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EPA Oversight in Determining Best Available Control Technology: The Supreme Court Determines the Proper Scope of Enforcement

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Notes

EPA Oversight in Determining Best Available Control Technology: The Supreme Court Determines the Proper Scope of Enforcement

Alaska Department of Environmental Conservation v. EPA[1]

I. INTRODUCTION

Prior to 1977, the Clean Air Act[2] did not purport to regulate the quality of air in regions of the United States that met or exceeded national ambient air quality standards[3] ("NAAQS") in any different manner than those regions in which the air was particularly dirty.[4] Although Section 101(b)(1) of the 1970 Amendments[5] to the Clean Air Act stated that the preeminent purpose of the Act was "to protect and enhance the quality of the Nation's air resources so as to promote the public heath and welfare,"[6] the Environmental Protection Agency ("EPA") did not implement regulations designed to protect "against significant deterioration of the existing clean air areas" until 1974.[7] The initial regulations required that the states ensure the continued

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1. Alaska Dep't of Envtl. Conservation v. EPA, 124 S. Ct. 983 (2004).

2. The "Clean Air Act" refers to 42 U.S.C. §§ 7401-7671 (2000).

3. NAAQS are set by the EPA to establish the "maximum permissible concentrations of air pollutants." Ala. Power Co. v. Costle, 636 F.2d 323, 346 (D.C. Cir. 1979). The NAAQS are pollutant-specific, and the EPA sets these threshold standards on criteria pollutants that are particularly harmful to the public health and welfare. *Id.* States then implement and enforce the NAAQS through state implementations plans ("SIPs") approved by the EPA. *Id.* Within a state's SIPs, the state must implement a strategy for attaining the NAAQS within each Air Quality Control Region ("AQCR") located within the state. *Id.*

4. *Id.* at 346-47.

5. The 1970 Amendments were the first major attempt by Congress to federally regulate air quality across the several states by mandating enforcement of NAAQS set by the EPA. *See* 3 MARK SQUILLACE, ENVIRONMENTAL LAW: AIR POLLUTION 47 (2d ed. 1992).

6. 42 U.S.C. § 7401(b)(1) (2000). This language has remained unchanged since the 1970 Amendments.

7. Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 254 (D.D.C. 1972), *aff'd per curiam without opinion*, 2 Envtl. L. Rep. 20,656 (D.C. Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 541 (1973).

maintenance of air quality in clean areas despite the fact that these areas did not violate any federal pollution emissions standards.[8]

In the 1977 Amendments, Congress explicitly created a new framework "for maintaining air quality in those regions which are in compliance with the national standards."[9] Known as "Prevention of Significant Deterioration" ("PSD"), these statutory provisions[10] require that any new or modified "major emitting facility"[11] in an attainment area apply for a preconstruction permit showing that emissions from the source "will not cause, or contribute to, air pollution in excess of . . . maximum allowable increase or maximum allowable concentration for any pollutant."[12] Under the PSD program, stationary sources[13] must demonstrate that "the proposed facility is subject to the best available control technology for each pollutant subject to regulation . . . emitted from . . . such facility."[14] The best available control technology ("BACT") determination for any new or modified stationary source is made on a case-by-case basis by the state permitting authority "taking into account energy, environmental, and economic impacts and other costs."[15]

In both the Clean Air Act generally and the PSD program specifically, Congress granted the EPA a large oversight function to ensure that states acted in compliance with the terms of the statute.[16] According to the terms of

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8. *Ala. Power Co.*, 636 F.2d at 347.

9. Solar Turbines v. Seif, 879 F.2d 1073, 1075 (3d Cir. 1989). The 1977 Amendments essentially divided the country into "attainment" and "non-attainment" areas with different regulations for air quality attendant to each category. *See Ala. Power Co.*, 636 F.2d at 349. Area classification is pollutant-specific so "the same area may be a clean air area due to the air quality with respect to one pollutant, yet be a non-attainment area with respect to another pollutant." *Id.* at 350.

10. The relevant provisions detailing the PSD requirements for attainment areas are found at 42 U.S.C. §§ 7470–7479 (2000). These provisions have remained virtually unaffected by subsequent amendments to the Clean Air Act and still operate as detailed in the 1977 Amendments. SQUILLACE, *supra* note 5, at 173.

11. The statutory definition of "major emitting facility" found in the Clean Air Act includes "stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from . . . [particularly designated sources and] any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." 42 U.S.C § 7479(a).

12. *Id.* § 7475(a)(3) (detailing the statutory requirements for permit authorization).

13. *Id.* § 7411(a)(3) (defining "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant").

14. *Id.* § 7475(a)(4).

15. *Id.* § 7479(3). The technological requirements must be detailed in the state's State Implementation Plan ("SIP") to ensure compliance with the PSD program. *Id.* § 7471.

16. *See id.* §§ 7477, 7413(a)(5)(A) (describing the enforcement options available to the EPA when it finds that a state is not complying with any requirement of the

the PSD permitting program, the EPA is authorized to "take such measures, including issuance of an order . . . as necessary to prevent the construction or modification of a major emitting facility which does not conform to the [PSD permitting] requirements."[17] As discussed in this Note, the United States Supreme Court recently clarified and expanded the scope of the EPA's PSD oversight and enforcement authority in *Alaska Department of Environmental Conservation v. EPA*.[18]

In *Alaska Department of Environmental Conservation*, the Supreme Court addressed the issue of whether the EPA was authorized to bar construction of a new major emitting facility where it found the state permitting authority's BACT determination unreasonable.[19] The Court held that, given the legislative history and plain language of the enforcement provisions contained in the Act, the EPA has the authority to force compliance with the PSD program where the EPA reasonably believes that the state permitting authority has acted arbitrarily in determining BACT.[20] This Note explores the analysis employed by the Court and argues that, in light of the underlying purpose of the PSD program, the Court in *Alaska Department of Environmental Conservation* reached the correct conclusion.

II. FACTS AND HOLDING

Teck Cominco Alaska, Inc. ("Cominco") operates the Red Dog Mine in northwest Alaska, located approximately one hundred miles north of the Arctic Circle.[21] The mine is a major producer of zinc concentrates and zinc material and is the largest private employer in the area.[22] Given the remote location of the mine, it relies on independent on-site power sources in the form of electric generators to facilitate its daily operations.[23] The mine is located in an attainment area for nitrogen oxide, so it must abide by the PSD permitting requirements of the Clean Air Act.[24]

Clean Air Act with respect to construction of a new source or modification of an existing source).

17. *Id.* § 7477. *See also* Alaska Dep't of Envtl. Conservation v. EPA, 124 S. Ct. 983, 993-94 (2004).

18. 124 S. Ct. 983 (2004).

19. *Id.* at 991.

20. *Id.* at 1000.

21. *Id.* at 994.

22. *Id.* The mine supplies approximately one-quarter of the region's wage base. *Id.*

23. Alaska Dep't of Envtl. Conservation v. EPA, 298 F.3d 814, 816 (9th Cir. 2002), *aff'd*, 124 S. Ct. 983 (2004).

24. *Id. See also* 40 C.F.R. § 81.302 (2004) (detailing attainment and nonattainment areas for specific pollutants in the state of Alaska as required by the Clean Air Act); *Id.* § 51.166(b)(23)(i) (requiring a PSD permit for facilities that increase nitrogen oxide emissions in excess of 40 tons per year).

In 1988, Cominco obtained an initial PSD permit from the Alaska Department of Environmental Conservation[25] (the "State") for authorization to operate the mine and five electric generators needed for on-site power.[26] The State subsequently issued a second PSD permit to Cominco in 1994 which authorized construction of a sixth generator to help power the mine's operations.[27] In 1996, Cominco instituted a plan to significantly increase its zinc production and in 1998 applied for a PSD permit "to allow . . . increased electricity generation by its standby generator."[28] After reviewing the initial permit application, the State proposed Selective Catalytic Reduction ("SCR")[29] as BACT for the generator that Cominco planned to take out of standby status.[30] Cominco responded by amending its permit application to propose addition of a seventh generator at the plant and "to propose as BACT an alternative control technology--Low NOx--that achieves a 30% reduction in nitrogen oxide pollutants."[31] Cominco suggested that it could lower its total emissions of nitrogen oxide at the mine by retrofitting the existing generators with Low NOx technology and using this technology on the new generator as well.[32] Cominco stated that SCR was not economically or technically feasi-

25. The Alaska Department of Environmental Conservation, acting for the State of Alaska, is the permitting authority for Alaska according to the state's SIP. *See* Approval and Promulgation of Implementation Plans: Alaska, 56 Fed. Reg. 19,284 (Apr. 26, 1991) (codified at 40 C.F.R. pt. 52).

26. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 994. "The mine's PSD permit authorized five 5,000 kilowatt Wartsila diesel electric generators, MG-1 through MG-5 . . . ." *Id.* These generators were subject to operational limitations, as two of the generators were relegated to standby status. *Id.*

27. *Id.* The 1994 permit also imposed "a new operational cap that allowed all but one generator to run full time." *Id.*

28. *Id.* The State required Cominco to apply for a new permit because the increase in production and attendant need for increased generator power would cause the mine to increase its emissions of nitrogen oxide by more than forty tons per year. *Id. See also* 40 C.F.R. § 51.166(b)(23)(i) (2004) (requiring a PSD permit for Alaskan facilities that increase nitrogen oxide emissions in excess of forty tons per year).

29. "SCR requires injections of ammonia or urea into the exhaust before the exhaust enters a catalyst bed . . . . The reduction reaction occurs when the flue gas passes over the catalyst bed where the [nitrogen oxide] and ammonia combine to become nitrogen, oxygen, and water." *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 994 n.5. This technology reduces nitrogen oxide emissions by approximately 90 percent. *Id.* at 994.

30. *Id.*

31. *Id.* Low NOx technology involves changing the generator itself "to improve fuel atomization and modify the combustion space to enhance the mixing of air and fuel." *Id.* at 994 n.6.

32. *See id.* at 995; Alaska Dep't of Envtl. Conservation v. EPA, 298 F.3d 814, 817 (9th Cir. 2002), *aff'd*, 124 S. Ct. 983 (2004). This proposal would only truly create commensurate emission levels with SCR technology if Cominco permanently relegated at least one generator to standby status. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 995.

ble, which is a factor that the permitting authority is permitted to take into account in determining BACT for a particular source.[33]

In issuing its first-draft technical report in response to the amended permit application, the State first stated that SCR was "the most stringent technology" for Cominco's fifth and seventh generators and that it was both economically and technically feasible for installation on the generators at issue.[34] The State also recognized that if the mine ran all seven generators simultaneously, the Low NOx proposal submitted by Cominco "would increase emissions by 79 tons per year."[35] Despite these findings, the State endorsed the Low NOx technology proposal submitted in Cominco's amended permit application.[36] The State accepted the proposal, finding that it would decrease the total output of nitrogen oxide at the mine "to a level comparable to that which would result were SCR installed in only the [fifth and seventh] generators."[37] The initial permit determination was then submitted to the EPA and circulated for public comment.[38]

At the close of the public comment period[39] in June 1999, the National Park Service notified the State that the BACT determination for the Cominco mine was improper.[40] First, the Park Service expressed concern that the nitrogen oxide emissions from the mine would harm native vegetation at a nearby environmental preservation area.[41] Second, the Park Service argued that the proposed offset provisions included in the BACT determination were "neither allowed by BACT, nor [would achieve] the degree of reduction that would

33. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 994-95. *See also* 42 U.S.C. § 7479(3) (2000) (stating that the definition of BACT includes a calculation of "energy, environmental, and economic impacts" in setting the appropriate technology).

34. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 995. Particularly, the State found that Cominco had overstated the cost of SCR and that "SCR has been installed on similar diesel-fired engines throughout the world," thus undercutting Cominco's two primary arguments in opposition to SCR as BACT at the mine. *Id.*

35. *Id.*

36. *Id.*

37. *Alaska Dep't of Envtl. Conservation*, 298 F.3d at 817.

38. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 994. The state permitting authority is required to provide notice to the EPA Administrator of each permit application and to give updated information any time the state takes any action on consideration of the permit. 42 U.S.C. § 7475(d)(1) (2000).

39. *See* 42 U.S.C. § 7475(a)(2) (requiring a public notice and comment period for the proposed permit "with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of [the] source, alternatives thereto, control technology requirements, and other appropriate considerations" before the permit may be issued).

40. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 995.

41. *Alaska Dep't of Envtl. Conservation*, 298 F.3d at 817. The area that the Park Service expressed concern about included the Cape Krusenstern National Monument and Noatak National Preserve, located near the mine in northwest Alaska. *Id.*

result . . . with SCR."[42] Finally, the Park Service asserted that, because the new project would "remove operating restrictions that the 1994 PSD permit had placed on four of the existing generators," these generators should be considered a part of the project and subjected to BACT requirements.[43]

The EPA first contacted the State in July, 1999, and issued a letter stating that the State's BACT determination was not reasonable in light of the State's initial determination that SCR was BACT for the Cominco generators.[44] The EPA asserted that "once it is determined that an emission unit is subject to BACT, the PSD program does not allow the imposition of a limit that is less stringent than BACT."[45] With respect to the offsetting proposal, the EPA declared that "[n]ew emissions could be offset only against reduced emissions from sources covered by the same BACT authorization."[46] Finally, the EPA agreed with the Park Service that, due to the technology alterations proposed for the older generators, these too would be subject to BACT in the new permit.[47]

In response to the EPA's concerns, the State issued a second report in September 1999, limiting its focus to the new generator but again asserting that Low NOx was BACT for that generator.[48] Although it did not conduct any economic analysis on this issue, the State argued that SCR would impose "a disproportionate cost on the mine."[49] The EPA again protested, noting that the State had previously stated that SCR was both technically and economically feasible as BACT for the new generator and that there was no basis for this change of opinion.[50] However, the EPA did give the State and Cominco the opportunity to submit financial data supporting its claim of economic infeasibility.[51] Cominco refused to submit the requested data, arguing, without specification, that it had high debts and asserting for the first time that Low NOx was needed "for industrial development in rural Alaska."[52]

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42. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 995-96.

43. *Id.* at 996.

44. *Id.*

45. *Id.*

46. *Id.* The older Cominco generators were subject to a different initial technology control (Fuel Injection Timing Retard) which was less stringent that either Low NOx or SCR. *Id.* at 995 n.8.

47. *Id.* at 996.

48. *Id.* The State abandoned the offsetting justification found in the first draft report and agreed with the EPA that the older generators "could not be considered in determining BACT for MG-17." *Id.* The State and Cominco subsequently agreed that the older generators would be fitted with Low NOx. *Id.* at 996 n.9. The EPA did not object to this arrangement, as there was no requirement that these generators implement BACT since this would not cause an increase in emissions. *Id.*

49. *Id.* at 996.

50. *Id.* at 996-97.

51. *Id.* at 997.

52. *Id.*

On December 10, 1999, the State issued the permit and its final technical report, finding that Low NOx was BACT for the Cominco generator, but again changing its rationale for this determination.[53] In the report, the State specified that it made no judgment concerning the economic or technical infeasibility of SCR, but instead asserted that SCR would have an "adverse effect on the mine's unique and continuing impact on the economic diversity of the region and on the venture's world competitiveness."[54]

On the same day, the EPA issued its first order to the State "prohibiting [the State] from issuing a PSD permit to Cominco unless [it] satisfactorily documents why SCR is not BACT" and finding that the State's BACT determination and accompanying rationale were "both arbitrary and erroneous."[55] Since the State had already issued the PSD permit, the EPA issued a second order on February 8, 2000, prohibiting construction or modification activities at the mine.[56] This order was later vacated by the EPA's third and final order to the State issued on March 7, 2000. That order permitted minimal preconstruction activities to be conducted during the summer, but "generally prohibited Cominco from acting on [the State's] December 10 PSD permit."[57]

The State and Cominco initially petitioned the United States Court of Appeals for the Ninth Circuit for review of the EPA's orders on February 8, 2000, the same day that the EPA issued its order to stop construction.[58] In response to the petition, the EPA moved to dismiss, arguing that the court lacked subject matter jurisdiction because the EPA's orders were not "final agency action[s]."[59] The court rejected this argument, holding that the EPA had "asserted its final position" on the matter by issuing the orders and that "legal consequences [would] flow if Cominco [chose] to disregard the Order and go forward with construction."[60] The court then deferred consideration of the merits of the case to allow the EPA the option of withdrawing its orders, commencing an enforcement action in a district court, or submitting an administrative record to the court detailing the EPA's justifications for its or-

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53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 998. *See* Alaska Dep't of Envtl. Conservation v. United States EPA, 244 F.3d 748 (9th Cir. 2001).
59. *Alaska Dep't of Envtl. Conservation*, 244 F.3d at 749. The United States Courts of Appeals have original jurisdiction only over "final action[s]" taken by the EPA. *Id. See also* 42 U.S.C. § 7607(b)(1) (2000).
60. *Alaska Dep't of Envtl. Conservation*, 244 F.3d at 750. In so holding, the court applied the test for finality developed in *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, the Court held that an agency has taken a final action where the action "mark[s] the 'consummation' of the agency's decisionmaking process" and is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177-78 (citations omitted).

ders.[61] The EPA later submitted a declaration to the court that the record was complete.[62] The State and Cominco agreed to this submission.[63]

In 2002, the United States Court of Appeals for the Ninth Circuit finally resolved the merits of the case.[64] Both the State and Cominco claimed that the EPA did not have authority to issue any of the underlying orders and that it had "abused its discretion in finding that [the BACT] determination did not comply with the requirements of the Clean Air Act and Alaska's State Implementation Plan."[65] Furthermore, the State argued that Section 169 authorized the State to use discretion in determining BACT.[66] Thus, the EPA did not have the right to unilaterally veto the State's decision based "on a mere difference of opinion."[67] In response, the EPA asserted that the plain language and legislative history of the Clean Air Act's enforcement provisions[68] gave the EPA the authority to force compliance with the PSD program where the state has acted unreasonably in setting BACT.[69] The EPA characterized the State's BACT determination for the Cominco generator as "nothing short of incomprehensible, unreasoned, and unsupported." [70]

The court agreed with the EPA, holding that the "EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP."[71] The court particularly emphasized that a *reasoned* justification determining BACT was one of the "requirements" that a state must follow in implementing the PSD program.[72] Where the state "fail[s] to provide an adequate justification for its BACT decision," the EPA is authorized to enforce the PSD provisions to ensure that the program is properly implemented.[73] Once the court resolved this initial matter, it went on to hold that the EPA had not acted arbitrarily in issuing the orders[74] since the

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61. *Alaska Dep't of Envtl. Conservation*, 244 F.3d at 751.

62. Alaska Dep't of Envtl. Conservation v. EPA, 298 F.3d 814, 818 (9th Cir. 2002), *aff'd*, 124 S. Ct. 983 (2004).

63. *Id.*

64. *Id.* at 816.

65. *Id.*

66. *Id.* at 820 (citing 42 U.S.C. § 7479(3) (2000)).

67. *Id.*

68. 42 U.S.C. §§ 7413(a)(5)(A), 7477 (2000). *See supra* notes 16-17 and accompanying text.

69. *Alaska Dep't of Envtl. Conservation*, 298 F.3d at 818-19. The EPA asserted that the State must give a reasoned justification for its BACT designation as one of the requirements of the Act. *Id.*

70. *Id.* at 822.

71. *Id.* at 820.

72. *Id.* at 821.

73. *Id.* at 821-22.

74. "Under the Act, we may reverse a final action by the EPA if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Id.* at 822 (quoting 42 U.S.C. § 7607(d)(9)(A) (2000)).

State had not complied with the statutory requirements for determining BACT and had acted irrationally in issuing the Cominco permit.[75]

Cominco and the State appealed to the United States Supreme Court, which granted certiorari to resolve the scope of the EPA's enforcement authority under the PSD program, an issue not previously addressed by the courts.[76] A majority of the Court affirmed the Ninth Circuit's decision, rejecting the theory advanced by the State and Cominco that the PSD program gave the State broad discretion to adopt BACT and issue PSD permits.[77] The Court held that where the State has made an arbitrary or erroneous BACT determination in issuing a PSD permit, the EPA is authorized to force compliance with the PSD program's requirements.[78]

III. LEGAL BACKGROUND

In response to rising concerns with the quality of the nation's air and the failure of the states to create a viable solution to the implicit health concerns associated with dirty air, Congress federalized air pollution controls with the 1970 Amendments to the Clean Air Act.[79] Prior to the 1970 Amendments, regulation and implementation of air quality and pollution controls was mostly left to the states.[80] State compliance with the minimal federal attempts at regulation was extremely inconsistent.[81] As a result, "Congress reacted by taking a stick to the States"[82] and promulgating national ambient air quality

75. *Id.* In its discussion of the reasonableness of the State's BACT determination, the court detailed the "top-down approach" to determining BACT for a particular source, which is the approach that the State purported to follow in this case. *Id.* Under this approach, BACT technologies are ranked "in descending order of control effectiveness."*Id.* "The most stringent technology is BACT unless the applicant can show that it is not technically feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable." *Id.* Applying this formula, the court found that SCR was, in fact, the most stringent control technology for the Cominco generators and that neither the State nor Cominco had sufficiently demonstrated why it was technically or economically infeasible. *Id.* at 822-23.

76. Alaska Dep't of Envtl. Conservation v. EPA, 124 S. Ct. 983, 998 (2004).

77. *Id.* at 1000.

78. *Id.*

79. *See* SQUILLACE, *supra* note 5, at 47. The first attempt at federal control of air quality was the Air Pollution Control Act of 1955, designed to promote research of air pollution by the federal government. *Id.* Congress later enacted the Clean Air Act of 1963, which provided limited federal jurisdiction to regulate interstate pollution. *Id.* The last major federal action prior to the 1970 Amendments was the Air Quality Act of 1967, which was the first law that actually "focused regulatory efforts on ambient air quality." *Id.*

80. *Id.*

81. *Id.* (citing DAVID P. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS § 8.01 (1981)).

82. Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 64 (1975).

standards ("NAAQS").[83] The states had no choice but to implement the NAAQS through a complex structure of federal regulations.[84] Although the states were given responsibility for implementing these air quality standards through promulgation of State Implementation Plans ("SIPs"),[85] Congress clearly intended the EPA to oversee the states and ensure that the standards were met.[86] Fearing that the states might not comply with the Clean Air Act in meeting the NAAQS, Congress specifically authorized the EPA to enforce these provisions against the states through administrative orders and civil and criminal penalties.[87]

Through this structure, Congress laid the foundation for cooperative federalism in environmental policy found in subsequent amendments to the Clean Air Act.[88] Despite these congressional mandates regarding the roles that the states and the EPA are to play, courts have sometimes struggled with the proper interpretation of the Act in deciding whether particular EPA enforcement actions are appropriate.

A. Prevention of Significant Deterioration

Shortly after the 1970 Amendments were promulgated, an issue arose regarding whether areas in which the air quality was better than required by the EPA should be treated any differently than those areas in which the air quality was particularly poor.[89] In *Sierra Club v. Ruckelshaus*,[90] a group of environmental activists brought suit against the EPA Administrator, asking

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83. *Id.* at 64-65.

84. *Id.*

85. "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan . . . ." 42 U.S.C. § 7407(a) (2000). *See also* 42 U.S.C. § 7401(a)(3) (2000) ("The Congress finds that . . . air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments. . . .").

86. Union Elec. Co. v. EPA, 427 U.S. 246, 256-57 (1976). The requirements in the 1970 Amendments were "of a 'technology-forcing-character' . . . expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Id.* at 257 (quoting *Train*, 421 U.S. at 90).

87. *See* 42 U.S.C. § 7413 (2000) (listing a broad range of enforcement alternatives that the EPA can institute when a state does not comply with the provisions of the Act).

88. *See* Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984) ("[T]he Clean Air Act creates a partnership between the states and the federal government. . . . The federal government . . . determines the ends . . . but Congress has given the states the initiative and a broad responsibility regarding the means . . . .").

89. *See generally* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd per curiam without opinion*, 2 Envtl. L. Rep. 20656 (D.C. Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 541 (1973).

90. *Id.*

the court to force the EPA to consider non-degradation of existing air quality in approving any SIP.[91] The EPA had previously enacted regulations[92] that would have allowed degradation of the existing air quality so long as the air quality did not fall below the NAAQS.[93] The EPA argued that the 1970 Amendments did not require such consideration of the non-degradation of air quality.[94]

The court looked at the language and legislative history of Section 101(b)(1)[95] of the 1970 Amendments and determined that Congress had contemplated non-degradation of existing clean air as one of the purposes inherent in the Act.[96] "[The] language would appear to declare Congress' intent to improve the quality of the nation's air and to prevent deterioration of that air quality, no matter how presently pure that quality . . . happens to be."[97] In response to the court's decision, the EPA issued regulations preventing significant deterioration of the air in areas where the air quality exceeded the minimum national standards.[98]

In the 1977 Amendments, Congress responded by enacting specific provisions to separately govern attainment and nonattainment areas located within the several states.[99] Congress included "an express directive that state plans include measures to prevent the significant deterioration of air quality in areas . . . having ambient air quality better than the applicable [NAAQS]."[100] Congress enacted these provisions to preserve the existing air quality in attainment areas and prevent deterioration to the minimum levels established in the NAAQS.[101]

Alongside the environmental goals, Congress also tailored the PSD requirements to allow economic growth consistent with preventing significant

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91. *Id.* at 254.

92. *See* 40 C.F.R. § 51.12(b) (1972).

93. *Ruckelshaus*, 344 F. Supp. at 254.

94. *Id.*

95. 42 U.S.C. § 1857(b)(1) (1970) (One of the basic purposes of the Act is "to *protect* and *enhance* the quality of the Nations's air resources so as to promote the public health and welfare.") (emphasis added). In the current Code, this language is now found at 42 U.S.C. § 7401(b)(1) (2000).

96. *Ruckelshaus*, 344 F. Supp. at 255.

97. *Id.*

98. 39 Fed. Reg. 42,510 (1974) (superseded); *see also* Ala. Power Co. v. Costle, 636 F.2d 323, 347 (D.C. Cir. 1979) (The 1974 regulations required each SIP to be revised to include PSD requirements.).

99. *Ala. Power Co.*, 636 F.2d at 349. "Nonattainment" areas are those regions in which the air quality falls below the EPA's national air quality standards. *See* 42 U.S.C. § 7407(d)(1)(A)(i) (2000). A discussion of the regulations attendant to nonattainment areas is beyond the scope of this Note, but the provisions are located at 42 U.S.C. §§ 7501-15 (2000).

100. *Ala. Power Co.*, 636 F.2d at 349. *See also* 42 U.S.C. § 7471 (2000).

101. 42 U.S.C. § 7470(1) (2000).

deterioration in attainment areas.[102] In this manner, Congress hoped to "identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air."[103] With this goal in mind, Congress gave the states a greater role in deciding how best to effectuate the PSD requirements because the states have more knowledge of local conditions and needs than the EPA does.[104] Although the Act clearly provides for an increased state role, the legislative history of the PSD program also suggests a heightened need for national guidelines to protect the ambient air from significant deterioration.[105]

According to the terms of the Act, the state permitting authority is the agency authorized to review permit applications from major emitting facilities to ensure that emissions from those facilities will not significantly deteriorate the existing air quality.[106] The Act requires that all major emitting facilities apply for a preconstruction permit from the state permitting authority before constructing a new facility or modifying an existing facility that will increase emissions in the attainment area.[107] The purpose of this process is to prevent major emission releases into the ambient air prior to actual construction or modification.[108]

When the state permitting authority receives a preconstruction permit application, it must evaluate two criteria before issuing a permit to construct or modify a facility.[109] First, the emissions must "not cause, or contribute to, air pollution in excess of any . . . maximum allowable concentration" for any

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102. *Id.* § 7470(3).

103. *Ala. Power Co.*, 636 F.2d at 353.

104. H.R. REP. NO. 95-294 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1085.

105. *Id.* at 1213. The Report highlights Congressional concern with respect to this issue:

> Without national guidelines for the prevention of significant deterioration a State deciding to protect its clean air resources will face a double threat. The prospect is very real that such a State would lose existing industrial plants to more permissive States. But additionally the State will likely become the target of "economic-environmental blackmail" from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls.

Id.

106. *Id.* at 1087 ("The permit program is to be operated by States. The purpose of the permit is to assure that the allowable increments and allowable ceilings will not be exceeded as a result of emissions from any new or modified major stationary source."). *See also* 42 U.S.C. § 7475 (2000).

107. *See* 42 U.S.C. § 7475(a)(1); *Ala. Power Co.*, 636 F.2d at 350.

108. *Ala. Power Co.*, 636 F.2d at 353.

109. There are eight requirements that the permit applicant must demonstrate to the state permitting authority. *See* 42 U.S.C. § 7475(a)(1)-(8). Full analysis of these requirements is outside the scope of this Note.

pollutant for which the area is an attainment area.[110] Second, the facility must employ the best available control technology (BACT) for each pollutant emitted from the facility.[111] BACT requires the state permitting authority to ensure, on a case by case basis, "the maximum degree of reduction of each pollutant [that is achievable by the facility] . . . taking into account energy, environmental, and economic impacts and other costs."[112]

The EPA has issued draft guidelines for determining which technology is BACT for a new or modified facility. These guidelines are frequently relied upon by state permitting agencies and the EPA.[113] The guidelines suggest a "top-down" approach where applicants seeking a PSD permit must apply the most stringent control technology unless they demonstrate that such technology is economically or technically infeasible.[114] Once it is determined that a PSD applicant has met all of the statutory requirements, the state permitting authority may issue the permit and construction or modification of the facility may begin.[115]

B. EPA Oversight and Enforcement Authority Under the PSD Program

The Clean Air Act includes both general and specific federal enforcement provisions designed to give the EPA the ability to ensure that states are complying with the mandates of the Act.[116] Section 113 gives the EPA the authority to issue orders and seek civil and criminal penalties for violations of the Clean Air Act.[117] These general enforcement provisions specifically authorize the EPA to issue orders "prohibiting the construction or modification of any major stationary source" where it finds that "a State is not acting in compliance with any requirement or prohibition . . . relating to the construction [or modification of such sources]."[118] Under these provisions, the EPA

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110. 42 U.S.C. § 7475(a)(3).

111. *Id.* § 7475(a)(4).

112. 42 U.S.C. § 7479(3) (2000).

113. *See* Sur Contra La Contaminacion v. EPA, 202 F.3d 443, 446 (1st Cir. 2000). The EPA guidelines were issued by the EPA's Office of Air Quality Planning and Standards in draft form in 1990 in a document entitled *New Source Review Workshop Manual, available at* http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf.

114. *See* Citizens for Clean Air v. United States EPA, 959 F.2d 839, 845 (9th Cir. 1992).

115. *See* 42 U.S.C. § 7475(a).

116. *See* 42 U.S.C. §§ 7413, 7477 (2000).

117. *See id.* § 7413(a). These "general" provisions include a state's failure to comply or enforce SIP requirements as enacted and a state's failure to comply with permit programs. *Id.* § 7413(a)(1)-(2).

118. *Id.* § 7413(a)(5)(A). Congress strengthened the EPA's oversight and enforcement authority over the PSD program in the 1990 Amendments. Prior to these Amendments, the EPA did not have authority under Section 7413(a) to issue orders

may issue administrative penalty orders, seek civil action, or commence criminal proceedings for noncompliance with the terms of the Act.[119]

Congress also included specific enforcement provisions tailored to the PSD regulations in the Act that authorize 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 [PSD] requirements."[120] The plain language of the statute makes clear that "before an enforcement action may be undertaken there must be a violation" of the PSD requirements.[121] However, prior to the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA*, it was unclear how far EPA enforcement authorization extended under Section 167, as it was unclear what constituted a "violation" of the PSD provisions.

In *United States v. Solar Turbines, Inc.*,[122] the District Court for the Middle District of Pennsylvania addressed the issue of whether the EPA could directly order a facility to halt construction for violation of the PSD regulations when the state permitting authority had already issued a PSD permit.[123] In looking at the structure of the Clean Air Act as a whole, the court held that the EPA could not enforce an order directly against a facility that was already operating under a permit, even if the permit violated the state's SIP and the PSD provisions of the Act.[124] In so holding, the court noted that "a violation is to be assessed against objective standards" such as "the source's failure to apply for a permit" or its failure to submit information requested by the state permitting authority.[125] Despite this determination, the court found that the EPA could have instituted an action immediately against the state permitting authority for issuing an invalid permit.[126]

In *Allsteel, Inc. v. United States EPA*,[127] the Court of Appeals for the Sixth Circuit indirectly addressed this issue in dicta, finding that the issue of whether the EPA could seek enforcement directly against a facility operating under a PSD permit that was improperly authorized was an open question.[128] The Court of Appeals for the Seventh Circuit noted this difference of opinion

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for non-compliance with the PSD provisions. *See* S. REP. NO. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3741.

119. 42 U.S.C. § 7413(a)(5)(B)-(C).

120. *Id.* § 7477.

121. United States v. Solar Turbines, Inc., 732 F. Supp. 535, 539 (M.D. Pa. 1989).

122. *Id.*

123. *Id.* at 538.

124. *Id.* at 539.

125. *Id.* The court noted that the EPA's action in this case amounted to a "veto" of the state permit, which was not authorized by the language of the PSD enforcement provisions. *Id.*

126. *Id.* at 540.

127. 25 F.3d 312 (6th Cir. 1994).

128. *Id.* at 315.

in *United States v. AM General Corporation*,[129] but determined that it did not need to resolve the issue as the EPA had waited too long in seeking to enforce the PSD provisions of the Act.[130] The court in *AM General* did note that "[t]he primary responsibility for the Act's enforcement at the level of the individual plant has been lodged in the states rather than in the national EPA, so it would not be surprising if Congress did not equip the EPA with a complete quiver of enforcement arrows."[131] What was clear after *AM General* was that the federal courts would not entertain an enforcement action under the terms of Section 113 if the EPA delayed seeking such enforcement until after construction or modification of a facility had begun.[132]

Despite the differing judicial views on this issue, the EPA has developed its own interpretation regarding the proper scope of its oversight and enforcement authority under Section 167.[133] The EPA has recognized that state permitting agencies are to be granted considerable discretion in making BACT determinations.[134] Accordingly, the EPA will not ordinarily "'second guess' state decisions" regarding BACT for a particular facility.[135] The EPA has also noted that, as the primary implementers of the PSD program, the "[s]tates have been largely successful . . . and EPA's involvement in interpretative and enforcement issues is limited to only a small number of cases."[136] However, the EPA has also clarified its position that the state permitting authority must give "a reasoned justification of the basis for its [BACT] decision."[137] In this manner, the "EPA acts largely as a guarantor that the state follow applicable procedures and not act arbitrarily" in making a proper BACT determination for individual PSD applicants.[138] Under its interpretation of Section 167, the EPA would have the authority to ensure that state

129. 34 F.3d 472 (7th Cir. 1994).

130. *See id.* at 475.

131. *Id.*

132. *Id.* (noting that it would be extremely inequitable to allow an EPA enforcement order or civil penalties where the facility has already received a PSD permit and completed plant modifications).

133. *See, e.g.*, Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 63 Fed. Reg. 13,795 (Mar. 23, 1998) (codified at 40 C.F.R. pt. 52); Approval and Promulgation of Implementation Plan State of Texas Prevention of Significant Deterioration, 57 Fed. Reg. 28,093 (June 24, 1992) (codified at 40 C.F.R. pt. 52).

134. Approval and Promulgation of Air Quality Implementation Plans, 63 Fed. Reg. at 13,797.

135. *Id.*

136. Approval and Promulgation of Implementation Plan State of Texas Prevention of Significant Deterioration, 57 Fed. Reg. at 28,095.

137. Joint Appendix at 282, Alaska Dep't of Envtl. Conservation v. EPA, 124 S. Ct. 983, 1001 (2004) (No. 02-658).

138. *Id.*

permitting authorities act justifiably in determining BACT for each major emitting facility.

When confronted with official agency interpretations of statutes in which Congress has delegated substantial regulatory authority to an agency, the courts have traditionally applied the test first developed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[139] However, where the agency's interpretation of a particular gap left in the statute is found in internal guidelines or memoranda that have not been subjected to the processes attendant to formal rulemaking, traditional *Chevron* analysis is not applicable.[140] Rather, such agency interpretations are "'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'"[141] The courts recognize that agencies are specialists in the field in which they regulate whereas judges typically do not have such specialized knowledge.[142]

Given the EPA's internal interpretation of its enforcement powers under the Clean Air Act and the lack of case law on the issue, the United States Supreme Court granted certiorari in *Alaska Department of Conservation v. EPA* to determine the proper scope of EPA enforcement authority, particularly with respect to ensuring that state permitting authorities act reasonably in determining BACT.

IV. INSTANT DECISION

In *Alaska Department of Environmental Conservation v. EPA*,[143] the United States Supreme Court clarified the respective roles of the states and the EPA in implementing and enforcing the provisions of the PSD program.[144] The issue the Court addressed was "whether EPA's oversight role,

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139. 467 U.S. 837 (1984). Under this test, the court first asks whether Congress has specifically addressed the question at issue in the case. *Id.* at 842. If so, the court will apply the Congressional mandate to the particular issue in dispute. *Id.* at 842-43. If Congress has not specifically spoken to the issue, leaving a gap to be filled by the regulatory agency, the "the court does not simply impose its own construction on the statute" but looks at "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

140. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (ruling that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law[,] do not warrant *Chevron*-style deference").

141. *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). *Accord* Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003) (noting that "[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect").

142. *See* Bragdon v. Abbott, 524 U.S. 624, 642 (2004).

143. 124 S. Ct. 983 (2004).

144. *Id.* at 1002.

described by Congress in [Sections] 113(a)(5) and 167, extends to ensuring that a state permitting authority's BACT determination is reasonable in light of the statutory guides."[145] In an opinion written by Justice Ginsburg,[146] a majority of the Court held that the "EPA has supervisory authority over the reasonableness of state permitting authorities' BACT determinations and may issue a stop construction order, under [Sections] 113(a)(5) and 167, if a BACT selection is not reasonable."[147]

A. The Majority Opinion

The Court began its discussion by addressing the jurisdictional claim raised by the EPA.[148] The Court agreed with the Court of Appeals for the Ninth Circuit, finding that the EPA's orders to the State and Cominco were "final agency actions" subject to review under the test enunciated in *Bennett v. Spear*.[149] Because the EPA had stated its final position in the orders and the orders created legal obligations for Cominco in that they prohibited construction at the mine, the Court determined that it had proper jurisdiction to hear the claim.[150]

Next, the Court analyzed the requirements of the statutory PSD provisions and the enforcement mechanisms granted to the EPA therein.[151] The Court first found that, according to the language of Section 169(3), the State was the authority initially responsible for determining BACT for Cominco's proposed generator.[152] However, the Court also noted that the EPA "may issue an order to stop a facility's construction if a PSD permit contains no BACT designation."[153] Left with the question of what the Act requires in cases where the permit contains a BACT designation that the EPA believes to be unreasonable, the Court found that the EPA's construction of the BACT requirements and its interpretation of the proper scope of its enforcement authority in relation to these requirements were appropriate.[154]

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145. *Id.* at 999 (citation omitted).

146. Justices Stevens, O'Connor, Souter, and Breyer joined the majority opinion.

147. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1009.

148. *See supra* notes 59-60 and accompanying text. The EPA raised the same claim that it had raised before the Court of Appeals, namely that the court lacked subject matter jurisdiction because the orders issued to the State were not "final agency actions" as required by 42 U.S.C. § 7607(b)(1). *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 998.

149. *Id.* at 998-99 (citing Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). *See supra* note 60 and accompanying text.

150. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 998.

151. *Id.* at 999.

152. *Id*; *see supra* note 112 and accompanying text.

153. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 999-1000.

154. *Id.* at 1000.

The EPA had argued that the proper interpretation of the BACT provisions required the state permitting authority to make "not simply *a* BACT designation, but a determination of BACT faithful to the statute's definition."[155] In this manner, the discretion accorded to state permitting authorities is constrained by the language of the Act, as it only grants the "authority to make *reasonable* BACT determinations."[156] From this interpretation, the EPA argued that Sections 113(a)(5) and 167 gave it the authority "to check a state agency's unreasonably lax BACT designation."[157]

In analyzing the arguments advanced by the EPA, the Court noted that the EPA's interpretation of the PSD provisions and its enforcement role therein were consistent with prior interpretations found "in interpretive guides the Agency has several times published."[158] Because these interpretations were published in internal guidance memoranda and not subjected to formal rulemaking requirements, the Court found that such interpretations could not be given dispositive effect under *Chevron*.[159] However, the Court determined that even if such interpretations are found in internal memoranda or agency manuals, if they are credible, these interpretations "'nevertheless warrant respect.'"[160] As such, the Court decided that the EPA's interpretation of both the BACT requirements of the PSD program and the proper scope of its enforcement authority under the Act were entitled to some respect.[161]

The Court next addressed the three primary opposing arguments advanced by the State.[162] First, the State argued that the plain language of Section 169(3)[163] gave it sole discretion to designate BACT for a particular facility and that the EPA's sole oversight and enforcement role was to ensure that the State make *a* BACT designation.[164] The Court rejected this argument, stating that Congress did not intend to give state permitting authorities unfettered discretion in making BACT determinations.[165] The Court noted that the EPA's interpretation of the statute did not undercut the states' ability to make initial BACT designations, as the "EPA claim[ed] no prerogative to designate the correct BACT . . . [and] assert[ed] only the authority to guard against

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1001.
159. *Id.* (citing Christiensen v. Harris County, 529 U.S. 576, 587 (2000)).
160. *Id.* (quoting Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003)).
161. *Id.*
162. *See id.* at 1001-06.
163. *See supra* note 112 and accompanying text.
164. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1001-02.
165. *Id.* at 1002 ("[T]he fact that the relevant statutory guides . . . may not yield a single, objectively correct BACT determination surely does not signify that there can be no *unreasonable* determinations.") *Id.* (citation omitted).

unreasonable designations."[166] Furthermore, the Court found that Congress had "expressly endorsed an expansive surveillance role for EPA" in Sections 113(a)(5) and 167.[167]

Second, the State argued that if Congress intended to give the EPA the authority to enforce the provisions of the Clean Air Act, it would have done so in unambiguous terms.[168] The Court rejected this argument, determining that the State had misunderstood the "difference between a statutory *requirement* and a statutory *authorization*."[169] The Court found that Congress intended to *require* EPA approval only in certain limited circumstances, but that this did not undercut Congress's *authorization* of EPA oversight and enforcement in ensuring that BACT designations are reasonably made by state permitting authorities.[170]

Third, the State argued that even if the EPA's interpretation was correct, the proper forum for enforcement was through state, not federal, administrative review boards and courts.[171] The State expressed concern that if the EPA's interpretation was correct, a BACT determination made by the state permitting authority could be invalidated by the EPA at any time, even after a permit had been issued and construction begun.[172] In response, the Court first noted that "[i]t would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court."[173] Moreover, the Court found that the enforcement provisions of the PSD program did not discuss or require recourse to state administrative or judicial forums by the EPA in taking corrective action under the statute.[174]

The Court also determined that the State's practical concerns were unfounded as federal courts would have to undertake the same inquiry as state

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166. *Id.* at 1002. The Court also noted that the EPA's interpretation of the statute gave the state permitting authorities "considerable leeway" in making BACT designations, as the EPA specifically disclaimed any "intention to 'second guess' state decisions." *Id.* at 1003 (quoting Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 63 Fed. Reg. 13,795, 13,797 (Mar. 23, 1998) (codified at 40 C.F.R. pt. 52)).

167. *Id.* at 1002-03.

168. *Id.* at 1003. Fundamentally, the State argued that "[h]ad Congress intended EPA superintendence of BACT determinations, . . . Congress would have said so expressly by mandating Agency approval of all, not merely some, BACT determinations." *Id.*

169. *Id.* (citation omitted).

170. *Id.* "Sections 113(a)(5) and 167 sensibly do not require EPA approval of all state BACT determinations, they simply authorize EPA to act in the unusual case in which a state permitting authority has determined BACT arbitrarily." *Id.*

171. *Id.* at 1003-04. The State suggested that state forums were appropriate to ensure an adequate factual record, put the burden of persuasion on the EPA when making a challenge, and promote certainty in the final determination of the issue. *Id.*

172. *Id.* at 1004.

173. *Id.*

174. *Id.* (citing 42 U.S.C. §§ 7413(a)(5), 7477 (2000)).

courts in determining whether the state's BACT designation was reasonable in light of the surrounding circumstances.[175] In response to the State's concern that federal enforcement of BACT designations would allow EPA invalidation after construction had begun, the Court found that in the one instance where the EPA attempted such a tardy invalidation, its enforcement proceeding was dismissed.[176] The Court also noted that the EPA itself recognized the necessity of acting in a timely fashion and acted in accordance with this understanding in the case at hand.[177]

Having determined that the EPA's interpretation of the PSD program was correct, the Court next turned to the question of whether the EPA had properly exercised its enforcement authority in the instant case.[178] The Court applied the standard of judicial review found in the Administrative Procedure Act,[179] which requires the Court to decide "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[180] Applying this standard, the Court held that the EPA had not acted arbitrarily in issuing its orders because the State made an unreasonable and erroneous BACT designation by issuing the PSD permit to Cominco.[181]

The Court primarily focused on the fact that the State had initially designated Selective Catalyst Reduction ("SCR") as BACT for the Cominco generator using the top-down approach suggested by the EPA but then changed its BACT determination without a factual basis for the modification.[182] The Court was not persuaded by any of the arguments advanced by the State and Cominco concerning the economic or technical infeasibility of applying SCR to the generator because Cominco had never submitted any information detailing why this technology was infeasible.[183] As the Court noted, the State had initially determined that SCR was well within the range

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175. *Id.* at 1004-05. In making this determination, the Court held:

> [I]n either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with EPA and the underlying question a reviewing court resolves remains the same: Whether the state agency's BACT determination was reasonable, in light of the statutory guides and the state administrative record.

Id. at 1005.

176. *Id.* at 1005-06 (citing United States v. AM Gen. Corp., 34 F.3d 472, 475 (7th Cir. 1994)).

177. *Id.* at 1006.

178. *Id.*

179. 5 U.S.C. § 706(2)(A) (2000).

180. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1006 (quoting 5 U.S.C. § 706(2)(A) (2000)). The Court applied this standard because the Clean Air Act does not specify a judicial review standard applicable to the instant dispute. *Id.*

181. *Id.* at 1006-07.

182. *Id.* at 1007-08.

183. *Id.*

that "[the State] and EPA considers economically feasible."[184] The Court found that no subsequent factual developments called this determination into question.[185] However, the Court carefully emphasized that the State was free to revisit the BACT determination and allow the less stringent Low NOx technology if it could accurately justify why SCR was not BACT for the Cominco generator.[186]

B. The Dissent

Writing for the dissent, Justice Kennedy[187] framed the issue as one in which the EPA "sought to overturn the State's decision, not by the process of judicial review, but by administrative fiat."[188] From this perspective, the dissenting Justices criticized the majority's holding as inconsistent with the relevant provisions of the Clean Air Act, reasoned principles of administrative law, and established principles of federalism.[189] The dissent argued that the EPA exceeded its authority by "vetoing" the State's designation of BACT for the Cominco generator.[190]

First, Justice Kennedy focused on the plain language of the PSD provisions, finding that the state permitting authority was the entity designated by Congress to make BACT determinations.[191] According to the dissent, "[t]o 'determine' is not simply to make an initial recommendation that can later be overturned. It is 'to decide or settle . . . conclusively and authoritatively.'"[192] Applying this language, the dissenting Justices would hold that where a state permitting authority has complied with the preconstruction requirements of the Act, the EPA does not have a proper supervisory role over the state's discretionary decision.[193] Moreover, the dissent found that the State had complied with all relevant statutory mandates as there was no allegation that Low NOx technology would violate any of the PSD requirements.[194]

Justice Kennedy criticized the majority's support of the EPA's fundamental distrust of state agencies that, according to the legislative history of the Clean Air Act, are the authorities primarily responsible for controlling air

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184. *Id.* at 1008.

185. *Id.*

186. *Id.* at 1009.

187. Chief Justice Rehnquist and Justices Scalia and Thomas joined in the dissenting opinion.

188. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1010 (Kennedy, J., dissenting).

189. *Id.* (Kennedy, J., dissenting).

190. *Id.* at 1016 (Kennedy, J., dissenting).

191. *Id.* (Kennedy, J., dissenting) (citing 42 U.S.C. § 7479(3) (2000)).

192. *Id.* (Kennedy, J., dissenting) (quoting AMERICAN HERITAGE DICTIONARY 495 (4th ed. 2000)) (alteration in original).

193. *Id.* at 1011 (Kennedy, J., dissenting).

194. *Id.* (Kennedy, J., dissenting).

pollution.[195] He stated that "Congress made the overriding judgment that States are more responsive to local conditions and can strike the right balance between preserving environmental quality and advancing competing objectives."[196] Justice Kennedy also suggested that there was no reason for the EPA to distrust state agencies' willingness to implement the requirements of the PSD program, as there is an "established presumption that States act in good faith" in complying with federal mandates such as the Clean Air Act.[197] Thus, he argued, there was no basis for the majority's purported concern about a "race to the bottom" in which states would compete for more lenient emissions rates absent extensive EPA oversight.[198]

Second, Justice Kennedy criticized the majority's holding as inconsistent with the statutory guidelines regarding proper judicial review of decisions made by the state permitting agencies.[199] The dissent argued that the proper forum for such review was through state administrative review boards and state courts.[200] Justice Kennedy also noted that the statute requires states to develop administrative processes in their SIPs for "interested persons," including the EPA, to comment on proposed BACT designations.[201] By allowing the EPA to bypass the state review forum, the majority shifted the burden of persuasion to the states.[202] Justice Kennedy argued that this was inconsistent with Congress's intent to structure the PSD program with the states as the primary entities charged with implementing the statutory requirements.[203] According to Justice Kennedy, "[t]his end run around the State's process is sure to undermine it."[204]

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195. *Id.* at 1012 (Kennedy, J., dissenting).

196. *Id.* (Kennedy, J., dissenting).

197. *Id.* (Kennedy, J., dissenting) (citing Alden v. Maine, 527 U.S. 706, 755 (1999)).

198. *Id.* (Kennedy, J., dissenting).

199. *Id.* at 1013 (Kennedy, J., dissenting).

200. *Id.* at 1013-14 (Kennedy, J., dissenting). As articulated by the dissent, "EPA, the federal agency charged only with the [Clean Air Act's] implementation, has no roving commission to ferret out arbitrary and capricious conduct by state agencies . . . . That task is left to state courts." *Id.* at 1013 (Kennedy, J., dissenting) (citing Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 276 (1997)).

201. *Id.* at 1013 (Kennedy, J., dissenting). *See also* 42 U.S.C. § 7475(a)(2) (2000) (requiring, as part of the state agency's preconstruction review, a notice and comment period in which all "interested persons" are entitled to express relevant concerns).

202. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1014 (Kennedy, J., dissenting).

203. *Id.* at 1015 (Kennedy, J., dissenting).

204. *Id.* (Kennedy, J., dissenting). Justice Kennedy also agreed with the State respecting their concern that allowing the EPA to intervene and veto the state permitting authority's BACT designation, while bypassing the state review forum, created the possibility that the EPA could attempt to invalidate a permit at any point in time, even years after the permit was initially issued and the facility had completed construction. *Id.* at 1016 (Kennedy, J., dissenting). According to Kennedy, this was a

Finally, Justice Kennedy critiqued the majority's holding as fundamentally inconsistent with established principles of federalism.[205] The dissent first expressed concern that, under the majority's holding, the EPA could intervene in any dispute commenced in state court[206] where it disagreed with the state court's final decision regarding proper BACT determinations.[207] Accordingly, "decisions by state courts would be subject to being overturned, not just by any agency, but by an agency established by a different sovereign."[208] The dissent argued that such a result is fundamentally inconsistent with notions of federalism.[209] According to Justice Kennedy, "[i]f, by some course of reasoning, state courts must live with the insult that their judgments can be revised by a federal agency, the Court should at least insist upon a clear instruction from Congress."[210] The dissent found that such a clear instruction did not exist in the explicit language and legislative history of the Clean Air Act.[211]

V. COMMENT

The United States Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA* serves to clarify the EPA's role in enforcing the PSD requirements of the Clean Air Act. As acknowledged by the EPA itself, so long as the state does not act unreasonably in determining BACT, the EPA must respect the state's decision regarding whether a particular construction permit should issue under the PSD permitting requirements.[212] However, where the state has acted arbitrarily or erroneously in determining BACT, the EPA does have the authority to enforce the mandates of the PSD program to ensure that attainment areas continue to exceed national ambient air quality standards. Were the EPA not given this authority, the states would be allowed to skirt the requirements of the Act, eventually causing deterioration of the ambient air quality in attainment areas. This would entirely frustrate the purposes underlying the Clean Air Act.

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particularly valid concern as "'the United States are not bound by any statute of limitations.'" *Id.* (Kennedy, J., dissenting) (quoting United States v. Beebe, 127 U.S. 338, 344 (1888)).

205. *Id.* at 1015 (Kennedy, J., dissenting).

206. As noted above, the dissent read the public notice and comment provisions of 42 U.S.C. § 7475(a)(2) to require states to establish administrative and judicial forums where disputes regarding BACT designations may be heard. *See id.* at 1013 (Kennedy, J., dissenting).

207. *Id.* at 1015 (Kennedy, J., dissenting).

208. *Id.* (Kennedy, J., dissenting).

209. *Id.* (Kennedy, J., dissenting).

210. *Id.* (Kennedy, J., dissenting).

211. *Id.* (Kennedy, J., dissenting).

212. *See id.* at 1002 ("EPA claims no prerogative to designate the correct BACT; the Agency asserts only the authority to guard against unreasonable designations.").

First, it is important to note that the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA* is essentially a manifestation of the "hard look" doctrine[213] initially endorsed by the Court in *Citizens to Preserve Overton Park v. Volpe*.[214] In *Overton Park*, the Court found that, under the Administrative Procedure Act, courts reviewing an agency decision must take a "hard look" at the underlying facts supporting the agency's decision to determine whether the agency acted reasonably and in accordance with statutory mandates.[215] Although *Overton Park* was primarily concerned with the proper scope of judicial review of an underlying agency decision, the rationale employed by the Court is applicable to the holding in *Alaska Department of Environmental Conservation* as well. With respect to EPA oversight and enforcement of the PSD provisions, the Court made it clear that the EPA must take a "hard look" at the state permitting authority's BACT designation to ensure that the state has acted reasonably as required by the terms of the Act.[216] Through this "hard look" review, the EPA can ensure that the states fulfill their statutory obligations under the PSD permitting program in a manner that accomplishes Congress's goals of protecting the quality of air in attainment areas.

Second, the Court's holding in *Alaska Department of Environmental Conservation* accurately resolves the specific problem that Congress was trying to alleviate in implementing the PSD program. Although the states are given the primary responsibility for implementing the PSD program,[217] Congress surely did not intend to give the states unfettered discretion in choosing lax technological controls. If Congress intended to give the states such control, it would not have explicitly mandated that the *best* available control technology be implemented at newly constructed or modified facilities.

The underlying facts of the instant case accurately depict the anomaly that would result if the states were given unfettered discretion in determining BACT and the EPA was not allowed to oversee and enforce the PSD program. Although it is not entirely clear why the State backed away from its initial determination that SCR was BACT for the Cominco generator, it is apparent that neither the State nor Cominco gave a reasoned justification for refusing to use this technology. Even after the EPA gave Cominco the chance

213. The phrase "hard look" review was originally coined by Judge Harold Leventhal in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). In *Greater Boston Television*, Judge Leventhal first suggested that the function of a reviewing court was "to intervene not merely in case of procedural inadequacies . . . but more broadly if the court becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Id.* (footnote omitted).

214. 401 U.S. 402, 415 (1971), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

215. *Id.* (citing 5 U.S.C. § 706 (1964)).

216. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1009.

217. *See* 42 U.S.C. § 7479(3) (2000).

to submit documentation detailing their particular economic and technological needs, it tendered no documentation and changed its justification for Low NOx as BACT on three different occasions. Contrary to the dissent's position, the EPA never suggested that it was trying to "unilaterally veto" the State's BACT determination. Rather, it was simply trying to get a reasonable explanation from the State as to why Cominco could not use or afford the more stringent technology. In fact, the EPA acknowledged that if the State had submitted documentation or other support for its position that Low NOx was BACT for the generator, it would have allowed the State to proceed with the PSD permit without further interference.[218]

Congress clearly had such concerns in mind as it provided the EPA with specific authority to oversee[219] and enforce[220] the PSD requirements. Congress included Sections 113(a)(5) and 177 expressly to guarantee that the EPA had a role in ensuring that the states comply with the requirements of the Act. Although the dissent argued that the notice and comment requirements of Section 165(a)(2) require state courts and administrative boards to be the exclusive arena for enforcement of the PSD program, the plain language of this provision clearly does not suggest such a result. Furthermore, as the majority pointed out, it would be odd for Congress to relegate the EPA to the state courts as the exclusive vehicle to enforce a federal statute.[221] It would be even more bizarre in this case, where the statute was implemented to solve an overarching national concern with ambient air quality and the public health and welfare.

Third, and similar to other provisions of the Clean Air Act, Congress created a structure of cooperative federalism within the PSD program. Congress's goal was to prevent the "race to the bottom" that would result if states were given unwavering discretion in deciding the terms under which a PSD permit should issue.[222] The concern expressed by proponents of the "race to the bottom" theory is that, absent uniform national standards, states would engage in a race to lure lucrative industries within their borders, thereby sacrificing environmental quality for economic benefits.[223] Although there is

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218. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1003.

219. This oversight authority is specifically granted through the notice and comment provisions of 42 U.S.C. § 7475(a)(2) (2000), which requires an update to the EPA Administrator any time action is taken with respect to a PSD permit.

220. *See* 42 U.S.C. § 7477 (2000).

221. *See Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1004.

222. *See, e.g.*, 42 U.S.C. § 7471 (2000); Ala. Power Co. v. Costle, 636 F.2d 323, 349 (D.C. Cir. 1979); JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 85 (2003) ("A driving force behind the [Act] was the historic failure of state programs to control air quality and the consequent fear that, absent national standards, states might be willing to sacrifice air quality for economic growth.").

223. *See* HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 17-18 (1996). Specifically with respect to the PSD

some debate about whether a "race to the bottom" would actually occur absent uniform standards, it is clear that Congress had these fears in mind when implementing the Clean Air Act.[224] Otherwise, Congress would have either created a statutory system under which the EPA had no federal oversight or enforcement authority or not regulated ambient air quality at all.[225] Thus, the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA* was very much in accordance with Congress's intent in enacting the PSD provisions of the Clean Air Act.

VI. CONCLUSION

In *Alaska Department of Environmental Conservation v. EPA*, the United States Supreme Court held that the EPA is entitled to review the reasonableness of state permitting authorities' BACT determinations under the PSD program of the Clean Air Act.[226] The Court further held that the EPA has the authority to issue stop construction orders if it reasonably believes that a BACT designation is erroneous or unreasonable.[227] In so holding, the Court not only clarified the scope of the EPA's enforcement authority under the Act, but it also ensured that Congress's intent underlying the statutory PSD provisions was effectuated. In an effort to prevent the "race to the bottom" feared by Congress, the Supreme Court in *Alaska Department of Environmental Conservation* reached the correct conclusion.

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permitting program, if the EPA had no enforcement ability, the states would not have an adequate incentive to develop new technologies to prevent air pollution concerns. This would decrease motivation for innovation and help to encourage the "race to the bottom."

224. SALZMAN & THOMPSON, *supra* note 222, at 85; *see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, *in* FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY 169, 169-70 (Richard L. Revesz ed., 1997) (critiquing the "race-to-the-bottom" theory, but recognizing that it is a preeminent justification for federal environmental regulation).

225. *See Ala. Power Co.*, 636 F.2d at 346.

226. *Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1000.

227. *Id.*