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CASENOTE
SUPREME COURT DECISION ALLOWS THE EPA TO FLEX ITS MUSCLE AND TRUMP STATE PERMITTING AUTHORITIES

Alaska Department of Environmental Conservation v. Environmental Protection Agency¹

I. INTRODUCTION

The Supreme Court recently held that the Environmental Protection Agency (EPA) may overrule a state’s issuance of a construction permit to a polluting entity if it determines that the state acted unreasonably in issuing the permit.² While the Court’s holding was based on facts specific to the case, its analysis indicates that the Court may be moving toward granting administrative agencies such as the EPA considerably more power and deference than they were previously afforded. Specifically, the decision ignores traditional limitations on judicial deference to agency interpretations of statutes, as well as fundamental principles of state sovereignty under the Tenth Amendment. This note examines the legal bases for the Court’s decision and considers its possible implications on the future of federal and state cooperation under the Clean Air Act and other statutes that divide responsibilities between the states and the federal government.

II. FACTS AND HOLDING

Teck Cominco Alaska, Inc. (Cominco) is a mining company that operates a zinc concentrate mine in the northwest corner of Alaska, called the “Red Dog Mine.”³ This mine is the largest private employer in the region, and contributes a quarter of the area’s total wages.⁴ The Red Dog Mine is classified as a “major emitting facility” under the Clean Air Act (CAA)⁵ and the parallel state regulations.⁶ As such, prior to constructing the mine, Cominco had to acquire a permit from the Alaska Department of Environmental Conservation (ADEC).⁷ In 1988, Cominco obtained a permit authorizing it to operate five 5,000 kilowatt generators, two of which were to be operated only in a standby capacity.⁸

The CAA and Alaska’s parallel state regulations also require the obtainment of a permit prior to any major pollution-increasing modifications to a facility.⁹ It is this requirement that is relevant to the present case. In 1996, Cominco entered into a venture, with funding from the State of Alaska, which would increase its zinc production by 40 percent.¹⁰ Because this project required the use of additional generators, and constituted a

¹ 124 S. Ct. 983 (2004) [hereinafter ADEC].
² Id. See generally infra Part IV.
³ Id. at 994.
⁴ Id.
⁶ ADEC, 124 S. Ct. at 994. See also 42 U.S.C. § 7475 (requiring the obtainment of a permit prior to constructing or modifying any facility emitting more than 250 tons of nitrogen oxides per year); 18 Alaska Admin. Code § 50.300(c)(1) (2003) (Alaska’s State Implementation Plan (SIP), containing an analogous requirement).
⁷ ADEC, 124 S. Ct. at 994.
⁸ Id.
¹⁰ ADEC, 124 S. Ct. at 994.
major pollution-increasing modification under the CAA and the parallel state regulations, Cominco sought to obtain a permit from ADEC.\textsuperscript{11}

As part of the permitting process, the CAA requires state environmental agencies such as ADEC to determine the “best available control technology” (BACT) relative to the polluting source.\textsuperscript{12} In turn, the entity seeking the permit must agree to employ this pollution control before the state agency will authorize construction or modification of the facility.\textsuperscript{13} In 1999, ADEC proposed that a technology known as selective catalytic reduction (SCR) was BACT for Cominco’s expansion project.\textsuperscript{14} This control would reduce nitrogen oxide emissions from the generator(s) it was applied to by 90 percent.\textsuperscript{15}

In response to ADEC’s proposal, Cominco submitted an amended application proposing a different control technology—Low NOx—as BACT, and further requesting permission to add an additional (seventh) generator.\textsuperscript{16} Low NOx achieves only a 30 percent reduction in nitrogen oxide emissions.\textsuperscript{17} ADEC initially determined that SCR was BACT using the EPA’s procedure, which states that the most effective pollution control must be used, unless the applicant demonstrates that it is infeasible due to technical, energy, environmental, or economic considerations.\textsuperscript{18} At that time, ADEC determined it was technologically, environmentally, and economically feasible for Cominco to use SCR on the two generators that would be subject to the BACT requirements.\textsuperscript{19}

In response to this, Cominco proposed an alternative, which would require it to fit all seven of its generators with the Low NOx controls.\textsuperscript{20} By doing this rather than fitting only two of the generators with SCR, Cominco urged, it would decrease its total net emissions of nitrogen oxides by 396 tons per year.\textsuperscript{21} This calculation rested on the assumption that at least one generator would typically be kept on standby mode; if not, the alternative would actually increase emissions.\textsuperscript{22}

Convinced that Cominco’s proposal would achieve a reduction in emissions equal to or greater than applying SCR to only two of the generators, ADEC issued a draft permit on May 4, 1999, allowing construction of the additional generator, and employing Low NOx as BACT.\textsuperscript{23} However, in July of 1999, the National Parks Service (NPS) submitted comments to ADEC objecting to Cominco’s scheme of offsetting new emissions from its expansion project by installing pollution controls on generators already in use, which were not subject to

\begin{itemize}
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id. at 990. See also 42 U.S.C. § 7475(a)(4) (establishing the BACT requirement).
\item \textsuperscript{13} 42 U.S.C. § 7475(a)(5).
\item \textsuperscript{14} ADEC, 124 S. Ct. at 994. SCR involves injecting “ammonia or urea into the exhaust before the exhaust enters a catalyst bed made with vanadium, titanium, or platinum.” Reduction of nitrogen oxide emissions takes place “when the flue gas passes over the catalyst bed where the NOx and ammonia combine to become nitrogen, oxygen, and water . . . ” Id. (citation omitted).
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id. Low NOx employs changes to the generator, which “improve fuel atomization and modify the combustion space to enhancing the mixing of air and fuel.” Id. (citation omitted).
\item \textsuperscript{17} Id.
\item \textsuperscript{18} See id. at 994-95 (citing the EPA’s New Source Review Manual B-2 (Draft Oct. 1990). This method is referred to as the “top-down” method, in which the state agency ranks all available control technologies in descending order relative to their effectiveness, and then picks as BACT the highest ranked control that is considered “achievable” after considering technical, energy, environmental, and economic factors.
\item \textsuperscript{19} Id. at 995. The two affected generators are MG-5 (which was being changed from standby status to active use) and MG-17 (the seventh generator, which was to be newly constructed). See id. at 994.
\item \textsuperscript{20} Id. at 996.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. at 994.
\end{itemize}
BACT requirements.\textsuperscript{24} NPS also argued that the proposed permit removed operating restrictions on four of Cominco's existing generators, and as such, those generators should be subject to BACT as well.\textsuperscript{25}

Acting in its capacity as enforcer of the CAA, EPA agreed with NPS and informed ADEC that it could not offset new emissions by imposing controls on Cominco's other generators, which were not subject to BACT.\textsuperscript{26} In response to the EPA comments, ADEC issued a second draft permit, which again listed Low NOx as BACT.\textsuperscript{27} In so doing, ADEC abandoned the emissions offsetting argument, and agreed with NPS and EPA that generators not subject to the permit could not be considered in determining BACT for those that were.\textsuperscript{28} However, it argued (contrary to its May 1999 statements) that SCR would impose "a disproportionate cost" on Cominco.\textsuperscript{29} ADEC further stated that if SCR was required for a rural Alaska utility, prices would increase by 20 percent, and though Cominco had provided no economic data to establish SCR's effect on its own costs, ADEC concluded that they would be "significantly higher" than with other potential BACTs, such as Low NOx.\textsuperscript{30}

EPA was unconvinced, and suggested that ADEC provide an economic analysis of the effect of installing and operating SCR at the Cominco mine.\textsuperscript{31} Cominco, however, refused to submit financial data, stating that such an economic analysis was unnecessary, and that it had concerns about confidentiality.\textsuperscript{32} Nonetheless, in December of 1999, ADEC issued a final permit to Cominco, listing Low NOx as BACT. As justification for its decision, ADEC declared that using SCR as BACT would have a negative effect on Cominco's "unique and continuing impact on the economic diversity of the region" and on its "world competitiveness."\textsuperscript{33}

EPA responded by issuing an order to ADEC under Sections 113(a)(5) and 167 of the CAA\textsuperscript{34} prohibiting issuance of a permit to Cominco unless ADEC provided satisfactory documentary evidence as to why SCR was not chosen as BACT.\textsuperscript{35} Two months later, EPA issued a second order, this time to Cominco, prohibiting it from beginning "construction or modification activities at the Red Dog mine."\textsuperscript{36} In response to these orders, ADEC and Cominco petitioned the United States Court of Appeals for the Ninth Circuit for judicial review of EPA's actions.\textsuperscript{37} After denying EPA's motion to dismiss for lack of subject-matter jurisdiction, the Ninth Circuit decided the case on the merits in favor of EPA on July 30, 2002, holding that it had acted within its authority under Sections 113(a)(5) and 167.\textsuperscript{38} The Court stated that Cominco did not

\textsuperscript{24} Id. at 995.
\textsuperscript{25} Id. at 996.
\textsuperscript{26} Id. at 996.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. (citation omitted).
\textsuperscript{31} Id at 996-97.
\textsuperscript{32} Id. at 997.
\textsuperscript{33} Id. (citation omitted).
\textsuperscript{34} 42 U.S.C. §§ 7413(a)(5), 7477.
\textsuperscript{35} ADEC, 124 S. Ct. at 997. See also infra nn. 64-69 and accompanying text (discussing EPA's authority under §§ 113(a)(5) and 167 of the CAA).
\textsuperscript{36} ADEC, 124 S. Ct. at 997. EPA later withdrew this order and allowed ADEC to conduct limited construction in the summer of 2000. Id.
\textsuperscript{37} Id at 998.
\textsuperscript{38} Id. See Alaska v. U.S. Envl. Protection Agency, 298 F.3d 814, 820-823 (9th Cir. 2003) (citing Alaska v. U.S. Envl. Protection Agency, 244 F.3d 748, 750-751 (9th Cir. 2001) (The preliminary motion to dismiss for lack of subject matter jurisdiction was denied because the Court determined that EPA's order was a final administrative action, subject to judicial review)).
"demonstrate that SCR was economically infeasible," and that "ADEC failed to provide a reasoned justification for its elimination of SCR as a control option."39

The United States Supreme Court granted certiorari on February 24, 200340 to determine "the scope of EPA's authority under §§ 113(a)(5) and 167" of the CAA.41 In a 5-4 decision, the Supreme Court held that EPA does have certain supervisory powers over state permitting agencies such as ADEC, and may issue orders to overrule state-issued construction permits if it finds that the state's BACT selection is unreasonable.42 Specifically, the Court held that EPA was not arbitrary or capricious in finding that ADEC's BACT determination lacked evidentiary support, and the Court of Appeals' judgment was affirmed.43

III. LEGAL BACKGROUND

A. History of the Clean Air Act

The Clean Air Act was passed on December 17, 1963 "[t]o improve, strengthen, and accelerate programs for the prevention and abatement of air pollution."44 In effect, the CAA expanded the Federal Government's resources devoted to air quality research, enabled it to financially support state air pollution reduction efforts, and granted it authority to intervene directly to prevent pollution in certain circumstances.45 Four years later, Congress increased the Federal Government's role in enforcing the CAA through the Air Quality Act of 1967.46 The States, however, retained most of the control over implementing air quality improvement measures, and moved relatively slowly to do so.47

In response to the States' lackadaisical implementation of the previous Acts, Congress decided to force the States to take measures to reduce air pollution through the Clean Air Act Amendments of 1970.48 While the Amendments purportedly created a "partnership" between the States and the Federal Government in reducing air pollution, effectually, the Amendments created an ultimatum for the States to meet certain air quality specifications within a given time period.49

The Amendments required the Administrator of the EPA to create "national ambient air quality standards" (NAAQS) within 30 days, and further required the states to create and submit plans50 for

39 ADEC, 124 S. Ct. at 998 (citing Alaska, 298 F.3d at 823).
41 ADEC, 124 S. Ct. at 998. Meanwhile, on July 16, 2003, ADEC issued another permit to Cominco, allowing for construction of the new generator, and listing SCR as BACT, under the proviso that SCR would cease to be BACT if the U.S. Supreme Court decided this case in favor of ADEC. Id. at 997.
42 Id. at 1009.
43 Id.
45 Where the pollution originated in one state but endangered citizens of another state, the Attorney General could sue the polluter on behalf of the U.S. However, for air pollution that was solely intrastate, the Federal Government could only aid in judicial proceedings and the Attorney General could only bring suit upon the request of the Governor of that state. Train v. Natl. Resources Defense Council, 421 U.S. 60, 63-64 (1975).
46 Pub. L. No. 90-148, 81 Stat. 485, 485 (1967) ("AN ACT To amend the Clean Air Act to authorize planning grants to air pollution control agencies; expand research provisions relating to fuels and vehicles; provide for interstate air pollution control agencies or commissions; authorize the establishment of air quality standards, and for other purposes.").
47 Train, 421 U.S. at 64.
49 Id.; Train, 421 U.S. at 64-65.
50 Referred to as State Implementation Plans (SIPs).
implementing these NAAQS within nine months. In compliance with this statutory directive, the EPA first published NAAQS in 1971. In 1985, EPA issued the NAAQS for nitrogen dioxide—the pollutant at issue in ADEC. Likewise, state environmental agencies began publishing complimentary ambient air quality standards during this period.

Though EPA required that states maintain air quality at a certain level, there was initially no requirement that states with pollution levels already in compliance with NAAQS had to maintain those levels. In response to this (as well as a court order), EPA set forth regulations requiring all SIPs to have permitting procedures for the creation of new polluting sources in areas where pollution levels were lower than the NAAQS required (so-called “attainment areas”). These regulations, roughly encoded by Congress through its 1977 amendments to the CAA, call for states to require a Prevention of Significant Deterioration (PSD) Permit prior to the construction or modification of any “major emitting facility” within the designated area. A “major emitting facility” included any source emitting more than 250 tons of any air pollutant (such as nitrogen oxide) per year.

Specifically, the CAA provides that the owner or operator of such a facility will only be granted a permit if he or she can show that the facility will not create air pollution that is greater than: (1) the “maximum allowable increase . . . or concentration” for any area under the PSD plan more than once a year, (2) the NAAQS in any attainment area affected, or (3) any other emission standard under the CAA. In addition to these requirements, the CAA also requires that a polluting entity use the “best available control technology” (BACT) for the particular pollutant involved with the new or modified source. BACT is defined as:

an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the CAA] emitted from or which results from any major emitting facility,

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53 Id.; 40 C.F.R. § 50.11 (2002), entitled “National primary and secondary ambient air quality standards for nitrogen dioxide,” states: “(a) The level of the national primary ambient air quality standard for nitrogen dioxide is 0.053 parts per million (100 micrograms per cubic meter), annual arithmetic mean concentration. (b) The level of national secondary ambient air quality standard for nitrogen dioxide is 0.053 parts per million (100 micrograms per cubic meter), annual arithmetic mean concentration.” Id.
54 See e.g. 18 Alaska Admin. Code § 50.010(5). Note that the Alaska regulation simply reiterates the federal mandate: “The standards for concentrations of contaminants in the ambient air . . . are established as follows: . . . (5) for nitrogen dioxide: annual arithmetic mean of 100 micrograms per cubic meter . . .” Id.
56 Id.; 40 C.F.R. § 52.21(a)(2) (1975) states: “(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.” Id. The permitting requirements applied to new sources in both attainment and “unclassifiable” areas (areas that cannot be classified as meeting or not meeting NAAQS on the basis of available information). ADEC, 124 S. Ct. at 992.
59 42 U.S.C. § 7479(1); See also ADEC, 124 S. Ct. at 992 (noting that any modification increasing nitrogen oxide emissions more than 40 tons per year also requires a permit). Id. (citing 40 C.F.R. § 51.166(b)(23)(i) (2002)).
60 42 U.S.C. § 7475(a)(3).
61 Id. at (a)(4).

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which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques... for control of each such pollutant.62

Further, the CAA states that the BACT must never exceed the emissions allowed by any of the other standards set forth by the EPA or through the SIPs.63

Where the State fails to require a polluting entity to utilize BACT or any other PSD directive, the EPA has two similar enforcement provisions it may use under the CAA. First, under Section 113 of the Act, if the State “is not acting in compliance with any requirement or prohibition... relating to the construction of new sources or the modification of existing sources,” the EPA may issue a stop-construction order, prohibiting any work on the facility.64 Second, under Section 167 of the Act, the EPA may take appropriate measures (such as issuing an order or injunction) “to prevent the construction or modification of a major emitting facility which does not conform to the [PSD] requirements.”65 Though these provisions seem facially almost identical, Section 113 applies only to the State and its failure to act in compliance with the CAA, while Section 167 enables the EPA to issue an order to the polluting entity itself.66

These statutory provisions not only authorize the EPA to take action, they have been interpreted to actually compel EPA action in some instances. For instance, in Save the Valley Inc. v. Ruckelshaus, the Court held that where a polluting entity exceeds what it is authorized to do under the PSD Permit, the EPA must issue a stop-construction order to prevent further activity beyond the bounds of the permit.67 Though this would seemingly give the EPA great power over state environmental agencies, the Agency has consistently conceded that the primary responsibility for enforcing the requirements of the CAA rests on the States.68 Thus, the question has been somewhat murky as to what degree of power the EPA should have in this ever-tedious balance between protecting local social and economic interests, and furthering national environmental efforts.

B. Limitations on the EPA’s Power Under the CAA

There are two major sources that define and/or limit the power of the EPA other than the various environmental statutes, such as the CAA. These are worth discussing briefly.

I. Chevron Deference

The United States Supreme Court defined the amount and type of deference that should be afforded to an administrative agency’s interpretation of an ambiguous statute in its landmark decision, Chevron USA, Inc. v.   

63 That is, any standards, such as NAAQS, promulgated under 42 U.S.C. §§ 7411 & 7412.
66 Note that Section 113 refers only to when the State does not fulfill its requirements, such as issuing permits, enforcing compliance with SIPs, etc. (regardless of whether environmental standards are met), while Section 167 focuses on the facility itself and whether it conforms with the PSD requirements.
68 See 40 C.F.R. § 52 (2002) (“... states have the primary role in administering and enforcing the various components of the PSD program. States have been largely successful in this effort, and EPA’s involvement in interpretative and enforcement issues is limited to only a small number of cases”); See also ADEC, 124 S. Ct. at 1012 (Kennedy, J. dissenting).
In *Chevron*, the Court laid out a two step process by which courts should decide this issue. First, the court must determine whether Congress has directly addressed the issue (i.e., is the statute self-explanatory?). If the statute is unambiguous, then no deference is afforded to the agency’s interpretation. If Congress has not addressed the issue, or the statute is ambiguous as to the question at hand, courts must consider “whether the agency’s answer is based on a permissible construction of the statute.” If so, the court must defer to the agency’s reasonable interpretation.

Though *Chevron* deference is clearly expansive and applies in most agency interpretations of statutes, the Court subsequently made clear that such deference does not apply to interpretations that are not subject to procedural safeguards such as judicial review. In *Christensen v. Harris County*, the Court considered whether an agency’s interpretation of a statute in the form of a letter from the Department of Labor was entitled to *Chevron* deference. The Court held that “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.” The Court has been relatively unclear in its application of what deference agency interpretations are afforded when not subject to actual *Chevron* deference. Nonetheless, prior to *ADEC*, it had consistently held that several factors, including thoroughness of an agency’s consideration of the issue, consistency in application, and the agency’s unique ability to make such determinations, must be considered before granting deference to an agency’s interpretation of a statute.

2. State Sovereignty under the Tenth Amendment

While the Supreme Court has had an infamous and somewhat conflicted history with the Tenth Amendment, its recent jurisprudence has signified a rebirth of that amendment’s guarantee of state sovereignty. In *New York v. United States*, and *Printz v. United States*, for instance, the Court struck down statutory provisions that imposed the burden of implementing a federal statute on the state governments. The Court made this clear in the following oft-quoted phrase: “… a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”

New York, the Court considered a federal statute that divided the control of low-level radioactive waste between the state and federal government. The statute created a complicated regulatory scheme by which the federal government would offer monetary assistance, among other incentives, to states that had, or chose to create, waste disposal sites within their boundaries, or entered into compacts with other states that did. The statute also created a requirement that if states with no disposal sites did not develop one by a certain date, they would be required to "take title" to the waste, thereby becoming liable for any damage caused by the radioactive waste. The Court said that this last provision violated the Tenth Amendment because it forced the states to choose between taking title to the waste and regulating according to Congress’s will. It regarded this as "coercion" rather than merely "encouragement," which the Court had historically allowed. Specifically, the Court stated that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions."

Indeed, even in Reno v. Condon, a decision upholding a federal privacy statute requiring states to "take administrative and sometimes legislative action," the Court implied that an analysis of Tenth Amendment concerns was necessary to validate the constitutionality of a statute. Nonetheless, the Supreme Court’s recent trend toward giving teeth to the Tenth Amendment has been predominantly limited to cases where Congress has "commandeered" a state or its officials in carrying out federal statutes. None of these cases make it clear how the Tenth Amendment might apply to cases where a federal agency commandeers the functions of state agencies that are acting to fulfill their duties under a federal statute, as is alleged in ADEC.

IV. INSTANT DECISION

The central issue the Supreme Court decided in this case is whether EPA should be allowed to overrule a state-issued permit if it believes that the state’s BACT determination is unreasonable. While both EPA and ADEC agreed that Sections 113(a)(5) and 167 of the CAA confer upon the EPA the duty of ensuring that state-issued construction permits contain a BACT requirement, they disagreed as to whether the CAA allows EPA to intervene when a state has included a BACT requirement, but EPA determines that it is unreasonable. EPA argued that this power is necessary to further the policies Congress set forth when it drafted the CAA. ADEC countered that to permit this would be to strip from the states a power Congress explicitly designated to them, and to allow the EPA to effectively impose on a state whatever BACT it feels is most appropriate.

85 N.Y., 505 U.S. at 150-54.
86 Id.
87 Id. at 153-54. That is, the companies that created the waste would not be liable—the states would. Id.
88 Id. at 175-76.
89 Id.
90 Id. at 162.
93 See id. at 149 (citing Printz and New York and stating that a determination that the federal government may regulate a certain subject matter does not vitiate Tenth Amendment sovereignty concerns).
95 ADEC, 124 S. Ct. at 999.
96 Id. at 999-1000.
97 Id. at 1000.
98 Id. at 1001-03.
A. EPA's Arguments

EPA's position was that the CAA requires not only a BACT determination, but one that furthers the policies Congress intended to support in enacting the statute. It argued that because the statute requires the state permitting authority to establish a BACT that results in "maximum" emissions reduction in light of "energy, environmental, and economic impacts, and other costs," states have limited discretion in determining BACT. It further interpreted Sections 113(a)(5) and 167 of the CAA to empower it to prevent states from abusing that discretion by creating unreasonably lenient BACT determinations, which might, in turn, encourage other states to lower their standards in an effort to remain as attractive to industry as less demanding states.

EPA noted that it has consistently interpreted its duties and power under the CAA, particularly as it applies to BACT determinations. It reiterated its position that it would intervene only in cases where the state permitting agency failed to give "a reasoned justification for the basis of its decision." It further argued that it was entitled to "Chevron deference" regarding agency interpretation of an ambiguous statute.

B. ADEC's Arguments

ADEC interpreted Sections 113(a)(5) and 167 and other relevant provisions of the CAA quite differently. According to ADEC, the CAA explicitly and unambiguously grants the state permitting authority exclusive power to determine the appropriate BACT. Under this interpretation, the EPA should only be allowed to exercise its enforcement powers where a state has failed to include any BACT requirement in a construction permit. According to ADEC, when the state permitting authority does make a BACT determination and includes the BACT requirement in the permit, EPA should not be allowed to intervene and force the state to conform to its own BACT determination.

In support of this argument, ADEC cited 42 U.S.C. § 7475(a)(8), which delineates certain instances where EPA approval of a state's BACT determination is required before construction begins. ADEC reasoned that if Congress had intended for EPA to be able to intervene in all BACT determinations, it would have been unnecessary for it to list certain types of cases where EPA approval of the state's BACT determination is required.

ADEC also argued that even if the CAA does require that a state's BACT determination be reasonable, the proper venue for reviewing a state agency's decisions is by way of the state's court system, not by administrative fiat. That way, the reviewing body would be able to have a full factual record, and EPA would have to carry the burden of persuasion whenever it chose to challenge a BACT determination.

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99 Id.
100 Id. (citing 42 U.S.C. § 7479(3)).
101 Id.
102 Id. at 1001.
103 Id. (citations omitted).
105 ADEC, 124 S. Ct. at 1001-02.
106 Id. at 1002.
107 Id.
108 Id. at 1003.
109 Id.
110 Id. at 1003-04; see also id. at 1010 (Kennedy, J., dissenting).
111 This argument assumes, of course, that the discovery procedures in state court would provide a much more detailed record than that which EPA utilized in this case.
112 Id. at 1004.
argued that these due process requirements would not be met under the EPA’s proffered enforcement mechanism. Lastly, ADEC argued that its arrangement with Cominco, whereby Cominco would employ Low NOx on all of its generators, would actually decrease overall emissions, which, after all, is the purpose of the CAA.114

C. The Majority Opinion

Justice Ginsburg delivered the majority opinion, and was joined by Justices Stevens, O’Connor, Souter, and Breyer.115 The majority quickly accepted EPA’s interpretation of the relevant statutes as they relate to its oversight role.116 Its analysis focused on discrediting ADEC’s claims117 and determining whether EPA’s actions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” under the APA.118 While the Court did reject EPA’s argument that its statutory interpretation should be afforded Chevron deference because it was merely “internal guidance memoranda,” it nonetheless stated that EPA’s interpretation warranted respect.119

The Court found that EPA’s actions were not an abuse of discretion under the APA.120 The Court criticized ADEC’s seemingly indecisive application of the top-down approach to BACT determination.121 It also admonished ADEC for making claims that Cominco would suffer great economic loss if it was required to use SCR without having made any determination of the actual financial impact on Cominco of employing SCR.122 The Court was unconvinced by ADEC’s analogy to the costs a rural utility company would incur if it employed SCR, and held that EPA was justified in finding that ADEC’s BACT determination was unreasonable in light of the rather scant evidence of economic infeasibility.123

The Court spent considerably more time addressing ADEC’s arguments. First, it discounted ADEC’s assessment that the CAA granted state permitting authorities exclusive authority to determine BACT.124 While it admitted that the state had the initial responsibility of making BACT determinations, it was unconvinced that these determinations could not be deemed unreasonable and therefore be overruled by the EPA in the exercise of its oversight authority under §§ 113(a)(5) and 167.125 The Court noted that the EPA has “explicit and sweeping authority to enforce CAA ‘requirements’ relating to the construction and modification of [polluting sources].”126 The Court therefore declared that EPA may intervene where a state’s decision as to BACT is “not based on a reasoned analysis.”127

114 ADEC, 124 S. Ct. at 1008.
115 Id. at 989.
116 See id. at 1001.
117 See id. at 1001-05.
118 See id. at 1006-09. The APA’s standard for review of agency action is encoded at 5 U.S.C. § 706(2)(A). Id.
119 Id. at 1001.
120 Id. at 1009.
121 Id. at 1006-07. Recall that ADEC initially determined that SCR was BACT, but then changed its determination to allow for an alternative solution, and further changed its reasoning in response to EPA’s criticism of the emissions offsetting approach. See supra nn. 19-30 and accompanying text.
122 Id. at 1007.
123 See id. at 1007-08, 1009. The Court noted that EPA freely stated that ADEC was welcome to reopen the issue of BACT determination if it could show some hard evidence that SCR was economically infeasible. Id. at 1009.
124 Id. at 1002-03
125 Id.
126 Id. at 1002.
127 Id. at 1003 (citation omitted).
The Court next addressed ADEC’s argument that if Congress had intended for all BACT determinations to be reviewable by EPA, it would not have created a separate class of cases where EPA approval of BACT was required. The Court stated that although in certain cases EPA approval is required by the CAA, it does not follow that in all other cases EPA is precluded from issuing any stop construction orders where the state BACT determination is unreasonable. It further noted that there is a “difference between a statutory requirement and a statutory authorization.”

The Court also rejected ADEC’s argument that the proper venue for review of a state’s BACT determination is in the state’s court system. It refused to read into the statute a scheme that would relegate an agency charged with enforcing federal law to state court alone. It was equally unconvinced by ADEC’s due process concerns, finding that requiring a state agency to challenge EPA’s decision in federal court would not unfairly shift the burdens of persuasion and production, or provide an inadequate record for review.

Lastly, the Court dismissed ADEC’s contention that its BACT determination was reasonable because it would result in lower emissions. Although Cominco agreed to employ Low NOx on all of its generators, rather than just those relevant to the permit it was seeking, the Court held that these other generators could not be considered as a single emissions “bubble.” Only those generators subject to the present permit action could be considered together. Thus, although the arrangement between Cominco and ADEC made practical sense, the Court held that it is simply not permitted under the CAA.

D. The Dissenting Opinion

Justice Kennedy delivered the dissenting opinion, and was joined by the Chief Justice and Justices Scalia and Thomas. The dissent takes issue with the majority’s statutory interpretation. It notes that the statute specifically states that the state permitting authority determines BACT. The dissent further states that Sections 113(a)(5) and 167 should be read together with the rest of the CAA. In other words, the enforcement provisions should only be invoked when the state permitting agency has failed to meet a specific statutory requirement. The dissent concluded that since ADEC made a BACT determination, and weighed the express statutory factors, it fulfilled its statutory requirement, and EPA was not authorized to invoke the enforcement provisions.

The dissent argued that the CAA provided sufficient safeguards against arbitrary and capricious BACT determinations outside EPA’s enforcement provisions. Specifically, the CAA dictates that a state’s permit...
program must provide “an opportunity for state judicial review.” More importantly, the dissent was concerned with several due process issues raised by ADEC. It was particularly worried about the shifting of the initial burden of pleading from the EPA to the State. If the EPA was allowed to issue stop orders effectively overruling state BACT determinations, the State would be forced to challenge the order in federal court. If, however, the EPA was not allowed to issue stop construction orders by fiat, but rather was required to initiate a civil action in state court, the burden of pleading would be on the EPA. According to the dissent, Congress intended to grant the states—being more able to “strike the right balance between preserving environmental quality and advancing competing objectives”—the primary responsibility of enforcing the CAA and specifically of determining BACTs. And, as such, the dissent opined that the burden should be on EPA to bring an action in state court and prove that the state agency’s determination was arbitrary and capricious—not the other way around.

Lastly, the dissent took issue with the majority’s *Chevron* analysis. The dissent notes that although the majority states that *Chevron* deference is not appropriate for an “internal guidance memoranda,” it adopts EPA’s statutory interpretation without question and, in essence, grants it *Chevron* deference “in fact.” In concluding, the dissent warns that the majority opinion may open the door to unbridled federal oversight, whereby any and all state action could be overridden by federal agency mandate.

V. COMMENT

The Supreme Court’s decision may indicate a shift away from its recent trend of broadening state sovereignty. To say the least, this case indicates a preference for federal supervision of CAA enforcement. Moreover, the Court not only gave the EPA direct power to overrule state environmental agencies’ actions it deems unreasonable, it also granted substantial deference to the EPA’s interpretation(s) of the CAA itself. Perhaps this case indicates that state sovereignty is, indeed, a “myth.”

First, the Court gives the EPA direct authority to overrule a state’s BACT determination. While the Court notes that the CAA permits the EPA to issue stop construction orders when a state does not comply with

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144 Id. at 1013 (citing 61 Fed. Reg. 1882 (1996)).
145 Id. at 1014.
146 Id.
147 Id.
148 Id. at 1012.
149 See id. at 1018 (stating that “federal agencies cannot consign States to the ministerial tasks of information gathering and making initial recommendations, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight”). The dissent raises three additional concerns relative to this point: First, if the initial burden of pleading is shifted to the State, what assurance does the State have that it will not also bear the burdens of persuasion and production? Id. at 1014. Second, what is to say that EPA will not use the power the majority has given them to overturn state action that has already been reviewed and deemed reasonable by the state court, thereby creating serious separation of powers issues? See id. at 1015. Third, what prevents EPA from setting aside a BACT determination years after it is made, since oversight power is necessarily after the fact? Id. at 1016.
150 Id. at 1018.
151 Id.
152 Id.
153 See generally Gey, supra n. 80.
154 See supra nn. 124-27.
the specific provisions related to new sources and source modifications, it does not point out where in the statute it found Congressional intent to allow the EPA to overrule state action in conformity with the CAA when it determines that such action is unreasonable. Indeed, this decision may allow federal administrative agencies to overrule any parallel state agency’s decision(s) or action(s) they happen to disagree with.

To say the least, such practice would fly in the face of the Tenth Amendment. As previously mentioned, the Tenth Amendment has had a tumultuous history—being at times a very powerful tool for the states or the people to fight “big government,” and at other times, nearly dead—in recent years the Amendment has been frequently cited by the Court in striking down improper federal usurpation of state powers. This decision indicates a shift in the opposite direction. Here, the Majority’s analysis does not even address Tenth Amendment concerns, and even Kennedy’s dissent only briefly mentions the issue in its conclusion.

Perhaps the Court sees a distinction between a “power” of the state as opposed to a “task” delegated to the state. Nonetheless, the Court has previously applied the Tenth Amendment to areas of the law in which the state and federal governments “share” power through the delegation of certain tasks to the state government and others to the federal government. It seems strange that the Court would now turn completely away from its precedent without even discussing it. Perhaps, instead, the Court feels that the Tenth Amendment should only apply to statutes that specifically coerce the state into abiding by a federal regulatory scheme and not to federal agency action that achieves the same result. However, that distinction also seems superficial at best. The Tenth Amendment does not differentiate between executive and legislative power.

Equally disconcerting is the amount of deference the Majority gives to EPA’s interpretation of the CAA. As Justice Kennedy states in his dissent, the Majority in one breath states that Chevron deference does not apply, but in the very next grants the EPA Chevron deference in deciding the case. Although Chevron has been applied with great breadth, the Court has explicitly held that it only applies to agency actions that have the force of law. Yet, here the Court accepts the EPA’s statutory interpretation without stating why it is reasonable. To do so may open the door to the Court accepting an agency’s interpretation of a statute without considering its reasonableness, and then turning around and upholding the agency’s determination that a state’s

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155 Id. See also 42 U.S.C. § 7413(a)(5) (stating that the EPA may act to stop construction when “a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources”).

156 See Gey, supra n. 80, at 1643-44 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991), N.Y. v. U.S., 505 U.S. 144 (1992), and Printz v. U.S., 521 U.S. 898 (1997), as examples of recent Supreme Court jurisprudence favoring state sovereignty). Note, however, that Gey is not convinced that these cases show a true return to state sovereignty principles—rather, he sees them as limiting but not prohibiting the federal government from imposing its policies on the states. Id. at 1644.

157 See ADEC, 124 S. Ct. at 999-1009; see also id. at 1018 (Kennedy, J. dissenting) (noting that the Court’s decision could undermine states’ sovereignty as defined in cases such as N.Y. v. U.S., 505 U.S. at 167, and Alden v. Maine, 527 U.S. 706 (1999)).

158 See N.Y., 505 U.S. at 175 (considering a federal statute dividing the responsibility of controlling the disposal of low-level radioactive waste between the states and the federal government. The Court held that federal action “commandeer[ing] state governments into the service of federal regulatory purposes . . . [is] inconsistent with the Constitution’s division of authority between federal and state governments”); see also supra nn. 85-90 and accompanying text.

159 See U.S. Const. amend. X.

160 ADEC, 124 S. Ct. at 1018.

161 See e.g. Rust v. Sullivan, 500 U.S. 173, 186. (granting Chevron deference to the Department of Health and Human Services even though the regulations in question “reverse[d] a longstanding agency policy”) (citation omitted).

162 See ADEC, 124 S. Ct. at 1001 (stating that Chevron does not apply to “policy statements, agency manuals, and enforcement guidelines”) (citations omitted).
action was unreasonable. Surely this double standard could greatly increase federal agencies’ power and completely vitiate the sovereignty of complimentary state agencies.

Perhaps the greatest concern here is one of policy. ADEC, a state agency acting on behalf of the people of the State of Alaska, came to its BACT determination after meeting extensively with Teck Cominco over a period of three years. The parties developed a BACT solution using that would actually create lower emissions than the Low NOx control initially proposed by ADEC. This determination, made by a state agency that is infinitely more in tune with the local economic climate and other extrinsic factors, should not have been disrupted absent a showing that the objectives of the CAA were not met.

By focusing on the strictures of EPA policy determination, the Court overlooks the bigger picture—the CAA was enacted to reduce air pollution in America. To be so inflexible as to require complete adherence to the EPA’s chosen method of BACT determination, regardless of the fact that Congress specifically delegated the task to the states, is to completely thwart the purpose of the statute. ADEC exemplifies this. Through this decision, the EPA, which is charged with being the federal government’s guardian of the environment, has succeeded in enforcing an emissions control measure that will actually cause greater emissions than that proposed by the polluting entity and approved by the State. Perhaps this is why Congress had the foresight to leave most of the burden of implementing the CAA with the states. More importantly, this is certainly why the Constitution of the United States was amended to state that those powers not specifically granted to the federal government “are reserved to the States respectively, or to the people.”

VI. CONCLUSION

It is unclear what effect the Supreme Court’s decision in ADEC will have. Potentially, it could extend Chevron deference to agency interpretations not subject to any procedural safeguards, and also send the Tenth Amendment once again into oblivion. On the other hand, it may be that the Court’s holding will be viewed as limited to the facts of the case, or at least to cases where a state acts in a grossly arbitrary manner, pandering to the will of big business without requiring it to substantiate its claims of economic damage, as the Court seemed to think ADEC did. Either way, the Court’s decision has to be seen as a victory for federal agencies. After all, even a very narrow interpretation of the holding still concedes that federal agencies may overrule state agency action they deem unreasonable without Congress specifically permitting them to do so. Whether this decision signifies the first tumble down the proverbial slippery slope remains to be seen.

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164 See id. at 994-95.
165 Id. at 995.
166 U.S. Const. amend. X.