air exemption.

IV. COMMENT

The environment is a contentious topic in American politics. During his second inaugural speech, President Obama managed to stir up excitement and speculation when he promised to take a firmer stance on environmental protection.[147] However, there was another issue facing his second presidential term that resonated with voters: the economy.[148] The President made big promises to ease both problems, but some see them as incompatible.[149] Due to such a politically-charged climate, some

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fence in the ocean would be unreasonable. *Id.*

[144] REDOIL, 704 F.3d at 753.

[145] *Id.*

[146] *Id.*

[147] David J. Unger, *Inauguration 2013 speech: Obama puts energy, climate change in spotlight,* THE CHRISTIAN SCIENCE MONITOR (Jan. 21, 2013), http://www.csmonitor.com/Environment/Energy-Voices/2013/0121/Inauguration-2013-speech-Obama-puts-energy-climate-change-in-spotlight-video.

[148] Jeffrey M. Jones, *Obama's Performance, Economy Foremost in Voters' Minds*, GALLUP (June 14, 2012), http://www.gallup.com/poll/155186/obama-performance-economy-foremost-voters-minds.aspx.

[149] Unger, *supra* note 148 (pointing out that the President did not mention oil and gas production at all during his speech regarding the environment).

critics from both sides of the environmental versus economics issue fear *Chevron* and *Auer* deference leave room for judges to insert themselves into the debate, taking power away from the agencies tasked with balancing the two interests.

The EPA, as the agency vested by Congress with the authority to regulate the environment, often takes the brunt of Americans' anger. Some believe the EPA does not do enough to help the environment; others believe the EPA places too many regulations on the already troubled economy.[150] However, the EPA does not deserve all of this criticism. The courts that review the EPA's decisions should also share some of the blame. To some, the deference given to federal agency decision-making often gives the appearance of the EPA getting away with whatever agenda it is purported to hold. However, the courts apply the standards of review. In a way, the judges writing the court opinions have the opportunity to apply their political beliefs during the decision making process, due to the less than rigid boundaries given in the deference tests employed in the cases.

A. Pro-Business or Pro-Environment?

The EPA faces a lot of criticism that alleges the agency does not go far enough in its regulations to make any real difference in the environment.[151] Unfortunately, much of the EPA's activity may be seen to have a political agenda, which does nothing to alleviate the concerns of the environmentally conscious. For example, under the Clean Air Act, the EPA must review air quality standards every five years.[152] The EPA complied with this requirement in 2008 and decided those standards must be tightened.[153] However, the Obama Administration blocked these new standards from being implemented, apparently under the guise of a need to make them

[150] MCCARTHY & COPELAND, *supra* note 2, at 1-3.
[151] MCCARTHY& COPELAND, *supra* note 2, at 3.
[152] MCCARTHY& COPELAND, *supra* note 2, at 10.
[153] MCCARTHY& COPELAND, *supra* note 2, at 10.

even more restrictive.[154] In 2010 the revisions were completed, and the resulting proposed standards were highly controversial.[155] Many state's counties would be held to be in violation of these new standards because of their expansive reach.[156] The changes required to conform to the new air quality requirements would be costly, an issue which has always been a sore point for those subject to the EPA's regulations, both past and present.[157]

Additionally, many in the American business sector fear the EPA's regulations are too costly and have the effect of hurting the already damaged economy.[158] In December 2012, when *REDOIL v. E.P.A.* was heard in the Ninth Circuit Court of Appeals, the unemployment rate in Alaska was 6.6%.[159] Fishing is a huge part of the Alaskan economy, creating 78,500 jobs.[160] In recent years, oil drilling has become a prominent money-maker in the state, also creating more jobs.[161] In fact, Alaska's oil production could benefit the whole country economically by relieving the United States' dependence on foreign oil sources.[162]

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[154] MCCARTHY& COPELAND, *supra* note 2, at 10.
[155] MCCARTHY& COPELAND, *supra* note 2, at 11.
[156] MCCARTHY& COPELAND, *supra* note 2, at 11.
[157] MCCARTHY& COPELAND, *supra* note 2, at 11.
[158] MCCARTHY& COPELAND, *supra* note 2, at 1.
[159] *Unemployment Rate Alaska*, GOOGLE PUBLIC DATA (March 13, 2013), http://www.google.com/publicdata/explore?ds=z1ebjpgk2654c1_&met_y=unemployment_rate&idim=state:ST020000&fdim_y=seasonality:S&dl=en&hl=en&q=unemployment%20alaska.
[160] Alaska Department of Fish and Game, *Commercial Fisheries*, STATE OF ALASKA (2013), http://www.adfg.alaska.gov/index.cfm?adfg=fishingcommercial.main.
[161] Penny Starr, *New Study Shows That Offshore Drilling Could Make Alaska the Eighth Largest Oil Producer in the World – Ahead of Libya and Nigeria*, CNS.NEWS.COM (Feb. 25, 2011), http://cnsnews.com/news/article/new-study-shows-offshore-drilling-could-make-alaska-eighth-largest-oil-producer-world.
[162] *Id.*

The Chukchi Sea is an important asset to the state, both in terms of economics and environmental concerns.[163] The Chukchi Sea has felt the impact of global warming, and it has many types of wildlife Alaska must consider when making industrial and economic decisions regarding its waters.[164] However, because the unemployment rate is a constant stressor, Alaska has embraced the chance to lease the Chukchi Sea to oil companies.[165] As for the Beaufort Sea, commercial fishing is banned to prevent overfishing in the receding waters.[166] Because fishing is such a major contributor to the Alaskan economy, the state makes up that money by drilling for oil.[167]

Economic concerns prompted Alaska to submit an amicus brief to the Ninth Circuit in *REDOIL v. E.P.A.*,[168] stating, "The State and its citizens have an economic interest in seeing responsible oil and gas exploration occur on the Outer Continental Shelf."[169] It is in this brief that the court found prior support for not requiring actual fences to be constructed on the OCS source for there to be a restriction to public access.[170] Nonetheless, the amicus brief was not solely focused on economics; the state also mentioned that the Alaska Department

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[163] *Chukchi Sea,* AUDUBON ALASKA, http://ak.audubon.org/chukchi-sea.
[164] *Id.*
[165] *Id.*
[166] *Beaufort Sea commercial fishing banned*, CBC NEWS (Apr. 15, 2011) http://www.cbc.ca/news/canada/north/story/2011/04/15/beaufort-sea-commercial-fishing-ban.html.
[167] Northern Economics, *Economic Analysis of Future Offshore Oil and Gas Development:*
Beaufort Sea, Chukchi Sea, and North Aleutian Basin (March 2009), *available at*
http://www.iser.uaa.alaska.edu/Publications/Econ_Analysis_Offshore_O&GDevpt.pdf.
[168] *See* Amicus Brief for State of Alaska at *1-*2, Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A., 704 F.3d 743 (9th Cir. 2012) No. 12-70518, 2012 WL 1943747.
[169] *Id.* at *1-*2.
[170] *Id.* at *3.

of Environmental Conservation has a desire to make sure the EPA is acting consistently and responsibly in granting permits.[171]

The amicus brief defended the administrative process the EPA and EAB went through to approve the permits, wherein the state noted the EPA did not abuse its discretion.[172] This "general observation," as Alaska called it, turned out to be pivotal in the court finding for the EPA.[173] Because the agency followed its administrative guidelines, the court affirmed the EPA's issuance of the permits and the EAB's dismissal of the challenges to those permits.[174]

B. Deference to Whom?

Indisputably, administrative guidelines are important in reviewing a federal agency's decision. Federal agencies should be aware of the scope of their authority and adhere to the boundaries. Before REDOIL even appealed to the EAB, the EPA's initial determination regarding Shell's exploratory activities was fair. The Chukchi permit went through two rounds of public notice and comment, and the permit for the Beaufort Sea had one round.[175] The EPA complied with the OCS statute by requiring Shell to use BACT practices when its support vessels were attached to its drillship and when the drillship was anchored to the seabed.[176] The ambient air exemption, however, is not as straightforward in trying to decipher if the EPA was within its administrative parameters.

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[171] *Id.* at *2.
[172] *Id.* at *4.
[173] *Id.*
[174] Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A., 704 F.3d 743, 752 (9th Cir. 2012).
[175] *Id.* at 746.
[176] *Id.* at 747.

Lest the public think the court will take the opportunity to favor its environmental inclinations, or, alternatively, business concerns, it is important to recall the court supposedly has its own limitations on what it can do with an EPA's course of action. It must allow for *Chevron* deference, wherein a court must follow Congress's intent on the issue, or, if that is unclear, the agency's interpretation of its own statute must be reasonable.[177]

The Ninth Circuit in the present case followed this administrative line of reasoning, which seems to put all concerns regarding its environmental or pro-business objectivity to rest. The court determined that Congress's intent was unclear regarding the two competing provisions in the Clean Air Act that state how support vessels should be treated, and thus it looked solely at the question of whether the EPA's interpretation of the choice between the two was reasonable.[178]

Even though the court went through the proper steps the *Chevron* deference test requires, there was a wrinkle that those who believe this decision was anti-environment could latch onto. Was Congress's intent really so unclear? The court scoffs at REDOIL's use of legislative history when REDOIL wants to disprove the notion of ambiguity.[179] Perhaps the court need not have considered that argument in reference to the ambiguity issue, but could the legislative history have been useful in the Ninth Circuit's determination that Congress did in fact make its intent regarding the use of BACT known? The court stated: "[h]owever, were the statutory language clear, reference to the legislative history would be both unnecessary and inappropriate to illuminate unambiguous text."[180] True, legislative history is not referenced when the statutory language is clear, but perhaps in this case, where two provisions provide for two different

[177] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[178] *REDOIL*, 704 F.3d at 751.
[179] *Id.*
[180] *Id.*

courses of action for the same subject matter, legislative history could have been illuminating. However, the Ninth Circuit seems to have taken steps to save itself from criticism at the end of Part B of its opinion, where it nevertheless analyzed the legislative history of § 7627 and dismissed it as not being probative of Congress's intent.[181] Therefore the court seems to be following the course it was administratively required to follow, presumably resulting in a fair outcome that stays out of environmental politics. The court was right in its analysis, at least from the perspective of the law. It followed the tests for *Chevron* and *Auer* deference to the best of its ability and did not create new standards that defied judicial precedent. Any change in deference must come from Congress, who has the power to create laws and determine in the statutes what standard of review is owed to agency action.

Another tricky point in the opinion occurred when the Ninth Circuit discussed the ambient air exemption awarded to Shell. The court, in reviewing this action, could only overturn the EPA's decision if it was "plainly erroneous or inconsistent with the regulation."[182] In deciding whether the ambient air exemption, which has in the past dealt with restrictions over land, could reasonably be expanded to water, the court ended up agreeing with the EAB in believing the EPA should be given "leeway" to regulate OCS sources.[183]

Was this decision to allow the EPA to grant an exemption to Shell a pro-business move? There is no doubt Shell, or any other oil company that would qualify, benefitted from this exemption; that is, drilling operations are not held to expensive standards for their support vessels when not attached to the

[181] *Id.*
[182] Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).
[183] *REDOIL*, 704 F.3d at 752-53.

seabed. For the Ninth Circuit's part, it was only following administrative procedure. It set out the proscribed rules of law, and followed them.

What about those rules though? Are they enough to remove the EPA and the courts from political influence? Justice Scalia would argue they are not.[184] He expressed his growing concerns with *Auer* deference in *Talk America, Inc. v. Michigan Bell Telephone Co.*,[185] in which he explained his old view of the standard in terms of it being interrelated to the *Chevron* deference test.[186] Justice Scalia stated Congress should not pass an imprecise statute and then leave it to an agency to make its regulations with relatively little parameters.[187] As a result, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases."[188]

Though this seems to be pointing the finger at agencies in that they have free reign to make regulations however they want, courts should also be examined for potential biases that may come through in their decisions. Justice Scalia discussed the advantages of *Auer* deference in *Talk America, Inc. v. Michigan Bell Telephone Co.*, one of them being the ease of which courts can review agency decisions.[189] However, this article argues that standard of review leaves the judge a chance to impart his beliefs about an agency's action. *Auer* requires an interpretation to be affirmed so long as it is consistent with the regulation.[190] That is

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[184] Jon Robinson, *Justice Scalia Questions Validity of Deference to Agency Interpretations*, NAVWATERS.COM (June 10, 2011), http://navwaters.com/2011/06/10/justice-scalia-questions-validity-of-deference-to-agency-interpretations/.

[185] Talk America, Inc. v. Michigan Bell Telephone Co., 131 S. Ct 2254, 2265-66 (2011).

[186] *Id.* at 2266.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] Auer v. Robbins, 519 U.S. 452, 461 (1997).

a flimsy standard. Courts have a lot of room to take other issues into consideration when deciding whether something is consistent. For example, in, *REDOIL v. E.P.A.*, the court may well have accounted for Alaska's economic situation when it reviewed the ambient air exemption.

Chevron also gives courts much discretion, especially in the second step. Step one of the deference test is pretty rigid in that Congress is required to have its intention followed.[191] It is in step two that courts could insert their own bias, in which judges have the discretion to decide what is "reasonable."[192] *Rapanos v. U.S.*[193] is a good example of how judges can radically differ in what they conclude, while using the same *Chevron* deference test. There were three different opinions in *Rapanos* which purport to say what a "reasonable" definition of "navigable waters" was.[194]

Because the courts can vary in their implementation of the *Chevron* deference test, the EPA suffers more criticism than usual. Some suggest the EPA will always win, because the courts must follow rules that are designed to favor federal agencies.[195] It is the standards of review, though, that invite bias not of the agency, but of judges deciding the case. There will never be concrete proof of this, only speculation, but it is a probable explanation of why cases involving the EPA garner so

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[191] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[192] *See id.*
[193] 547 U.S. 715 (2006).
[194] *See id.*
[195] James Christman, David S. Harlow & Craig Harrison, *Courts Should Not Defer to Agencies' Interpretations of Their Own Rules*, 15 LEGAL BACKGROUNDER 29, 1 (2000), *available at* http://www.hunton.com/files/Publication/4e498b6e-69c5-4dff-bd6d-cbb1d9b0fe44/Presentation/PublicationAttachment/80e98178-d09c-48ab-9a75-ee045dab0303/wlf.pdf.

much criticism for being arbitrary. Perhaps the results, whether they lean more pro-environment or pro-business, should be reviewed in the context surrounding the case. Turning to,*REDOIL v. E.P.A.*, Alaska's economy would be greatly affected by the result.[196] Also, the EPA did not deviate from any regulation, but rather chose one of two conflicting provisions of the OCS statute.[197] If the ambient air exemption had been for a source of pollution located on land, REDOIL probably would not have been able to challenge the exemption at all. But because Shell's ambient air exemption would have been for sources on water, the EPA, and then the Ninth Circuit, did not split hairs about the fence requirement and adjusted its exemption accordingly.[198] The EPA was not acting outrageously, and so the court may have given them leeway in the *Chevron* deference test and in applying *Auer* deference. The standards of review in this case allowed much discretion for the court, and though there is no clear evidence of what outside influences affected it, the court was at least aware of them.

V. CONCLUSION

Shell and, presumably, other oil drilling companies in the future may feel benefitted by the decision in *REDOIL v. E.P.A.* Even so, the EPA, the EAB, and the Ninth Circuit each worked within their legal and regulatory perimeters to come to a decision, which should quiet pro-environment critics. However, the reality is that these three bodies did exercise just enough discretion, even within the bounds of their authority, to invite frustration. The EPA and its decisions have been, and will most likely continue to be, a source of political conflict, even though all of the blame should not be on the EPA. The courts exercise discretion under

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[196] *See* Amicus Brief for State of Alaska, Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A., 704 F.3d 743 (9th Cir. 2012) No. 12-70518, 2012 WL 1943747.

[197] Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. E.P.A., 704 F.3d 743, 750 (9th Cir. 2012).

[198] *Id.* at 753.

deferential standards of review, which are flimsy enough that judges could insert their own pro-business or pro-environment biases into a case. Justice Scalia has expressed his concern over letting others besides Congress dictate the law, and that argument should be based on an awareness of the power of the courts under *Chevron* and *Auer*.

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