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Environmental Law - An Environmental Federalism Dust-up: EPA's Authority to Override Unreasonable State Permitting Decisions under the Clean Air Act

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ENVIRONMENTAL LAW – An Environmental Federalism Dust-Up: EPA’s Authority to Override Unreasonable State Permitting Decisions Under the Clean Air Act. *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 124 S. Ct. 983 (2004)

INTRODUCTION

The Clean Air Act (the Act) is a federal law that establishes national standards for air quality so that “all Americans have the same basic health and environmental protections.”¹ The Environmental Protection Agency (EPA) sets standards that limit how much of a pollutant is allowed to be emitted into the air anywhere in the United States.² The Act acknowledges that because of widely varied local conditions and circumstances, the state governments have a significant role to play in ensuring Americans have clean air to breathe, and the Act gives them primary responsibility in carrying out its provisions.³ States gain authority to enforce the Act by developing state implementation plans that “explain how each state will do its job under the [Act].”⁴ The states develop their plans with input from the public and submit them for approval by EPA.⁵ If the plan is not acceptable to EPA, it may step in and enforce the Act directly.⁶

In practice, however, the division between state and federal control in implementing the Act is not that clearly delineated.⁷ It is not simply a matter of state control on the one hand or federal control on the other, but is instead a complicated cooperative scheme.⁸ In creating and amending the

1. U.S. EPA, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT, EPA 400-K-93-001 (Apr. 1993), available at http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html#-topic2 (last visited Dec. 6, 2004). The Clean Air Act is codified at 42 U.S.C. §§ 7401-7671q (West 2003).

2. U.S. EPA, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT, EPA 400-K-93-001 (Apr. 1993), available at http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html#-topic2 (last visited Dec. 6, 2004).

3. *Id.* Under the Act, states may choose to enact stricter, but not weaker, pollution controls than those set for the whole nation. *Id.* See also Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 200 (1997) (listing several federal pollution control and liability programs and explaining that while they generally give the states substantial implementation roles and allow states to enact stricter controls and standards, the “stringency of environmental requirements . . . have been set [largely] by Congress and the [EPA]”).

4. U.S. EPA, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT, EPA 400-K-93-001 (Apr. 1993), available at http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html#-topic2 (last visited Dec. 6, 2004).

5. *Id.*

6. *Id.*

7. John P. Dwyer, *Environmental Federalism: The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1193 (1995) (explaining that “Congress weaved a complicated role for the states [under the Act]”).

8. See *id.*

Act, "Congress sought both to enlist the states' assistance and to bend them to the federal will."⁹ It did so by reserving to the states "an important role . . . in implementing and enforcing the federal program . . . and creat[ing] mechanisms to compel the states to adhere to federal policy."¹⁰ In the United States, there has always been a tension between federal and state governments and their respective roles in our federal system.¹¹ When EPA found fault with the way in which the State of Alaska was implementing the Act at a remote mine and used one of the Act's mechanisms to compel adherence to federal policy, this tension lead both parties to the Supreme Court. In *Alaska Dep't of Env'tl Conservation v. EPA*, the Court was confronted with the question of whether the Act gives EPA the authority to override a state decision, made under its implementation plan, when it finds that the decision is unreasonable.

The Red Dog Mine, located in northwest Alaska, is the world's largest producer of zinc concentrates.¹² The mine produces its own electrical power using six diesel electric generators.¹³ The generator emissions include nitrogen-oxides (NOx), an air pollutant regulated under the Act.¹⁴ Five of the generators (MG-1 through MG-5) were permitted for NOx emissions by the Alaska Department of Environmental Conservation (the Department) under the Act's Prevention of Significant Deterioration of Air Quality (PSD) program and Alaska's State Implementation Plan (Implementation Plan) in 1988.¹⁵

The PSD requirements are part of the 1977 amendments to the Act and "are designed to ensure that air quality in attainment areas or areas that are already 'clean' will not degrade."¹⁶ Under the terms of the 1988 PSD permit, three of the generators were allowed to be used full-time and two

9. *Id.*

10. *Id.*

11. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1141 (1995).

12. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct 983, 994 (2004); Brief for Teck Cominco Alaska Incorporated in Support of Petitioner at 2, *ADEC v. EPA* 124 S. Ct. 983 (2004) (No. 02-685). The mine is located approximately 100 miles north of the Arctic Circle on land leased from the NANA Regional Corporation, a native Alaskan corporation. *ADEC v. EPA*, 124 S. Ct. at 994; Brief for NANA Regional Corporation, Inc. as Amicus Curiae in Support of Petitioner at 1-2, 4, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-685). The mine also provides one quarter of the wage base of the area. Brief for Petitioner at 9, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658).

13. *Alaska v. EPA*, 298 F.3d 814, 816 (2002).

14. *ADEC v. EPA*, 124 S. Ct. at 994; Clean Air Act, 42 U.S.C. §§ 7401-7671q (West 2003). The specific allowable level for NOx was established in 1985. See 40 C.F.R. § 50.11 (2004).

15. *ADEC v. EPA*, 124 S. Ct. at 994.

16. *Id.* at 992 (quoting ROY S. BELDEN, CLEAN AIR ACT 43 (2001)). Attainment areas are those which meet national ambient air quality standards. See 42 U.S.C. § 7407(d)(1)(A)(ii) (West 2003).

were to be operated in standby mode.¹⁷ A sixth generator (MG-6) was added under a second PSD permit issued by the Department in 1994.¹⁸ This permit allowed full-time operation of the sixth generator, and imposed a new operational cap that allowed full-time operation for all but one generator.¹⁹

In 1996, the mine's owner, Teck Cominco Alaska, Inc. (Cominco) sought, with funding from the State of Alaska, to expand the mine and increase production by forty percent.²⁰ The proposed expansion required additional electrical generation, which would increase NOx emissions by more than forty tons per year.²¹ Cominco applied to the Department for a PSD permit to allow for increased operation by the remaining standby generator (MG-5).²² Prior to issuing a PSD permit, the permitting agency must "subject [the facility] to the best available control technology [(BACT)] for each pollutant subject to [the Act's] regulation . . . emitted from . . . [the] facility."²³

On March 3, 1999, the Department proposed that selective catalytic reduction (SCR) be selected as BACT for generator MG-5.²⁴ SCR reduces NOx emission by ninety percent.²⁵ Cominco submitted an amended permit application, proposing to add a seventh generator (MG-17) and Low NOx as BACT.²⁶ Low NOx reduces NOx emissions by thirty percent.²⁷ On May 4, 1999, the Department issued a draft PSD permit and preliminary technical

17. *ADEC v. EPA*, 124 S. Ct. at 994.

18. *Id.*

19. *Id.* The permit altered the operational status of MG-2 from standby to full-time. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* See 40 C.F.R. § 51.166(b)(23)(i) (2004) (providing that modifications to major emitting facilities that increase nitrogen oxide emissions in excess of 40 tons per year require a PSD permit).

23. *ADEC v. EPA*, 124 S. Ct. at 993 (quoting 42 U.S.C. § 7475(a)(4) (2000)). Best available control technology (BACT) is defined by the Act as:

[A]n emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, 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. . . . In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the [emission standards for new and existing stationary sources].

42 U.S.C. § 7479(3) (West 2003).

24. *ADEC v. EPA*, 124 S. Ct. at 994.

25. *Id.*

26. *Id.*

27. *Id.*

analysis report (Technical Report) that selected Low NO_x as BACT for generators MG-5 and MG-17.²⁸ Following Environmental Protection Agency (EPA) guidance for selection of BACT, the Department “first homed in on SCR as BACT” for the existing generator (MG-5) and for the new generator (MG-17).²⁹ The Department further found that the costs of NO_x removal by SCR were “well within what [the Department] and EPA conside[r] economically feasible.”³⁰

Despite these findings, the Department did not require SCR on MG-5 and MG-17, but made a final determination that Low NO_x was best for these two generators.³¹ In order to achieve a reduction in NO_x reductions similar to SCR, Cominco proposed Low NO_x be installed on all six existing generators.³² Cominco asserted selecting this option would reduce total NO_x emissions by 396 tons per year over the reduction achievable by installing SCR on MG-5 and MG-17 and operating one of them as a standby unit.³³

The National Park Service (Park Service) submitted comments to the Department, objecting to the offset of new emissions from the generators being permitted against emissions from the existing generators that were not subject to BACT.³⁴ The Park Service commented “[s]uch an offset . . . ‘is neither allowed by BACT, nor achieves the degree of reduction that would

28. *Id.* The draft permit and preliminary Technical Report were issued in conjunction with Cominco's representative. *Id.*

29. *Id.* at 994-95. EPA's recommended method for selecting technologies is a top-down approach. *Id.* at 994. Briefly, this method, after first identifying the available control options, evaluates the most stringent technology first. Joint Appendix at *62, LEXSEE 2002 U.S. Briefs 658, *ADEC v. EPA*, 124 S. Ct 983 (2004) (No. 02-658). If this technology is found to be technically feasible, then the energy, environmental, and economic impacts of the control option are evaluated. *Id.* If the most stringent option is “shown to be inappropriate due to adverse economic, environmental, or energy impacts” it is eliminated and the next most effective technology is evaluated. *Id.*

30. *ADEC v. EPA*, 124 S. Ct. at 995 (quoting Joint Appendix at *84, LEXSEE 2002 U.S. Briefs 658, *ADEC v. EPA*, 124 S. Ct 983 (2004) (No. 02-658). The Department found Cominco's cost estimate for NO_x removal by SCR of \$5,643 per ton was high and, using Cominco's data, estimated the cost of NO_x removal by SCR to range from \$1,586 to \$2,279 per ton. *Id.*

31. *Id.* The United States Supreme Court stated that “[d]espite its staff's clear view that SCR (the most effective individual technology) [was] technologically, environmentally, and economically feasible for the Red Dog power plant engines, [the Department] endorsed the alternative proffered by Cominco.” *Id.* (internal citations omitted).

32. *Id.*

33. *Id.* The United States Supreme Court noted that “Cominco's proposal hinged on the assumption . . . that under typical operating conditions one or more engines will not be running due to maintenance of standby-generation capacity,” and that “[i]f all seven generators ran continuously, however, Cominco's alternative would increase emissions by 79 tons per year.” *Id.* (internal citations omitted).

34. *Id.* The Park Service submitted the comments on July 2, 1999, the last day of the public comment period. *Id.* The Act requires notice of any permit application be given to the federal land managers and officials responsible for any lands in a class I area that may be affected by the emissions to be permitted. 42 U.S.C. § 7475(d)(2)(A) (West 2003).

result if all the generators that are subject to BACT were equipped with SCR.”³⁵ The Park Service also noted that the mine expansion project would alter the operating restrictions on four of the generators imposed by the 1994 PSD permit and that this alteration should make those four generators subject to BACT as well.³⁶ EPA agreed, and in separate comments submitted to the Department, noted specifically that (1) once an emission unit is subject to BACT, the PSD program does not allow anything less than BACT, and (2) BACT would be required for the four existing generators for which the 1994 PSD permit imposed operational limitations.³⁷

In September, 1999, the Department issued a second draft PSD permit and Technical Report.³⁸ The Department agreed a BACT determination could not consider “emission reductions from sources that were not part of the permit action.”³⁹ Dropping its reliance on the emissions offset, the Department again found Low NOx to be BACT.⁴⁰ Despite a lack of financial data from Cominco, the Department made “no judgment . . . as to the impact of . . . [SCR] on the operation, profitability, and competitiveness of the Red Dog Mine” in its analysis and determination of BACT for MG-17, but found that SCR imposed “a disproportionate cost” on Cominco.⁴¹ Comparing the Red Dog Mine to a rural Alaska electrical utility, it found that requiring SCR

35. *ADEC v. EPA*, 124 S. Ct. at 995-96 (quoting letter from John Notar, National Park Service Air Resources Division, to Jim Baumgartner, Alaska Department of Environmental Conservation). The Park Service was concerned about the effect of nitrogen oxide emissions on the vegetation at Cape Krusenstern National Monument and Noatak National Preserve. *Alaska v. EPA*, 298 F.3d 814, 817 (2002). The Act charges the federal officials managing lands in Class I areas with “an affirmative responsibility to protect the air quality,” and requires that they “consider, in consultation with the [EPA], whether a proposed major emitting facility will have an adverse impact.” 42 U.S.C. § 7475(d)(2)(B) (West 2003).

36. *ADEC v. EPA*, 124 S. Ct. at 996.

37. *Id.*

38. *Id.*

39. *Id.* (citations omitted).

40. *Id.* In order to avoid a BACT determination for generators MG-1, MG-3, MG-4 and MG-5,

[The Department] and Cominco agreed to permit conditions that would require low NOx controls on MG-1, MG-3, MG-4 and MG-5, and emission limits that reflect the previous “bubbled” limits. Under this approach, the permit would result in no increase in actual or allowable emissions from any of these engines and the installation of BACT would not be necessary for these four units. EPA found no cause to question this [Department]-Cominco agreement.

Id. at 996 n.9 (internal citations omitted).

41. *Id.* at 996 (internal citations omitted).

for a rural utility would increase costs to customers by twenty percent.⁴² The Department provided no economic basis for this analogy.⁴³

EPA objected to the September 1, 1999, permit on the grounds that elimination of SCR on the basis of economic infeasibility was “not supported by the record and [was] clearly erroneous.”⁴⁴ EPA indicated the Department could “include an analysis of whether requiring Cominco to install and operate [SCR] would have any adverse economic impacts upon Cominco specifically.”⁴⁵ Cominco refused to submit financial data in support of its position that SCR was economically infeasible, except to say that its debt was “quite high despite continuing profits.”⁴⁶

The Department issued the final PSD permit and Technical Report on December 10, 1999.⁴⁷ The permit and Technical Report did not include the economic analysis suggested by EPA.⁴⁸ The Department, without expla-

42. *Id.*

43. *Id.* The EPA addressed the Department’s comparison of Cominco’s Red Dog Mine to a rural Alaska electrical utility in a November 10, 1999 letter from Chuck Findley, EPA Deputy Regional Administrator to Michele Brown, Commissioner, Alaska Department of Environmental Conservation. Joint Appendix at *138, LEXSEE 2002 U.S. Briefs 658, ADEC v. EPA, 124 S. Ct 983 (2004) (No. 02-658). In that letter, EPA stated,

[The Department] has expressed the concern that if SCR is required at Cominco, then SCR would automatically be required for new or modified engines at rural electric utilities. The concern is understandable given the essential nature of the service provided by the rural utilities in Alaska. . . . In accordance with EPA guidance and case law, BACT determinations are made based on individualized consideration of the specific facts and circumstances at the facility being permitted. Specifically, once the most effective technically available control technology is identified, the collateral issues of “energy, environmental, and economic impacts and other costs” are considered. Consideration of these collateral issues may operate as a “safety valve” when circumstances unique to specific facility justifies use of a less effective technology. . . . [In our review of an analysis for a rural utility] it’s [sic] status as a non-profit, isolated public utility, influences how those “other costs” are considered in determining BACT.

Id. (internal citations omitted).

44. *ADEC v. EPA*, 124 S. Ct at 996. In a September 28, 1999, letter from Anita Frankel, Director of the EPA Office of Air Quality, to Tom Chapple of the Department, Frankel stated, “Cominco has not adequately demonstrated any site-specific factors to support their claim that the installation of [SCR] is economically infeasible at the Red Dog Mine. Therefore, elimination of SCR as BACT based on cost-effectiveness grounds is not supported by the record and is clearly erroneous.” Joint Appendix at *127, LEXSEE 2002 U.S. Briefs 658, ADEC v. EPA, 124 S. Ct 983 (2004) (No. 02-658).

45. *ADEC v. EPA*, 124 S. Ct. at 997 (citations omitted). See Joint Appendix at *126-27, LEXSEE 2002 U.S. Briefs 658, ADEC v. EPA, 124 S. Ct. 983 (2004) (No. 02-658) for EPA’s comments on the Department’s economic analysis of SCR and Low NOx.

46. *ADEC v. EPA*, 124 S. Ct. at 997 (citations omitted).

47. *Id.*

48. *Id.*

nation, selected Low NO_x over SCR as BACT on the grounds of SCR's adverse impact on the Red Dog Mine's "unique and continuing impact on the economic diversity of the region and on the [mine's] world competitiveness."⁴⁹ The permit and Technical Report included the rural utility comparison, about which the Department stated,

[P]erhaps [a] better way to determine if the cost of BACT is excessive, is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant [Cominco] did not present this information. Therefore, no judgment can be made as to the impact . . . on the operation, profitability, and competitiveness of the Red Dog Mine.⁵⁰

Despite this, the Department selected Low NO_x as BACT "to support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region."⁵¹

On December 10, 1999, EPA issued an order to the Department prohibiting the state agency from issuing a PSD permit that did not "satisfactorily document[] why SCR is not BACT for [MG-17]."⁵² EPA grounded its authority to issue the order in sections 113(a)(5) and 167 of the Act, which give EPA authority to issue orders prohibiting construction or modification of emission sources and to prohibit a state from issuing a permit.⁵³ On February 8, 2000, EPA, again under the authority of sections 113(a)(5) and 167 of the Act, issued an order to Cominco prohibiting Cominco from construction or modification activities at the mine.⁵⁴ The Department and Cominco petitioned for review of EPA's orders in the United States Court of Appeals for the Ninth Circuit.⁵⁵ EPA at first challenged the court's power to review

49. *Id.* (citations omitted).

50. Join Appendix at *207, LEXSEE U.S. Briefs 658, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658).

51. *ADEC v. EPA*, 124 S. Ct. at 997 (quoting the Department's December 10, 1999, final PSD permit). See Joint Appendix at *208, LEXSEE 2002 U.S. Briefs 658, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658).

52. *ADEC v. EPA*, 124 S. Ct. at 997 (quoting Application to Petition For Certiorari, 36a.)

53. *Id.* at 997. Sections 113(a)(5) and 167 are codified, respectively, at 42 U.S.C. §§ 7413(a)(5), 7477 (West 2003).

54. *ADEC v. EPA*, 124 S. Ct. at 997. EPA issued a third order to Cominco on March 7, 2000. *Id.* This order superseded and vacated the order of February 8, 2000, and prohibited Cominco from acting on the Department's PSD permit of December 10, 1999, but did allow for limited summer construction. *Id.* EPA later withdrew its December 10 order to the Department on the grounds that once the Department had issued its permit, EPA's order lacked utility. *Id.* The Department issued a PSD permit to Cominco on July 16, 2003, to install MG-17 with SCR. *Id.* This permit stated that if the Department were to prevail in the Supreme Court, SCR would cease to be BACT for MG-17. *Id.*

55. *Id.* at 998. The Act "lodges jurisdiction over challenges to 'any . . . final [EPA] action' in the Courts of Appeals." *Id.* (quoting *Alaska v. United States EPA*, 244 F.3d 748, 750-51 (9th Cir. 2001) (citations omitted)).

its orders, asserting the court lacked subject matter jurisdiction because EPA's orders were not a "final action."⁵⁶ The Ninth Circuit concluded that because EPA's "findings in the Orders are its 'last word' on its position as to [SCR] as BACT" and because "Cominco is in legal jeopardy if it fails to comply with the Order," it had jurisdiction under section 307(b)(1) of the Act.⁵⁷

Before the Ninth Circuit, the Department disputed EPA's authority to issue the orders.⁵⁸ The Department argued EPA abused its discretion when it found the Department's BACT determination for MG-17 did not comply with the requirements of the Act and Alaska's Implementation Plan.⁵⁹ The Department and Cominco argued that because section 169(3) of the Act grants the Department discretion in determining BACT, EPA could not "veto [the Department's] judgment based on a mere difference of opinion as to which technology was BACT."⁶⁰ After concluding that the text, structure, and history of the Act granted EPA broad oversight and enforcement powers over states' implementation of the Act's requirements, including BACT determinations, and that EPA had not acted arbitrarily or capriciously, the court denied the petition to review.⁶¹

The United States Supreme Court granted certiorari to address the question of whether "[EPA may] act to block construction of a new major pollutant emitting facility permitted by [a state permitting authority] when EPA finds [the state's] BACT determination unreasonable"⁶² In a five-to-four decision, the Court affirmed the Ninth Circuit decision and held "EPA has supervisory authority over the reasonableness of state permitting

56. *ADEC v. EPA*, 124 S. Ct. at 998. Had EPA's orders been "interlocutory" and not final, the action would lie in the district court under 42 U.S.C. § 7413(b) (2000). *ADEC v. EPA*, 124 S. Ct. at 998 n.11.

57. *Alaska v. United States EPA*, 244 F.3d 748, 749-50 (9th Cir. 2001). Citing *Bennett v. Spear*, 520 U.S. 154 (1997), and *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), the Ninth Circuit determined EPA's orders met the two conditions requisite for an action to be final for the purposes of appellate review: (1) "the action must mark the 'consummation of the agency's decision-making process'" and (2) "it must 'be one by which rights of obligations have been determined, or from which legal consequences will flow.'" *Alaska v. United States EPA*, 244 F.3d at 750 (quoting *Bennett*, 520 U.S. at 177-78) (quotations and citation omitted in original)). EPA later dropped this contention and agreed the Ninth Circuit had subject matter jurisdiction because its order subjected Cominco to legal consequences. *ADEC v. EPA*, 124 S. Ct. at 998 n.10. Prior to argument before the Ninth Circuit, the Department first contended that the record before the court was incomplete. *Alaska v. EPA*, 298 F.3d 814, 818 (9th Cir. 2002). In response, the court directed EPA to submit a complete administrative record. *Id.* This dispute was settled after EPA declared that the record was complete and both parties agreed that the record was "adequate to resolve the issues on appeal." *Id.*

58. *Alaska v. EPA*, 298 F.3d 814, 816 (9th Cir. 2002).

59. *Id.*

60. *Id.* at 820. BACT is defined in section 169(3) of the Act. See *supra* note 23.

61. *Alaska v. EPA*, 298 F.3d at 818, 823.

62. *ADEC v. EPA*, 124 S. Ct. at 991.

authorities' BACT determinations and may issue a stop construction order, under sections 113(a)(5) and 167 [of the Act], if a BACT is not reasonable."⁶³ The Court also held EPA's action was not arbitrary or capricious.⁶⁴ Further, the Court held the burden of production and persuasion rests with EPA, whether the action is initiated by EPA as a civil action or whether the state challenges an EPA stop construction order in federal or state court.⁶⁵

This case note will explore the historic roles of the state and federal governments in enforcing the Act. It will analyze the concept and effectiveness of "cooperative federalism" in achieving air quality goals and argue that the Court correctly endorsed EPA's authority to override unreasonable state PSD permitting decisions. It will argue uniform national air quality standards are desirable because they put states on an equal footing, and prevent states from competing for industry at the expense of air quality. Finally, it will argue a substantive federal role, including the power to override unreasonable state permitting decisions, is necessary to ensure enforcement of the Act and to achieve national air quality goals.

BACKGROUND

The findings and declarations of purpose of the Act outline the roles of the federal and state governments in administering the Act and state in relevant part:

[T]hat air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments; and that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution. A primary goal of this Act is to encourage or otherwise promote reasonable Federal, State, and local government actions, consistent with the provisions of this Act, for pollution prevention.⁶⁶

Prior to the 1960s, the federal government considered control of air pollution to be entirely a state and local problem.⁶⁷ The legislation that was later to become known as the Clean Air Act was originally enacted in 1955 and it limited the role of the federal government in controlling air pollution

63. *Id.* at 1009.

64. *Id.*

65. *Id.* at 1005.

66. 42 U.S.C. § 7401 (West 2003) (internal subdivisions omitted).

67. Percival, *supra* note 11, at 1156. Congress in 1955 passed the precursor to today's Clean Air Act, which stated that "it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution. . . ." Pub. L. No. 84-159, 69 Stat. 360 (codified as amended at 42 U.S.C. § 7401 (West 2003)).

to research and technical assistance.⁶⁸ This remained the state of affairs through the 1950s and 1960s, but as it became clear that pollution did not respect local or state boundaries, the federal government began taking a more active role in addressing pollution control.⁶⁹ The responsibility for controlling air pollution, however, remained with the states until the Act was amended in 1970.⁷⁰

The 1970 amendments were passed “in response to ‘dissatisfaction with the progress of existing air pollution programs.’”⁷¹ The amended Act envisioned a system of “cooperative federalism” with the federal and state governments working together.⁷² The federal role was greatly expanded and EPA was required to determine which pollutants posed threats to air quality and public health or welfare and to establish national ambient air quality standards (NAAQS).⁷³ Also, each state, with approval from EPA, was required to promulgate a state implementation plan to achieve, maintain, and enforce the NAAQS.⁷⁴

Defining the Limits of Federalism Under the Clean Air Act

Realizing that car emissions were a major source of air pollution, Congress mandated that the states enact certain land use regulations and transportation controls, areas in which state and local governments had traditionally held responsibility.⁷⁵ Failure by a state to promulgate an approvable implementation plan required EPA to promulgate and enforce a federal implementation plan.⁷⁶ The amended act also gave the states and EPA very little time to achieve these standards.⁷⁷

68. The Lawyers Co-operative Publishing Company, Annotation, *Orders or Penalties Against State or Its Officials for Failure to Comply With Regulations Directing State to Regulate Pollution – Creating Activities of Private Parties, Under §113 of Clean Air Act*, 31 A.L.R. Fed 79 (2a) (2001). See also *supra* note 67.

69. Percival, *supra* note 11, at 1157. See also Dwyer, *supra* note 7, at 1191 (explaining that in 1965 and 1967 Congress authorized the establishment of federal motor vehicle standards).

70. Dwyer, *supra* note 7, at 1191-92.

71. ADEC v. EPA, 124 S. Ct. 983, 991 (2004) (quoting *Union Elec. Co. v EPA*, 427 U.S. 246, 249 (1976)).

72. Dwyer, *supra* note 7, at 1191-92. The congressional supporters of the 1970 amendments to the Act “contemplated that the federal regulatory role would increase substantially at the expense of the states, but that they also ensured that the states would have a substantial role in implementing and enforcing the federal program.” *Id.*

73. 42 U.S.C. §§ 7408(a), 7409(a) (West 2003).

74. *Id.* § 7410(a)(1).

75. Dwyer, *supra* note 7, at 1199.

76. 42 U.S.C § 7410(c).

77. Dwyer, *supra* note 7, at 1199-1200. The amended Act required: (1) state submission of SIPs within nine months, (2) approval or disapproval by EPA within four months, and (3) achievement of the primary standards within three years of EPA approval. *Id.* at 1199-1200 n.81 (summarizing 42 U.S.C. §§ 1857c-5(a)(1), (a)(2)(A) (1970)).

Whether EPA could force states to implement pollution control regulation was the basis for much litigation. The states submitted implementation plans that were deficient in mandating land use and transportation controls.⁷⁸ EPA, being reluctant to so quickly take over state programs, immediately granted a two-year extension to the states to meet the national standards.⁷⁹ The Act, however, did not provide statutory authority for the extension.⁸⁰ In *Natural Resources Defense Council v. EPA*, the United States Court of Appeals for the District of Columbia Circuit ordered EPA to withdraw the extensions, established a new deadline for submission of approvable implementation plans, and required EPA to prepare a federal implementation plan for each state that failed to satisfactorily address land use and transportation controls.⁸¹ EPA, lacking the resources to directly implement and enforce such federal plans, sought to force the states to regulate local land use and transportation controls.⁸² As EPA interpreted the statute, it had the authority to force states to regulate land use and transportation under section 113 of the Act.⁸³ Section 113 was added in 1970 and gave EPA authority to issue orders to comply or to bring a civil action when it found that a state was not enforcing an implementation plan.⁸⁴

In *Pennsylvania v. EPA*, the United States Court of Appeals for the Third Circuit considered a transportation plan promulgated by EPA that required the state of Pennsylvania to establish a program for retrofitting pre-1968 vehicles with pollution control devices, to establish a vehicle inspection system, and to create bus and carpool lanes and limit public parking.⁸⁵ Specifically, EPA sought, under section 113 of the Act, to impose sanctions on the state if it failed to enforce the transportation plan.⁸⁶ Pennsylvania challenged EPA applying the enforcement powers of section 113 to the state

78. Dwyer, *supra* note 7, at 1201-02.

79. *Id.* at 1202.

80. *Natural Res. Defense Council v. EPA*, 475 F.2d 968, 970 (D.C. Cir. 1973).

81. *Id.* (finding that the EPA "did not conform to the strict requirements of the Clean Air Act of 1970 in permitting several states to delay submission of transportation control portions of their implementation plans . . . and in granting extensions"). In *Natural Res. Defense Council*, the United States Court of Appeals for the District of Columbia Circuit ordered EPA to inform the states that they must submit a plan in compliance with the Act's requirements "including . . . land-use and transportation controls." *Id.* at 971. In the event states did not comply, the court ordered EPA to "prepare, publish and promulgate regulations setting forth an implementation plan, or portion thereof, for the noncomplying state[s]." *Id.*

82. Dwyer, *supra* note 7, at 1203.

83. See *Pennsylvania v. EPA*, 500 F.2d 246, 248 (3d Cir. 1974); *United States v. Ohio Dept. of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980).

84. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1678, 1686 (1970).

85. *Pennsylvania*, 500 F.2d at 249.

86. *Id.* at 254 (citing 40 C.F.R. § 52.23 (1974), which provides that "[f]ailure to comply with any provisions of this part shall render the person or Governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under Section 113 of the Clean Air Act").

as exceeding the federal commerce power.⁸⁷ The Court of Appeals for the Third Circuit concluded section 113 allowed enforcement against any "person" for violating requirements of an implementation plan, and that the Act included states in its definition of a "person."⁸⁸ Therefore, the court reasoned, the only question was "whether Congress contemplated that an implementation plan might require a state to enforce the substantive . . . provisions of [an implementation plan]."⁸⁹ Relying on the legislative history of the amendments, the court found Congress did intend that land use and transportation controls were necessary to achieve national air quality standards.⁹⁰

Noting the state did not dispute that pollution control affected commerce, the court found the federal government had the power to regulate private individuals in regards to pollution control and "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."⁹¹ The Third Circuit rejected Pennsylvania's argument that in implementing the plan, the state was involved in uniquely governmental activities and it was beyond the federal government's commerce power to force a state to enact regulations.⁹² The court held EPA's enforcement of sanctions under the Act against a state was a legitimate exercise of the federal commerce power.⁹³ The court presciently noted, however, that "[w]e recognize that there may remain a legitimate concern for possible intrusions upon the proper functioning of our federalist system as a result of future developments in the implementation of the Clean Air Act."⁹⁴

The United States Court of Appeals for the Sixth Circuit reached a similar result in *United States v. Ohio Dept. of Highway Safety*, wherein the EPA brought an action under section 113 of the Act to force the state to withhold registrations from vehicles that had not passed emissions inspections as required by the EPA-promulgated implementation plan.⁹⁵ The Sixth Circuit found that Congress intended to authorize action against non-

87. *Id.* at 256.

88. *Id.* at 256-57.

89. *Id.* at 257.

90. *Id.*

91. *Id.* at 259 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968)).

92. *Id.* In reaching this conclusion, the Court of Appeals for the Third Circuit relied on *Wirtz*, *supra* note 91, wherein the Supreme Court found an extension of the Fair Labor Standards Act to state-operated schools and hospitals to be constitutional. *Pennsylvania*, 500 F.2d at 259. The Third Circuit characterized *Wirtz* as holding that the fact that the activity in question was carried on by a state or private individual did not affect the federal commerce power to regulate it. *Id.* at 260. The only determinative factor was whether the activity affected commerce. *Id.* at 261.

93. *Pennsylvania*, 500 F.2d at 263.

94. *Id.*

95. *United States v. Ohio Dept of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980).

compliant states and that “[w]hen the State fails to perform [a] duty it becomes a person in violation of a requirement of the implementation plan. As a violator, the State is subject to the enforcement procedures of section 113(a)(1).”⁹⁶ Further, the court “conclude[d] that the provision permitting EPA to enforce a regulation which requires the State to withhold registration from vehicles that do not comply with applicable pollution standards and procedures represents a lawful exercise by Congress of its power to regulate interstate commerce.”⁹⁷ Other courts have disagreed.⁹⁸

In *New York v. United States*, the Supreme Court decided that the federal government cannot force states to enact regulations.⁹⁹ In *New York*, the question was whether the federal government could compel states to enact legislation governing the disposal of low-level radioactive waste.¹⁰⁰ The Low-Level Radioactive Waste Policy Amendments Act of 1985 included a “take title” provision wherein if the states declined to “regulat[e] pursuant to Congress’ direction [the states were] to tak[e] title to and possession of all of the low-level radioactive waste generated within their borders and become liable for all of the damages the waste generators would suffer as a result of the States’ failure to do so promptly.”¹⁰¹ The Court noted that

96. *Id.* at 1204.

97. *Id.* at 1205.

98. See *Brown v. EPA*, 521 F.2d 827, 831-32 (9th Cir. 1975). In *Brown*, The Ninth Circuit held that “the [Act] does not authorize the imposition of sanctions on a state or its officials for failure to comply with . . . regulations which direct the state to regulate the pollution-creating activities of those other than itself,” and that the [Act] “permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs.” *Id.* See also *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), wherein the Fourth Circuit stated that the Act:

[T]ells the States to devise implementation plans conforming to federal specifications or else the EPA will promulgate its own plan. The threat is a federally imposed regulation with federal administration; the promise is the invitation for Maryland to enact a suitable implementation plan and administer it with state employees, thus avoiding federal interference.

Id. at 228. The court held that “EPA was without authority under the statute, as a matter of statutory construction, to require Maryland to establish the programs and furnish legal authority for the administration thereof.” *Id.*

99. *New York v. United States*, 505 U.S. 144, 149 (1992).

100. *Id.*

101. *Id.* at 175. The take title provision states in relevant part:

If a State . . . is unable to provide for the disposal of all [low-level radioactive] waste generated within such State . . . each State in which such waste is generated, upon request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner.

unlike other Tenth Amendment cases, *New York* did not involve Congress “subject[ing] a State to the same legislation applicable to private parties.”¹⁰² In a six-to-three decision, the Court held that “whatever the outer-limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.”¹⁰³

Purpose, Implementation and Enforcement of the PSD Program

While states have discretion in designing their implementation plans, the 1977 amendments to the Act require that they include a permitting process consistent with the Act’s Prevention of Significant Deterioration of Air Quality Program (PSD).¹⁰⁴ The PSD requirements “are designed to ensure that air quality in attainment areas or areas that are already ‘clean’ will not degrade.”¹⁰⁵ This is to be accomplished through the federal and state governments working cooperatively.¹⁰⁶ The congressionally declared purpose of the PSD program is five-fold: (1) to protect public health and welfare from actual or potential adverse effects notwithstanding attainment of air quality standards, (2) to preserve, protect and enhance air quality in national parks, wilderness areas, monuments, etc., (3) to ensure economic growth will not impair existing clean air, (4) to ensure emissions in one state do not impair air quality in another state, and (5) to ensure permitting decisions are made with informed public participation and carefully evaluated.¹⁰⁷

102. *New York*, 505 U.S. at 160. In *New York*, the Court noted its “recent cases interpreting the Tenth Amendment [had] concerned the authority of Congress to subject state governments to generally applicable laws” and that in that area “[t]he Court’s jurisprudence . . . [had] traveled an unsteady path.” *Id.* The Court stated *New York* offered no opportunity to re-examine that jurisprudence because the statute in question “concern[ed] the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.” *Id.* at 161.

103. *Id.* at 188.

104. 42 U.S.C. § 7475 (West 2003).

105. *ADEC v. EPA*, 124 S. Ct. 983, 992 (2004) (quoting *BELDEN*, *supra* note 16 at 43). Attainment areas are those areas where air quality meets NAAQS for a regulated constituent. See 42 U.S.C. § 7407(d)(1)(A)(ii) (West 2003).

106. 42 U.S.C. § 7401 (2004). See *supra* note 66 and accompanying text for the findings and declarations of purpose of the Act.

107. See 42 U.S.C. § 7470 (West 2003). The stated purpose of the PSD is:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipate [anticipated] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air[]], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and

Section 7475 of the Act requires that construction of a major emitting facility may not commence unless "the proposed facility is subject to [BACT] for each pollutant subject to regulation under this Act emitted from, or which results from, such facility."¹⁰⁸ BACT is defined as the emission limitation that produces the maximum reduction in consideration of energy, environmental and economic impacts and other costs.¹⁰⁹ The Act charges EPA with publishing a list of regulated pollutants and establishing standards for those pollutants.¹¹⁰ Sections 113(a) and 167 of the Act give EPA the authority to enforce the requirements of the PSD program.¹¹¹ Specifically, section 113(a) allows EPA to issue a stop construction order, an administrative order, or to bring a civil action in federal district court when a state does not act in compliance with the Act.¹¹² Section 167 is more explicit and re-

other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision making process.

Id.

108. 42 U.S.C. §7475(a)(4) (West 2003). The definition of major emitting facility includes various types of industrial facilities as well as "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." *Id.* § 7479(1).

109. *Id.* § 7479(3). See *supra* note 12 for the Act's definition of BACT. Alaska's implementation plan has a similar definition:

[B]est available control technology[] means the emission limitation that represents the maximum reduction achievable for each regulated air contaminant, taking into account energy, environmental and economic impacts, and other costs; the resulting emissions must comply with applicable state and federal emission standards; best available control technology includes, for example, design features, equipment specifications, and work practices.

18 Alaska Admin. Code § 50.990(13) (2004).

110. 42 U.S.C. §§ 7408(a), 7409(a) (West 2003) (codifying §§ 108(a) and 109(a) of the Act).

111. *Id.* §§ 7413(a), 7477.

112. *Id.* § 7413(a)(5). The section states in relevant part:

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirements or prohibition of the Act relating to the construction of new sources or the modification of existing sources, the Administrator may –

quires that EPA take such measures as are necessary to prevent construction of a facility that is not in conformance with the requirements of the Act.¹¹³

PRINCIPAL CASE

In *ADEC v. EPA*, the Supreme Court considered for the first time whether the Act gives EPA the authority to override a state's permitting decision under the PSD program.¹¹⁴ It answered in the affirmative that EPA has authority over state BACT determinations and may issue stop construction orders if EPA finds the state's determination to be unreasonable.¹¹⁵ The Court began its analysis by examining the Act to determine if EPA has statutory checking authority over state BACT determinations.¹¹⁶ Beginning its analysis with the 1970 amendments to the Act, the Court noted that these amendments were passed "in response to 'dissatisfaction with the progress of existing air pollution programs.'"¹¹⁷ The Court detailed the statutory underpinnings of the NAAQS, Implementation Plans, PSD, and BACT requirements and programs and stated that "in notably capacious terms" Congress gave EPA the authority to stop construction of a major emitting facility "when [the] state is not acting in compliance with any [Act] requirement" or

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;

(B) issue an administrative penalty order in accordance with subsection (d), or

(C) bring a civil action under [another subsection].

Id.

113. *Id.* § 7477. The section states in relevant part:

The Administrator shall . . . take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated . . . as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

Id.

114. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 1005 n.17 (2004).

115. *Id.* at 1009.

116. *Id.* at 991.

117. *Id.* (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976)).

when construction “does not conform to the requirements of [the PSD program].”¹¹⁸

The Court accepted EPA’s interpretation of the relevant statutory provisions.¹¹⁹ The Court’s reasoning for this was twofold: First, the congressional intent of the Act is to protect clean-air areas within states and between their neighbors and this requires a substantive role for EPA, and second, because EPA has a long history of emphasizing its supervisory role.¹²⁰ EPA argued the purpose of the PSD program, protecting clean-air areas, was unlikely to be met without a strong EPA oversight role because without it, states might lose existing facilities to more permissive states.¹²¹ Furthermore, new plants might “play one State off against another” in an “economic-environmental blackmail” game, threatening to locate in the state with the most permissive pollution standards.¹²² This argument was advanced by several states as well.¹²³

The Court accepted EPA’s reading of the Act, confirming the BACT definition, “together with [the Act’s] explicit listing of BACT as a preconstruction requirement, . . . mandate[d] not simply a BACT designation, but a determination of BACT faithful to the statute’s definition.”¹²⁴ The Court agreed with EPA that “BACT’s statutory definition requires selection of an

118. *Id.* at 999 (last alteration in original) (quoting 42 U.S.C. §§ 7413(a)(5) and 7477 (2000)).

119. *Id.* at 1001. The Court explained that agency interpretations in internal guidance documents are not afforded dispositive force and do not warrant *Chevron* deference, but nevertheless “administrative interpretations . . . warrant respect.” *Id.* (internal citations omitted). *Chevron* deference, established in *Chevron v. Natural Res. Defense Council*, 467 U.S. 837 (1984) is a two step test for judicial review of an agency’s interpretation of a statute. *Id.* at 842-43. In the first step, the reviewing court must determine whether the relevant statute clearly authorizes or forbids the agency’s interpretation. *Id.* If the statute is ambiguous or does not clearly prohibit the agency’s interpretation, the court proceeds to step two and determines whether the agency’s interpretation is permissible. *Id.* In the second step, the reviewing court is highly deferential to the agency’s interpretation. *Id.* at 843-44. The Court explained the reason for this deference by stating:

Judges are not experts in the field, and are not part of either political branch of the Government. . . . When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Id. at 865-66.

120. *ADEC v. EPA*, 124 S. Ct. at 1000-01.

121. *Id.*

122. *Id.*

123. See Brief of Amici Curiae Vermont et al. at 11, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658).

124. *ADEC v. EPA*, 124 S. Ct. at 1000 (internal quotation marks omitted).

emission control technology that results in the ‘maximum’ reduction of a pollutant ‘achievable for [a] facility’ in view of ‘energy, environmental, and economic impacts, and other costs’” necessarily constrains the discretion of the state’s permitting authority.¹²⁵ The Court thus accepted EPA’s interpretation, holding the Act limits the discretion of the state to making reasonable BACT determinations, and the Act’s “strong normative terms ‘maximum’ and ‘achievable’ empower the [EPA] to check a state agency’s unreasonably lax BACT designation.”¹²⁶

Addressing EPA’s long history of emphasizing its supervisory role, the Court explained that EPA, in its internal memoranda and published rules, has repeatedly stressed its oversight role in PSD permitting and its authority and intent to review and intervene if states make unreasoned BACT determinations.¹²⁷ The Court noted that EPA had a long history of interpreting the Act in this manner.¹²⁸ The Court cited PSD guidance memoranda, published between 1983 and 1993, that outlined EPA’s PSD “oversight function” and explained that EPA would find deficient any BACT determinations that were “not based on a reasoned analysis” and would act “to ensure that the state exercises its discretion within the bounds of the law.”¹²⁹

The Court rejected the Department’s construction of the Act.¹³⁰ The Department argued that because the BACT definition gives the state responsibility for determining BACT, EPA cannot question the substance of the determination, but has authority only to ensure that the PSD permit contains

125. *Id.* (quoting 42 U.S.C. § 7479(3) (2000)).

126. *Id.* (citing 42 U.S.C. § 7479(3) (2000)). The Court noted that similar language is used in the Act’s standards for new sources in nonattainment areas and for technology based standards for hazardous emissions. *Id.* at 1000 n.12.

127. *Id.* at 1001.

128. *Id.*

129. *Id.* (internal citations omitted). See also Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 63 Fed. Reg. 13795, 13796-97 (Mar. 23, 1998) (codified at 40 C.F.R. pt. 52) where, in approving Virginia’s PSD program, EPA stated:

Regardless of whether EPA addresses deficient permits using objection authorities or enforcement authorities or both, EPA cannot intervene unless the state decision fails to comply with applicable requirements. . . . [I]n determining whether a Title V permit incorporating PSD provisions calls for EPA objection . . . or use of enforcement authorities under sections 113 and 167, EPA will consider whether the applicable substantive and procedural requirements for public review and development of supporting documentation were followed. . . . EPA will also review whether any determination by the permitting authority was made on reasonable grounds properly supported on the record, described in enforceable terms, and consistent with all applicable requirements.

Id.

130. *ADEC v. EPA*, 124 S. Ct. at 1001.

a BACT limitation.¹³¹ The Court recognized Congress intended the states to have initial responsibility for determining BACT because the states are in the best position to account for local conditions that might make certain technologies unfeasible.¹³² The Court observed that simply because there may be no solitary “objectively ‘correct’ BACT determination” does not mean “there can be no *unreasonable* determinations.”¹³³ Noting that EPA “claim[ed] no prerogative to designate the correct BACT,” but only to “guard against unreasonable designations,” the Court stated,

We fail to see why Congress, having expressly endorsed an expansive surveillance role for EPA in two independent [Act] provisions, would then implicitly preclude the Agency from verifying substantive compliance with the BACT provisions and, instead, limit EPA’s superintendence to the insubstantial question whether the state permitting authority had uttered the key words “BACT”.¹³⁴

The Department contended that because one provision of the Act required EPA to approve state BACT determinations in some special cases, the Act limits EPA’s authority to these specific cases.¹³⁵ The Court rejected this argument by noting that a requirement was different than an authorization, and that EPA was authorized to issue a stop-construction order when a BACT determination was unreasonable, but could withhold a required approval of a permit if it came “to a different decision on the merits.”¹³⁶

Having confirmed EPA’s authority under the Act, the Court then considered whether EPA abused its authority in issuing a stop-construction order.¹³⁷ Because the Act does not contain a provision specifying a judicial review standard, the Court employed the Administrative Procedure Act default standard.¹³⁸ Examining the permitting record, the Court determined the Department’s selection of Low NOx as BACT was unreasonable.¹³⁹ The Court concluded that the Department designated Low NOx as BACT to support the mine expansion project and selected Low NOx over SCR on the basis of the latter’s higher costs.¹⁴⁰

131. *Id.* at 1001-02.

132. *Id.* at 1002.

133. *Id.*

134. *Id.* at 1002-03.

135. *Id.* at 1003. See U.S.C. § 7475(a)(8) (West 2003).

136. *ADEC v. EPA*, 124 S. Ct. at 1003.

137. *Id.* at 1006.

138. *Id.* (citing 5 U.S.C. §706(2)(A) (2000) and asking whether EPA’s action was “arbitrary, capricious, an abuse of discretion of otherwise not in accordance with the law”).

139. *Id.* at 1007-08.

140. *Id.* at 1007.

Because the Department itself selected SCR as BACT in the first draft permit, having at that time determined that SCR costs were “well within what [the Department] and EPA considers economically feasible,” the Court agreed with EPA’s finding that the later determination of economic infeasibility “had no factual basis in the record.”¹⁴¹ The Court noted that in the final permit, the Department acknowledged it could make no judgment on the economic impact of SCR on the mine because Cominco had declined to provide any relevant financial data on whether SCR would negatively impact the mine’s operation or profitability.¹⁴² The Court declared “we do not see how [the Department], having acknowledged that no determination ‘[could] be made . . . on the operation . . . and competitiveness of the [mine],’ could simultaneously proffer threats to the mine’s operation or competitiveness as reasons for declaring SCR economically infeasible.”¹⁴³ As the Court stated, “[a]bsent [relevant financial data from Cominco], [the Department] lacked cause for selecting Low NOx as BACT.”¹⁴⁴

As a second rationale for selecting Low NOx as BACT on the one generator in question, the Department pointed to the lower total emissions that would result from installing Low NOx on all of Cominco’s generators.¹⁴⁵ The Court rejected this argument, noting that the Department acknowledged the existing generators were outside of the BACT permitting action, and therefore any reduction in their emissions could not be offset against the generator subject to BACT.¹⁴⁶ Finding the Department’s BACT determination unreasonable, the Court concluded EPA had not abused its authority in issuing its orders prohibiting construction of the generators.¹⁴⁷ To bolster its holding that EPA has authority to countermand only unreasonable BACT determinations, the Court emphasized that its opinion “does not impede [the Department] from revisiting the BACT determination in question . . . and on an ‘appropriate record’ endeavor to support Low NOx as BACT.”¹⁴⁸

The dissent, authored by Justice Kennedy and joined by Chief Justice Rhenquist and Justices Scalia and Thomas, asserted that the majority opinion is in conflict “with the express language of the [Act], with sound rules of administrative law, and with principles that preserve the integrity of States in our federal system.”¹⁴⁹ On the first point, the dissent noted that while the EPA has authority under the Act to enforce its “requirements,” the

141. *Id.* at 1007-08.

142. *Id.* at 1007.

143. *Id.*

144. *Id.* at 1007-08.

145. *Id.* at 1008.

146. *Id.*

147. *Id.* at 1009.

148. *Id.* (noting EPA had repeatedly expressed to the Department that it would accept a justified and reasonable determination of Low NOx as BACT).

149. *Id.* at 1010 (Kennedy, J., dissenting).

Act's provisions do not define that term.¹⁵⁰ In this instance, finding the only requirement to be that emitting facilities are subject to BACT, the dissent interpreted the BACT definition as simply directing the permitting authority to determine what constitutes BACT in light of the requisite factors.¹⁵¹ In the view of the dissent, "the [Act] commits BACT determinations to the discretion of the relevant permitting authorities. Unless an objecting party, including EPA, prevails on judicial review, the determinations are conclusive."¹⁵²

The dissent pointed out that the Act allows for judicial review of BACT determinations.¹⁵³ Before EPA may approve a state's implementation plan, the state must provide "an opportunity for state judicial review," and any interested person who participates in the comment process may seek review of a state's BACT determination in state court.¹⁵⁴ In the dissent's opinion, the fact that EPA is defined as an "interested person" together with the requirement that "interested persons" be afforded opportunity for judicial review in state court means that EPA must follow that procedure and "cannot evade [it] by a mere stroke of the pen under the Agency's letterhead."¹⁵⁵ In response to the majority emphasizing that the Department could revisit its BACT determination, the dissent viewed this only as piling on additional procedure.¹⁵⁶

In the dissent's view, the most serious flaw in the Court's opinion is a "reworking of the balance between State and Federal Governments . . . [and] the reallocation of authority between the Executive and Judicial Branches."¹⁵⁷ Noting that the Act's permitting processes are slow and expensive in their current form, the dissent argued the Court's opinion will undermine the confidence of applicants in the state officials with whom they must deal.¹⁵⁸ To illustrate, the dissent offered the following hypothetical:

Suppose, before EPA issued its orders setting aside the State's BACT determination, an Alaska state court had reviewed the matter and found no error of law or abuse of discretion in [the Department's] determination. The majority's

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

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

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

153. *Id.* at 1012-13 (Kennedy, J., dissenting).

154. *Id.* at 1013 (Kennedy, J., dissenting). Justice Kennedy noted 42 U.S.C. § 7475(a)(2) requires notice to all interested persons, including EPA, to ensure participation in the comment process and § 7475(d) requires the state to notify EPA of all permit actions. *Id.* (Kennedy, J., dissenting) (citing 42 U.S.C. § 7475(a)(2), (d) (2000)).

155. *ADEC v. EPA*, 124 S. Ct. at 1013 (Kennedy, J., dissenting).

156. *Id.* at 1016-17 (Kennedy, J., dissenting).

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

158. *Id.* at 1017 (Kennedy, J., dissenting).

interpretation of the statute would allow EPA to intervene at this point for the first time, announce that [the Department's] determination is unreasoned under the [Act], and issue its own orders nullifying the state court's ruling.¹⁵⁹

The dissent emphasized that "for States to have a role . . . their own governing processes must be respected."¹⁶⁰ It is ill at ease with the holding of the majority that this case involves only preconstruction orders and EPA could not countermand state court actions when its decisions are subject to federal judicial review.¹⁶¹ The dissent concluded by stating, "[i]f cooperative federalism is to achieve Congress' goal of allowing state governments to be accountable to the democratic process in implementing environmental policies, federal agencies cannot consign States to . . . ministerial tasks . . . while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight."¹⁶²

ANALYSIS

The overriding purposes of the Act are to promote the public health and welfare by protecting the nation's air quality through reasonable federal, state and local government actions.¹⁶³ What in the eyes of the federal government is reasonable may, in the eyes of the state, be unreasonable. Thus, the roles the federal and state governments are to play and the limit on authority that each must abide by in the cooperative federalism scheme created by the Act will always be a contentious issue.¹⁶⁴ Final authority must rest with one government, however, and if national environmental goals are to be

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

160. *Id.* (Kennedy, J., dissenting) (citing *New York v. United States*, 505 U.S. 144 (1992)).

161. *Id.* at 1016 (Kennedy, J., dissenting). The reason for this unease stems from "[t]he [established] principal that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest." *Id.* (Kennedy, J., dissenting) (quoting *United States v. Beebe*, 127 U.S. 338, 344 (1888)).

162. *Id.* at 1018 (Kennedy, J., dissenting).

163. 42 U.S.C. §§ 7401(b)(1), (c) (West 2003). Section 7401(b)(1) states that "[t]he purpose of this subchapter are to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.* § 7401(b)(1). Section 7401(c) states that "[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this Act, for pollution prevention." *Id.* § 7401(c). Congress has found, however, "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." *Id.* § 7401(a)(3).

164. David L. Markel, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 32-33 n.129 (2000). Markel notes "[t]he oversight process is at the heart of federal-state conflict by its nature." *Id.* (quoting ENVTL. L. INST., FEDERAL OVERSIGHT OF AUTHORIZED STATE ENVIRONMENTAL PROGRAMS: REFORMING THE SYSTEM I (1995)).

met, that authority must be in the federal government.¹⁶⁵ The Court's decision in *ADEC v. EPA* affirmed the notion that while cooperative federalism runs in both directions—that neither the Federal nor the State governments can be mere clerks for the other—substantive EPA oversight is necessary to achieve the goals of the Act.¹⁶⁶

States Have Been Ineffective Regulators Without a Federal Backstop

The Act has been amended several times to increase the federal role, but it still leaves the primary responsibility for regulating and controlling air pollution with the states.¹⁶⁷ The early history of air pollution regulation confirms that when regulation and control have been left to the states alone, little has been done.¹⁶⁸ More recently, the states have failed to achieve atmospheric standards for ozone and carbon monoxide in a timely manner.

Ozone levels are related to emissions of volatile organic compounds and up to fifty percent of the emissions of these compounds are attributable to motor vehicle emissions.¹⁶⁹ Motor vehicles are responsible for up to ninety percent of carbon monoxide emissions.¹⁷⁰ The 1990 amendments to

165. William L. Andreen, *Water Quality Today – Has The Clean Water Act Been A Success?*, 55 ALA. L. REV. 537, 539 n.14 (2004). In discussing the need for national water quality standards, Andreen quotes Oliver Houck, who wrote:

In most states . . . [local] needs are aligned with economic and development interests whose local influence—be it chickens in Arkansas, sugar in Florida, the timber industry in Idaho, wheat in Kansas, oil and gas in Louisiana, cattle in Nevada, coal in Wyoming, and real estate nearly everywhere—is magnified by being the dominant game in town. Trying to achieve a national interest in clean air or water through state and local governments . . . is like trying to encourage spaghetti through a keyhole.

Id. (quoting OLIVER A. HOUCK, *THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY AND IMPLEMENTATION* 195 (2d Ed. 2002)).

166. *Compare* Brief of Northwest Env't Def. Cent. as Amicus Curiae at 8, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658) (arguing "Alaska's interpretation of the statute would relegate EPA to the role of an archivist. . . [whose role in overseeing permit determinations] would simply be that of a clerk, checking to make sure all the blanks were filled in, but not being concerned about the contents"), *with* *ADEC v. EPA*, 124 S. Ct. 983, 1018 (2004) (Kennedy, J., dissenting) (asserting that to achieve the goal of allowing state governments "to be accountable to the democratic process . . . federal agencies cannot consign States to the ministerial tasks of information gathering").

167. *See supra* notes 67-73 and accompanying text for a discussion of the history of the Act and its amendments.

168. Dwyer, *supra* note 7, at 1222. *See also* Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 HOUS. L. REV. 679, 701 (1999) (noting that between 1967 and 1970, only twenty-one states submitted implementation plans to the federal government and none received federal approval).

169. U.S. GAO, *AIR POLLUTION—DELAYS IN MOTOR VEHICLE INSPECTION PROGRAMS JEOPARDIZE ATTAINMENT OF THE OZONE STANDARD*, GAO/RCED 98-175 (1998).

170. *Id.*

the Act required states with the worst ozone and carbon monoxide problems to implement enhanced inspection and maintenance programs by November 1992.¹⁷¹ EPA was forced to extend this deadline to January 1995 because by November 1992, not a single one of the twenty-three states identified as being required to implement an enhanced inspection and maintenance (I & M) plan had done so.¹⁷² Only two states had begun testing vehicles under enhanced programs by the January 1995 deadline.¹⁷³

Many of the states attributed their delay in the design and implementation of their plans to a lack of flexibility afforded by the federal regulation.¹⁷⁴ Consequently, the EPA and Congress in 1995 revised the requirements to give the states more flexibility.¹⁷⁵ Still, by April 1998, only twelve states had begun testing vehicles under the enhanced inspection and monitor-

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* The GAO reported that:

A number of factors account for the delays in implementing enhanced I & M programs, including opposition to the stringent requirements of EPA's enhanced I & M regulation, the reluctance of some state legislatures to provide authority and funding for the programs, and difficulties in obtaining test equipment and software support.

Id. See also Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521, 1620 (1996), wherein the author argues that:

The history of federal [I&M] programs plainly demonstrates that the states are entirely unwilling to implement such programs voluntarily. . . . Left to their own devices, the states would have achieved very little of the substantial progress that the country has made toward attaining health-based goals for urban air quality.

Id.

175. U.S. GAO, AIR POLLUTION—DELAYS IN MOTOR VEHICLE INSPECTION PROGRAMS JEOPARDIZE ATTAINMENT OF THE OZONE STANDARD, GAO/RCED 98-175 (1998). The GAO reported:

[T]he revised regulation allowed the states to implement less stringent enhanced I&M programs if they could demonstrate emission reductions from other sources. The regulation also allowed the states more leeway in inspecting and repairing failed vehicles. . . . Additionally, the National Highway System Designation Act of 1995—which prohibited EPA from requiring the states to have centralized . . . programs—allowed the states to revise their programs to include decentralized testing and provided an 18-month interim approval period for them to demonstrate that their revised programs could achieve the needed emissions reductions.

Id.

ing plans.¹⁷⁶ Today, ground level ozone continues to be the most common urban air pollutant.¹⁷⁷ While there has been some progress regionally and nationally, the EPA reports, “some major metropolitan areas have not achieved the ozone precursor emission reductions required by the 1990 Act . . . [and that] analyses by EPA and other researchers indicate that recent downward trends in ozone may be more related to changes in weather patterns than emission reductions.”¹⁷⁸ To address this issue, the Office of the Inspector General of EPA has recommended that:

[C]ontingency measures and additional controls [be implemented], where appropriate . . . if nonattainment areas have not met the Act’s emission reduction requirements, including the use of any enforcement and/or sanctions available under Section 179 of the Act for failure of a State to submit adequate plans and/or failure to timely and adequately implement planned controls to achieve required emission reductions by the statutory milestone dates.¹⁷⁹

Pollution control efforts have been more successful in the water arena. When Congress addressed water pollution from point sources in the Clean Water Act, it also employed a “cooperative federalism” approach.¹⁸⁰ The approach was similar to that of the Clean Air Act, but the federal oversight role in controlling and regulating water pollution from municipal and

176. *Id.*

177. U.S. EPA: OFFICE OF INSPECTOR GENERAL, EPA AND STATES NOT MAKING SUFFICIENT PROGRESS IN REDUCING OZONE PRECURSOR EMISSIONS IN SOME MAJOR METROPOLITAN AREAS, Report No. 2004-P-00033 i (Sept. 29, 2004). The report observes that over 159 million citizens live in areas that do not meet the current EPA standard for ozone, and that more than one billion dollars in annual agricultural losses are attributable to ozone. *Id.*

178. *Id.* at i-ii. The EPA report also found:

[S]ome major metropolitan areas have not achieved the ozone precursor emission reductions required by the 1990 Act . . . [Twenty-three] of [twenty-eight] emissions reduction plans submitted since 1990 by 10 serious to extreme nonattainment areas raised questions as to whether required precursor emissions reductions were achieved by the dates specified in the Act. Further, precursor emissions in some areas may actually have increased. While EPA air trends reports have emphasized that ozone levels are declining nationally and regionally, only 5 of 25 nonattainment areas designated serious to extreme have experienced substantial downward trends in ozone levels.

Id. at i.

179. *Id.* at 15.

180. Percival, *supra* note 11, at 1162 (explaining that the federal government established national standards, but EPA could delegate authority to states to run the federal program).

industrial sources was more clearly defined in the Clean Water Act.¹⁸¹ It created the National Pollutant Discharge Elimination System (NPDES), which allows states to implement permit programs, but gives EPA veto authority over any state-issued permit.¹⁸² The NPDES program has been more successful in reducing point source pollutants in the nation's waters, and "over the past thirty years, significant progress has been made in reducing municipal and industrial point source discharges to our rivers and lakes."¹⁸³ In the last thirty years, the discharge of organic wastes from municipal treatment facilities has "dropped forty-six percent, while similar discharges from industry have fallen ninety-eight percent."¹⁸⁴

Today, the majority of water pollution derives from non-point sources.¹⁸⁵ This source of water pollution is wide-spread and rivers, streams, lakes and coastal waters suffer from pollution that impairs their use.¹⁸⁶ Like the original Clean Air Act, the Clean Water Act has left regulation of non-point sources to the states, and little progress has been made in reducing this cause of water pollution.¹⁸⁷ The decision in *ADEC v. EPA* appropriately

181. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (West 2003 & Supp. 2004)).

182. 33 U.S.C. § 1342(b)-(c) (West 2003). Whenever EPA finds that a state is not administering its permit approval program in conformance with the Clean Water Act's requirements, it "shall withdraw approval of such [a] program" if after notification the state has not taken corrective action within a reasonable time. *Id.* § 1342(c)(3) (West 2003). A point source discharge is one from a pipe or other identifiable conveyance. Andreen, *supra* note 165, at 547. In contrast, non-point sources of discharge are general runoff from agricultural fields, roadways, parking lots and the like that contribute pollutants to the nation's waters in a diffuse fashion. *Id.* at 551.

183. Andreen, *supra* note 165, at 554.

184. *Id.* at 591.

185. *Id.* at 544 n.6. Andreen explains that "[n]on-point source pollution is, in fact, the largest source of water quality problems today. 'It is the main reason that approximately 40% of surveyed rivers, lakes, and estuaries are not clean enough to meet basic uses such as fishing or swimming.'" *Id.* (quoting OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, SECTION 319 SUCCESS STORIES VOLUME III at 1 (2002)).

186. *Id.* at 578-86. Andreen notes EPA reported in 2000 that only fifty-three percent of surveyed rivers and streams fully support all uses without threat. *Id.* at 578. Agricultural operations contributed to water quality problems on nearly half of the impaired streams. *Id.* at 578-79. The leading sources of pollution in the Great Lakes are contaminated sediment, followed by "urban runoff/storm sewers, agriculture, atmospheric deposition, habitat modification, land disposal of wastes, and septic tanks." *Id.* at 581.

187. *Id.* at 545 n.42 (explaining that under sections 208 and 319 of the Clean Water Act, Congress relied on state-implemented plans to control non-point source discharges, but permitted the States to take non-regulatory approaches, such as education and technical assistance, with the result that little control of non-point sources has been made). See also Douglas R. Williams, *When Voluntary, Incentive-Based Controls Fail: Structuring a Regulatory Response to Agricultural Nonpoint Source Water Pollution*, 9 WASH. U. J. L. & POL'Y 21, 24-5 (2002) (noting that EPA's total maximum daily limit rules—which seek to attain water quality goals through control of both point and nonpoint sources—have spurred some action by the states, "suggesting that the longstanding 'carrot, not stick' approach to dealing with this major pollution problem may be wearing a bit thin").

moves enforcement of the Clean Air Act's requirements toward the more effective NPDES mode of federalism.

The Desirability of Uniformity in Air Quality Regulation

Uniformity in BACT permitting decisions fostered by adequate federal oversight and enforcement is desirable for three reasons: (1) it prevents groups from externalizing the costs of pollution control onto others, (2) it protects the states' environmental and economic interests, and (3) it deflects local political criticism of environmental regulation. Because air pollution does not recognize political boundaries, the costs of air pollution are not borne solely by the state in which they originate. In the absence of other external driving forces, upwind states have no incentive to prevent pollution from encroaching on downwind states because those located upwind can enjoy greater economic benefit from the pollution-generating activity by imposing little cost for pollution control.¹⁸⁸ On the other hand, to achieve their desired level of air quality, the downwind states must over regulate polluters within their own borders, stifling local economic activity.¹⁸⁹ The area receiving the economic benefits of the pollution generating activity and the area bearing the costs of that pollution simply do not always share the same geographic space.¹⁹⁰

Every industrial development of the type requiring a PSD permit necessarily requires some increase in emissions of a regulated pollutant.¹⁹¹ States with air that already meets the NAAQS can argue that requiring them to impose the most stringent "economically viable" technologies, regardless of whether a lesser technology will keep emissions below the permissible numerical limits, forces them to bear the externalized costs of meeting standards in the heavily developed states.¹⁹² Additionally, the diverse geography, climate, and distribution of resources and populations within the country necessarily require local knowledge and control of pollution regulation.¹⁹³ This is a primary criticism of federal regulation—that it "ignores variations in the costs of pollution and pollution control from locality to locality within a state."¹⁹⁴ But these externalities exist even within the local areas where the

188. Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 ST. LOUIS U. PUB. L. REV. 67, 98 (2001).

189. *Id.*

190. U.S. GAO, AIR POLLUTION—DELAYS IN MOTOR VEHICLE INSPECTION PROGRAMS JEOPARDIZE ATTAINMENT OF THE OZONE STANDARD, GAO/RCED 98-175 n.8 (1998) (explaining Vermont is required to implement an enhanced motor vehicle inspection and maintenance program to achieve ozone standards because of volatile organic compound emissions from other states).

191. See *supra* note 22 (explaining PSD permits are required for modifications to major emitting facilities that increase NO_x emission by more than forty tons per year).

192. See Williams, *supra* note 188, at 103-04.

193. Dwyer, *supra* note 7, at 1218.

194. Williams, *supra* note 188, at 101.

pollution generating activity takes place, and do not disappear simply because it is the state and not the federal government taking action.¹⁹⁵ While federal standards might not always distribute the costs of pollution control in an entirely equitable manner, they do “minimize opportunities for states to externalize the costs of their choices regarding environmental standards.”¹⁹⁶

A Federal Backstop Protects States From Industry Pressure to Ease Standards

Congress recognized that the PSD program and its provisions protect the states’ economic and environmental interests.¹⁹⁷ This was acknowledged by thirteen states, some of which (like California, New York, Michigan and New Jersey) are heavily industrialized, in an amicus brief submitted to the ADEC Court.¹⁹⁸ Amici pointed to the legislative history of the 1977 amendments, arguing that the “significant deterioration provision serves as an equalizer, enabling all areas of the county to join in the fight for clean air without fighting each other. It is in many respects the cornerstone of the [Act] on which the eventual realization of clean air goals is predicated.”¹⁹⁹ The competition between states in attracting new industry is fierce and the pressure to leniently regulate is real.²⁰⁰ This is especially true in clean air states, where without national guidelines, they face a “double-threat . . . that [they] would lose existing industrial plants to more permissive States [and

195. *Id.* Williams notes that “state regulatory decisions may also fail to yield to desirable levels of environmental quality, even when there are no inter-jurisdictional externalities. Strong local preferences for environmental quality may be overridden by contrary aggregate state-wide preferences.” *Id.* See Brief for the Native Village of Kivalina as Amicus Curiae at 4-5, ADEC v. EPA, 124 S. Ct. 983 (No. 02-658). The native village supported EPA’s position and argued that ADEC’s support of the project for its economic contributions to the area are misplaced because the Red Dog Mine maintains a “fly-in camp” which enables forty percent of the workers to live and spend their paychecks outside the area while the native population, reliant on subsistence hunting and fishing, is adversely affected by air and water pollution from the mine. *Id.*

196. Williams, *supra* note 188, at 104.

197. See 42 U.S.C. § 7470(3) (West 2003) (stating that one of the purposes of the PSD program is “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources”).

198. Brief of Amici Curiae Vermont et al. at 12, 124 S. Ct. 983 (2004) (No. 02-658).

199. H.R. REP. NO. 95-294, at 134 (1977).

200. *Id.* at 134-35 (citing Hearings on Nomination of William Ruckelshaus, Senate Public Works Committee, 91st Cong., 2d sess., 1970, 6; p. 248). Mr. Ruckelshaus stated,

Having spent a number of years in the State attorney general’s office in the State of Indiana, I know that the States as regulators of industry, and regulators, in the area of pollution, operate under some disadvantage. The States compete very fiercely for industry to locate in their States, and when they are asked to regulate that same industry that they are asking to locate in their States, sometimes they are not as effective as they should be.

would also] become the target of 'economic-environment 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."²⁰¹ Industrial plants looking for places to locate are often offered economic incentives by states.²⁰²

Tax breaks alone, however, cannot always keep industry from relocating to less expensive climates.²⁰³ Without EPA oversight of the PSD program, "[s]tates could feel the pressure to apply the PSD requirements leniently in order to compete with other states for new facilities."²⁰⁴ Reasonable conformity between states in BACT selection determinations, backed by EPA authority, relieves the pressure on states to weaken environmental enforcement and allows them to uphold stringent standards.²⁰⁵ As noted above, tough environmental standards are not always welcome everywhere within a state, and state officials may have to pay a political cost for enacting stringent regulation.²⁰⁶ Because state officials regularly decry federal intrusions into state affairs, the substantive though limited oversight authority resulting

201. H.R. REP. NO. 95-295 at 134 (1977).

202. Brief of Amici Curiae Vermont et al. at 12, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658). State funding was involved in the Teck Cominco Mine expansion project. *Alaska Dep't of Env'tl. Conservation v. EPA*, 124 S. Ct. 983, 994 (2004).

203. See Timothy Egan, *Towns Hand Out Tax Breaks, Then Cry Foul as Jobs Leave*, N.Y. TIMES, Oct. 15, 2004, at A1, A24 (explaining that tax breaks and incentives given to industry to locate in a community do not always ensure industry will remain and quoting a Putnam County, Florida lawyer and opponent of corporate tax breaks as stating "[i]t's universal blackmail out there . . . with corporations all playing the same game").

204. *ADEC v. EPA*, 124 S. Ct. at 994. See also H.R. Rep. No. 95-294 at 135 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1213.

205. Brief of Amici Curiae Vermont et al. at 12, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658). See H.R. Rep. No. 95-294 at 135(1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1214. The report stated,

Only with nationally applicable guidelines on prevention of significant deterioration will emissions from each new source and their impact on limited air resources be minimized regardless of where the source locates. And only such an approach will help prevent the flight of industry and jobs from heavily polluted areas of the Nation. It will render impotent threats of "economic-environmental blackmail." In short, it will "protect and enhance the quality of the Nation's air resources" while safeguarding the economic and tax bases of all regions of the Nation.

Id.

206. Dwyer, *supra* note 7, at 1219.

from the decision in *ADEC v. EPA* can deflect some of that political cost.²⁰⁷ This concept has become known as the “gorilla in the closet.”²⁰⁸

The Gorilla Rarely Leaves the Closet

While the Court’s holding is likely to precipitate much teeth gnashing by those advocating only the most limited role for the federal government, EPA is not likely to invoke the authority on a regular basis. In *ADEC v. EPA*, the Court limited this authority to those occasions where EPA finds “a state agency’s BACT determination is ‘not based on a reasoned analysis.’”²⁰⁹ EPA “acknowledges that 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.”²¹⁰ Prior to *ADEC v. EPA*, there were only two judicial decisions regarding the EPA’s exercise of its authority to issue orders by reason of unreasonable BACT determinations, and as the Court stated, this “restrained and moderate use of its authority hardly supports the . . . speculation that [EPA] will ‘dis-

207. Dwyer, *supra* note 7, at 1219 n.177 (stating “officials may think that federal responsibility for basic policy decisions will help them to deflect political criticism and controversy (‘The Feds made me do it.’)”).

208. See U.S. EPA, WILLIAM D. RUCKELSHAUS: ORAL HISTORY INTERVIEW, EPA 202-K-92-0003, Jan. 1993 available at <http://www.epa.gov/history/publications/ruck/13.htm> (last visited Dec. 6, 2004). In describing relations between EPA and state governments when EPA was first established, Mr. Ruckleshaus stated, “[s]ome of the more philosophic [state regulators] acknowledged that EPA was really a gorilla in the closet. So long as we didn’t come out of the closet and we let the states alone, the gorilla could help induce compliance.” *Id.* See also U.S. EPA, DOUGLAS M. COSTLE: ORAL HISTORY INTERVIEW, EPA 202-K-01-002, Jan. 2001 at <http://www.epa.gov/history/publications/costle/26.htm> (last visited Dec. 6, 2004). When asked how he handled delegation of authority to the states, Mr. Costle said:

Consider the gorilla-in-the-closet phenomenon. You want the gorilla to reside in the closet, and you want the players in the room to know he’s in there. EPA was the gorilla; it had a strong role to play in providing fledgling state agencies and programs with a backbone that they could rely on while taking some potentially very unpopular actions on their own turf.

Id.

209. Alaska Dep’t of Env’tl. Conservation v. EPA, 124 S. Ct. 983, 1003 (2004).

210. Approval and Promulgation of Implementation Plan State of Texas Prevention of Significant Deterioration, 57 Fed. Reg. 28093, 28095 (June 24, 1992). That EPA rarely steps in to override state actions is supported by its limited overfiling activity. See Ellen R. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 EMORY L.J. 373, 375 n.18 (2002) (citing an EPA estimate that EPA overfilings made up less than 0.3 percent of all federal enforcement actions between 1992 and 1994 and that EPA overfiled in only six cases between 1995 and 1997). An overfiling is an EPA action “step[ping] in to fix, change, undo, or add to what a state has already done or takes action after a state has failed to act.” *Id.* at 373.

plac[e]' or 'degrad[e]' state agencies or relegate them to the performance of mere 'ministerial' functions."²¹¹

Despite EPA's limited use of this authority, the dissent in *ADEC v. EPA* believes the ruling in this case will allow EPA to step in late, even after a state court has reviewed a BACT determination and found it adequate, and nullify the state court's ruling.²¹² The dissent contends that this "loophole," allowing EPA to issue an order rather than challenge a state's finding in state court, will undermine the state's process.²¹³ In the dissent's view, the Court in *ADEC v. EPA* "denies state judicial systems the same judicial independence it has long guarded for itself—only that the injury here is worse. Under the majority's holding, decisions by state courts would be subject to being overturned, not just by any agency, but by an agency established by a different sovereign."²¹⁴

EPA's action is not an "end run" around a requirement for state review, because "Congress often gave EPA a choice of enforcement measures," including the authority to issue stop-construction orders, to issue administrative penalty orders, or to bring a civil action.²¹⁵ As the Court noted, "[i]t would be unusual, to say the least, for Congress to remit to a federal agency enforcing federal law solely to state court."²¹⁶ Additionally, EPA has never asserted authority to override a state-court judgment by administrative fiat.²¹⁷ BACT determination reviews may be pursued in state court, and

211. *ADEC v. EPA*, 124 S. Ct. 983, 1003 n.14 (2004). The cases cited by EPA were *All-steel, Inc. v. EPA*, 25 F.3d 312 (6th Cir. 1994) and *Solar Turbines Inc. v. Seif*, 879 F.2d 1073 (3d Cir. 1989). This author contends that the record in *ADEC v. EPA* supports finding EPA was very deferential to the state agency's process and decision but stepped in when it appeared the agency's decision was tainted by outside pressures and the Department was not effectively enforcing environmental requirements on the mine. See the letter of September 15, 1999, from the director of EPA's Office of Air Quality to the Department in which EPA expressed its concern that the Department had allowed the mine to commence the expansion project prior to a PSD analysis and that the Department had authorized construction and installation of other equipment at the mine prior to Cominco's receipt of a PSD permit. Joint Appendix at *119-20, LEXSEE 2002 U.S. Briefs 658, *ADEC v. EPA*, 124 S. Ct. 983 (2004) (No. 02-658).

212. *ADEC v. EPA*, 124 S. Ct. at 1015 (Kennedy, J., dissenting).

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

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

215. *Id.* at 1004 n.15. With regard to requirements for new sources, the Act gives EPA the authority to "issue an order prohibiting the construction or modification of any major stationary source," 42 U.S.C. § 7413(a)(5)(A) (West 2003), to "issue an administrative penalty order," *id.* § 7413(a)(5)(3), or to "bring a civil action," *id.* § 7413(a)(5)(C). EPA has similar enforcement options when it finds other types of violations or requirements, plans or permits. See *id.* §§ 7413(a)(1)-(a)(3). As the Court observed, "[f]ollowing the dissent's logic, EPA's authority to bring a civil action would rule out, as a 'loophole,' its authority to issue a stop-construction order." *ADEC v. EPA*, 124 S. Ct. at 1004 n.15.

216. *ADEC v. EPA*, 124 S. Ct. at 1004.

217. *Id.* at 1003 n.14. Additionally, the Court noted, "[i]n the one instance of untimely EPA action [identified by ADEC] the federal courts declined to permit enforcement to pro-

"EPA actions are, of course, subject to the process of judicial review Congress empowered the federal courts to provide."²¹⁸ Were EPA to ever seek to override a state court judgment, "preclusion principles . . . unquestionably [would] apply against the United States, its agencies and officers."²¹⁹

CONCLUSION

By affirming that EPA has a substantive enforcement role over unreasonable state decisions, the Court has signaled to the states that they must make decisions "with fidelity to the Act's purpose 'to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.'"²²⁰ Air quality is a national concern deserving national action. History demonstrates that without substantive guidance and oversight by the Federal government, the states have not been able to achieve national air quality goals. Industry and local economic pressures are too great at the state level. Affirming EPA's authority to step in when states satisfy the form but not the substance of the Clean Air Act will help ensure that the progress that has been made in the last thirty years is not squandered.

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

218. *Id.* at 1002 n.13.

219. *Id.* at 1003 n.14 (citing *Montana v. United States*, 440 U.S. 147 (1979)). In *Montana*, the Court held the United States government was collaterally estopped from relitigating in federal court issues that had already been resolved in state court. *Montana*, 440 U.S. at 152-53. Likewise, the Court has held state-court judgments preclude subsequent federal action in other arenas as well, including Title VII employment discrimination suits, and actions for civil rights violations under 42 U.S.C. § 1983. See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982) (holding 28 U.S.C. § 1738 requires federal courts to apply the preclusive rules of the state court rendering the initial judgment that state court); *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980) (stating "that res judicata and collateral estoppel . . . promote the comity between state and federal courts that has been a bulwark of the federal system"). The Court has stated "it is now settled that a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

220. *ADEC v. EPA*, 124 S. Ct. at 1000 (quoting 42 U.S.C. 7407(3) (2000)).

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