

# NOTES

## *Alaska v. EPA*: The Ninth Circuit Upholds Administrative Orders Against Facilities for State’s Violation of the Clean Air Act

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### I. OVERVIEW

Teck Cominco Alaska, Inc. (Cominco), a major producer of zinc concentrates, operates the Red Dog Mine in partnership with the Northwest Arctic Native Association in Alaska.<sup>1</sup> This mine, located about one hundred miles from the Arctic Circle, has an on-site power supply comprised of six generators labeled “MG-1” through “MG-6.”<sup>2</sup> In 1998, Cominco began a project to boost the mine’s output and applied to the Alaska Department of Environmental Conservation (ADEC) for a Prevention of Significant Deterioration (PSD) permit.<sup>3</sup> Cominco sought permission to increase the emission of nitrogen oxides (NOx) from the MG-5 generator and proposed to use “Low NOx” as the best available control technology (BACT) for the new emissions.<sup>4</sup> ADEC rejected Cominco’s use of Low NOx as BACT for MG-5 and proposed that Cominco use Selective Catalytic Reduction (SCR) instead.<sup>5</sup> Cominco amended its permit application and proposed to install Low NOx on all

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1. *Alaska v. EPA*, 298 F.3d 814, 816 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3339 (Oct. 25, 2002) (No. 02-658).

2. *Id.* These generators are diesel-fuel Wartsila 5000-watt generators constructed under a 1988 Prevention of Significant Deterioration (PSD) permit. *Id.*

3. *Id.* ADEC runs the Clean Air Act (CAA) permitting program, including PSD permits, as part of Alaska’s state implementation program. Approval and Promulgation of Implementation Plans: Alaska, 48 Fed. Reg. 30,623 (July 5, 1983), *amended by* 56 Fed. Reg. 19,284-87 (Apr. 26, 1991) (codified at 40 C.F.R. pt. 52.70-52.96).

4. *Alaska*, 298 F.3d at 816-17. PSD permits require that facilities implement BACT for new emissions. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4) (2000).

5. Low NOx reduces air emissions by using “high combustion air temperatures to better atomize toxic particles.” *Alaska*, 298 F.3d at 816-17. SCR reduces NOx emissions by injecting the exhaust with ammonia or urea and then combining it with a catalyst. *Id.* at 817.

six current generators as well as on a proposed seventh generator, MG-17.<sup>6</sup> ADEC accepted this proposal in May of 1999 because it would reduce the overall NOx emissions to a level comparable to the one that would have been achieved had Cominco installed SCR on only two generators, MG-5 and MG-17.<sup>7</sup>

The United States Environmental Protection Agency (EPA), the federal agency responsible for administering the Clean Air Act (CAA), wrote a letter to ADEC in July of 1999 stating that equivalent emissions reductions are not sufficient for the PSD program if they are less stringent than BACT.<sup>8</sup> ADEC's response to the EPA's concern was a finding that SCR was not cost-effective for the facility; therefore, Low NOx was the BACT for the facility.<sup>9</sup> The EPA disagreed with ADEC's conclusion because the "cost-effectiveness estimate for SCR was 'well within the range that EPA considers reasonable.'"<sup>10</sup> The three parties then met to discuss the permit application and agreed to install Low NOx on four generators; but, they did not agree on BACT for the new generator, MG-17.<sup>11</sup> Further negotiations between the parties were unsuccessful.<sup>12</sup>

On December 10, 1999, the EPA issued a "Finding of Noncompliance Order" stating that "ADEC's authorization of Cominco's construction and installation of new equipment was not in compliance with the Clean Air Act [CAA] and the Alaska [State Implementation Plan] SIP."<sup>13</sup> That same day, ADEC continued with the issuing of Cominco's PSD permit.<sup>14</sup> The EPA responded with a formal finding that ADEC had violated state and federal PSD requirements and issued an Administrative Order to Cominco preventing construction at the facility.<sup>15</sup> The EPA followed with an Amended Administrative Order on March 7, 2000.<sup>16</sup> ADEC and Cominco then petitioned the United States Court of Appeals for the Ninth Circuit to review the EPA's three orders claiming

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6. *Id.* Cominco was not required to install BACT on all generators, only those which would have increased NOx emissions as a result of increased production. *Id.*

7. *Id.*

8. *Id.* The National Park Service asked the EPA to intervene in the Cominco permitting process because they were concerned about the possible effects of increased NOx emissions on vegetation at Cape Krusenstern National Monument and Noatak National Preserve. *Id.*

9. *Id.*

10. *Id.* "[T]he cost-effectiveness of recent NOx control BACT decisions ranged from \$0 to \$7000 per ton of NOx removed." *Id.* at 822. ADEC's cost-effectiveness estimate for SCR was \$2100 per ton of NOx removed. *Id.*

11. *Id.* at 817.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* The Administrative Order was issued on February 8, 2000. *Id.*

16. *Id.* at 817-18.

that the agency had exceeded its authority because ADEC's BACT determination was within the permitting authority's discretion.<sup>17</sup> The EPA challenged the court's subject matter jurisdiction and the Ninth Circuit found that the EPA's orders constituted "final agency action" thereby giving the court jurisdiction under section 307(b)(1) of the CAA.<sup>18</sup> After resolving the jurisdiction issue, the court reviewed the merits of the case.<sup>19</sup> The United States Court of Appeals for the Ninth Circuit *held* that "the plain text, structure, and history of the Act compel the conclusion that the administrative orders fell within the EPA's enforcement and oversight authority." *Alaska v. EPA*, 298 F.3d 814, 818 (9th Cir. 2002).

## II. BACKGROUND

The CAA was enacted "to protect and enhance the quality of the Nation's air resources."<sup>20</sup> Even though it is a federal statute, the primary responsibility to control and prevent air pollution is placed on states and local governments.<sup>21</sup> In 1970, Congress reacted to disappointment caused by states not taking a more proactive role in implementing air quality regulations by amending the CAA to increase federal authority.<sup>22</sup> The 1970 Amendments require the EPA to devise National Ambient Air Quality Standards (NAAQS) which states are required to attain.<sup>23</sup> Section 107 of the CAA now provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan . . . in which national primary and secondary ambient air quality standards will be achieved."<sup>24</sup> This responsibility requires the state to propose a SIP and submit it to the EPA for approval.<sup>25</sup>

After the 1970 Amendments were passed, there was still a question about whether or not air quality should be allowed to deteriorate in areas where quality exceeded the NAAQS.<sup>26</sup> In 1972, the United States

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17. *Id.* at 818.

18. *Id.* Section 307(b)(1) of the CAA allows aggrieved parties to petition directly to the Court of Appeals in several circumstances including cases of "final agency action." *Alaska v. EPA*, 244 F.3d 748, 749 (9th Cir. 2001); *accord* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (2000).

19. *Alaska*, 298 F.3d at 818.

20. CAA § 101(b), 42 U.S.C. § 7401(b).

21. *See, e.g.*, *Train v. Natural Res. Def. Council, Inc. (NRDC)*, 421 U.S. 60, 64 (1975); CAA § 110, 42 U.S.C. § 7401.

22. *NRDC*, 421 U.S. at 64.

23. *Id.*

24. CAA § 107(a), 42 U.S.C. § 7407(a).

25. ARNOLD W. REITZE, JR., *AIR POLLUTION LAW* § 3-1(a) (1995).

26. *Id.* § 6-1(b).

Supreme Court laid the foundation for further developments when it affirmed a lower court decision finding that the “protect and enhance” language of section 101 of the CAA meant that air in attainment areas could not deteriorate to the bare minimum standards.<sup>27</sup> In response to the Court’s decision, the Administrator of the EPA set forth regulations to “prevent the significant deterioration” of air quality in attainment areas.<sup>28</sup> In 1977, Congress passed amendments to the CAA codifying these regulations and in doing so, created the PSD program.<sup>29</sup> Today, this program requires a PSD permit before any construction can begin on “major emitting facilities.”<sup>30</sup> The proposed facilities are “subject to the best available control technology [BACT] for each pollutant subject to regulation.”<sup>31</sup> The permitting authority is allowed to consider energy, environmental, economic impacts, and other costs when determining BACT for a facility.<sup>32</sup>

States have a choice to implement a PSD program as part of their required SIP or to allow the EPA to administer the program for them.<sup>33</sup> The State of Alaska has implemented a PSD program as part of its “State Air Quality Control Plan.”<sup>34</sup> This program, which has been approved by the EPA, is run by ADEC and is codified in the Alaska Administrative Code.<sup>35</sup> Concerning BACT, Alaska’s PSD regulations require “a demonstration that the proposed limitation represents the best

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27. *Id.* (citing *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 256 (D.C. Cir. 1972), *aff’d per curiam*, 2 Env’tl. L. Rep. (Env’tl. L. Inst.) 20,656 (D.C. Cir. Nov. 1, 1972)).

28. S. REP. NO. 95-127, at 7 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1085.

29. Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 ST. LOUIS U. PUB. L. REV. 67, 76-77 (2001); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, tit. I, § 127(a), 91 Stat. 731 (1977) (prior to 1990 amendment).

30. CAA § 165 (a)(1), 42 U.S.C. § 7475(a)(1) (2000).

31. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4).

32. CAA § 169(3), 42 U.S.C. § 7479(3). The EPA advises using a “top-down” process which ranks all available control technologies in descending order of control effectiveness. U.S. EPA, NEW SOURCE REVIEW WORKSHOP MANUAL: PREVENTION OF SIGNIFICANT DETERIORATION AND NONATTAINMENT AREA PERMITTING § B (Oct. 1990), *available at* <http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf>. The most stringent alternative is established as BACT “unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not ‘achievable’ in that case.” *Id.* The PSD applicant must then use the next most stringent alternative or eliminate it using the same process until BACT is achieved. *Id.*

33. CAA § 110(a)(2)(C), 42 U.S.C. § 7410 (a)(2)(C).

34. Approval and Promulgation of Implementation Plans: Alaska, 48 Fed. Reg. 30,623 (July 5, 1983), *amended by* 56 Fed. Reg. 19,284-87 (Apr. 26, 1991) (codified at 40 C.F.R. pt. 52.70-52.96).

35. *Id.*

available control technology for each air contaminant and for each new or modified source.”<sup>36</sup>

Federal enforcement of CAA requirements is regulated by section 113 of the CAA and federal and state enforcement of the PSD program is regulated by section 167 of the CAA.<sup>37</sup> The 1990 Amendments to section 110 of the CAA strengthened the enforcement ability of the EPA by granting it the authority to issue administrative penalty orders and to seek injunctive relief and penalties in response to violations.<sup>38</sup> The legislative history explains an intent for this authority to be used by the EPA when states fail to enforce SIP or permit requirements.<sup>39</sup> Specific to the PSD program, section 167 of the CAA gives both the states and the EPA authority to take action on “a major emitting facility which does not conform to the requirements of this part.”<sup>40</sup>

Determinations made by the EPA may be subject to judicial review under section 307 of the CAA.<sup>41</sup> If an action constitutes final agency action, the aggrieved party may only seek relief in the United States Court of Appeals.<sup>42</sup> Under this section, the court may reverse any action of the Administrator that it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>43</sup>

When courts review statutes like the CAA, they often begin by analyzing the plain meaning of the language.<sup>44</sup> The courts are required to “give effect to the will of Congress, and where the will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”<sup>45</sup> In *United States v. Solar Turbines*, a PSD case from the United States District Court for the Middle District of Pennsylvania, the court used a “permissible construction” of the statute standard to determine whether or not the EPA had reasonably interpreted the CAA.<sup>46</sup>

In *Solar Turbines*, the district court reviewed the extent of the EPA’s enforcement power for PSD permits under the construction of sections

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36. ALASKA ADMIN. CODE tit. 18, § 50.310(d)(3) (2000).

37. CAA § 113, 42 U.S.C. § 7413; CAA § 167, 42 U.S.C. § 7477.

38. H.R. CONF. REP. NO. 101-952, at 347 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3879.

39. *Id.*; CAA § 113(a)(5), 42 U.S.C. § 7413(a)(5).

40. CAA § 167, 42 U.S.C. § 7477.

41. CAA § 307(b), 42 U.S.C. § 7607(b).

42. *Id.*

43. CAA § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A).

44. *See, e.g., In re Bonner Mall P’ship v. United States Bancorp Mortgage Co.*, 2 F.3d 899, 908 (9th Cir. 1993).

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

46. 732 F. Supp. 535, 538 (M.D. Pa. 1989).

113 and 167 of the CAA.<sup>47</sup> Because the parties could cite no prior case law on the subject, the court looked to the language of the CAA and to Congressional intent when deciding the issue.<sup>48</sup> The court found that the EPA did not have authority to issue an order against a facility for a permit issued under state law, yet in violation of the SIP, by the permitting authority.<sup>49</sup> The court also found that the EPA's only recourse would be a section 113 action against the state permitting authority.<sup>50</sup>

### III. COURT'S DECISION

In the noted case, the Ninth Circuit followed rules of statutory interpretation to determine that the EPA had the authority to issue an order against a facility for a PSD permit, issued by a permitting authority, which was in violation of Alaska's SIP.<sup>51</sup>

The court began by recapping the previous case where it reviewed and determined that it had subject matter jurisdiction because the EPA's issuance of Administrative Orders was considered "final agency action" and fell under section 307(b)(1) of the CAA.<sup>52</sup>

The court then turned to the language of the statute to examine the EPA's enforcement powers concerning PSD permits.<sup>53</sup> It read the enforcement provisions, sections 113 and 167, with a goal of giving "effect to the will of Congress."<sup>54</sup>

If the Administrator of the EPA finds that a state is not acting in compliance with PSD requirements, section 113(a)(5) of the CAA permits her to "issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies" or "issue an administrative penalty order."<sup>55</sup> Because this statute references the PSD program, the court then analyzed the language of the CAA that authorizes the program.<sup>56</sup>

Section 167 of the CAA is the enforcement provision specific to the PSD program.<sup>57</sup> The court found that the plain language of section 167, authorizing the EPA to issue orders "necessary to prevent the

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47. *Id.* at 537.

48. *Id.* at 538.

49. *Id.* at 538-39.

50. *Id.* at 540.

51. *Alaska v. EPA*, 298 F.3d 814, 819 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3339 (Oct. 25, 2002) (No. 02-658).

52. *Id.* at 818 (citing CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (2000)).

53. *Id.*

54. *Id.*

55. *Id.* at 818-19 (citing CAA § 113(a)(5), 42 U.S.C. § 7413(a)(5)).

56. *Id.* at 819.

57. CAA § 167, 42 U.S.C. § 7477.

construction or modification of a major emitting facility which does not conform to the requirements of this part,” together with the language of section 113 of the CAA, were sufficient to support the EPA’s actions in the noted case.<sup>58</sup>

The court then turned to the legislative history of the specific CAA sections in question to further support its finding.<sup>59</sup> It found that the 1977 and 1990 Amendments showed a trend of granting more decision making and enforcement power to the federal government.<sup>60</sup> More specifically, the court noted that the 1990 Amendments “strengthened the EPA’s enforcement authority in cases where states fail to enforce SIPs or permit requirements.”<sup>61</sup> The court concluded that while it is within the state’s power to make BACT determinations, these determinations are enforceable by the EPA when they are contrary to state law.<sup>62</sup>

The court dismissed ADEC’s and Cominco’s argument that the EPA exceeded its authority when the agency concluded that ADEC’s BACT finding was “inadequately justified.”<sup>63</sup> Because there are no exemptions in the enforcement statutes granting deference to states’ determinations, the court concluded the EPA may oversee the permitting process and issue enforcement orders as necessary.<sup>64</sup> The court also dismissed the argument made in *Solar Turbines*, reasoning that the noted case is about the requirements that a *state* must meet, not the requirements that a *source* must meet.<sup>65</sup>

Finally, the court concluded that “the EPA did not act arbitrarily and capriciously” in its decision to issue orders against Cominco.<sup>66</sup> Using the “top-down” method that is recommended by the EPA, the court found that ADEC’s use of Low NOx over SRC as BACT was unjustified.<sup>67</sup>

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58. *Alaska*, 298 F.3d at 819 (quoting CAA § 167, 42 U.S.C. § 7477).

59. *Id.* at 820.

60. *Id.*

61. *Id.* (citing H.R. REP. NO. 101-952, at 348, 358 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3731, 3741).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 821.

66. *Id.* at 822.

67. *Id.* The court found that ADEC did not sufficiently show why Cominco should not adopt BACT because of energy, environmental, or economic concerns; did not sufficiently prove the cost-effectiveness argument; and did not adequately consider Cominco’s actual situation in regard to energy consumption. *Id.*

## IV. ANALYSIS

While the court ultimately concluded that the statutory language of the CAA supports the EPA's issuance of Administrative Orders against Cominco, it did little in the way of distinguishing *Solar Turbines* from the noted case.<sup>68</sup> The court quickly dismissed *Solar Turbines* because "it examined the requirements that a *source* must meet," and yet, the noted case is also about orders against a source, not a state.<sup>69</sup> The facts of the two cases are basically identical: the state is the permitting authority and as such, issued a PSD permit that is in violation of the state's PSD program to a facility.<sup>70</sup> What the court did not mention is that the difference in holdings between the two cases is most likely the result of the 1990 Amendments to the CAA.<sup>71</sup> *Solar Turbines* was decided in 1989, a year before the Amendments.<sup>72</sup> Instead, the court's attempts to distinguish the two cases are unclear because there really are no material factual differences between the two.

The court in the noted case decided only the issue presented before it, but gave little insight into possible actions to be taken against the State of Alaska for violating its SIP requirements. The court in *Solar Turbines* found that the EPA would have had action against the state under sections 113(a) and (b) of the CAA.<sup>73</sup> While the noted case holds that it is within the EPA's authority to issue orders against the affected facility, this option does not necessarily address the more direct problem of the state's violation of its own SIP requirement.<sup>74</sup>

Finally, the court did not take into consideration a comparison the *Solar Turbines* court made between the legislative histories of the enforcement provisions of the CAA and other environmental statutes.<sup>75</sup> Both the Clean Water Act and section 211 of the CAA provide the EPA

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68. *Id.* at 821.

69. *Id.*

70. *Id.* at 817; *United States v. Solar Turbines*, 732 F. Supp. 535, 540 (M.D. Pa. 1989). In *Solar Turbines*, the permitting authority was the Pennsylvania Department of Environmental Resources. 732 F. Supp. at 537.

71. The 1990 Amendments to the CAA strengthened the EPA's enforcement authority over state programs. H.R. REP. NO. 101-952, at 347 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3879.

72. *Solar Turbines*, 732 F. Supp. at 535.

73. *Id.* at 540 (citing *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195, 1203 (6th Cir. 1980) (holding that the EPA was not limited to section 113(b) of the CAA to pursue action against a State for violating a SIP requirement because it also had authority under section 113(a))).

74. *Alaska*, 298 F.3d at 818.

75. *Solar Turbines*, 732 F. Supp. at 539-40.



with veto power over a permitting authority decision.<sup>76</sup> While the enforcement provisions in sections 113 and 167 of the CAA grant the EPA necessary authority in enforcing Subchapter I of the CAA, there are no provisions in the Subchapter that grant the EPA a veto power over a permitting authority decision.<sup>77</sup> Because the EPA's decision to issue orders against Cominco and not take action against ADEC is similar to a veto of the PSD permit, the court should have considered this when it analyzed the statutory construction and the legislative history.

#### V. CONCLUSION

The Ninth Circuit conducted an in-depth statutory analysis to arrive at the conclusion that the EPA acted within its authority granted by the CAA according to the "plain text, structure, and history of the Act."<sup>78</sup> The court's conclusion also closely mirrors the intent of Congress when it granted greater authority to the federal government in the 1970, 1977, and 1990 Amendments to the CAA. The Ninth Circuit failed to consider, however, options that the EPA may take against ADEC, the actual violator of the SIP requirements. As a result, the court affirmed the EPA's issuance of orders against a facility who may well be operating within the restrictions of the permit and gave little guidance about how to go after the actual violator of the law.

Tara McBrien

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76. *Id.* (citing Clean Water Act § 402(d)(2)(B), 33 U.S.C. § 1342(d)(2)(B) (2000); CAA § 211, 42 U.S.C. § 7545 (2000)).

77. CAA §§ 101-193, 42 U.S.C. §§ 7401-7515.

78. *Alaska*, 298 F.3d at 818.