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Federal Oversight Versus State Discretion: EPA's Authority to Reject State Permitting Authorities' Best Available Control Technology Determinations Under the Clean Air Act's Prevention of Significant Deterioration Program: *Alaska Department of Environmental Conservation v. Environmental Protection Agency*

by Sean H. Donahue

In *Alaska Department of Environmental Conservation (ADEC) v. U.S. Environmental Protection Agency*,[1] the U.S. Supreme Court narrowly upheld orders issued by the U.S. Environmental Protection Agency (EPA) pursuant to §§113(a)(5) and 167 of the Clean Air Act (CAA or Act),[2] prohibiting construction of a new power generator unit at a mine in Northwest Alaska. EPA issued the orders because it concluded that the Alaska Department of Environmental Conservation (ADEC), the state agency responsible for administering the CAA's prevention of significant deterioration (PSD) program in Alaska, had arbitrarily failed to require the mine operator to adopt the best available control technology (BACT) to limit emissions of nitrogen oxides (NO_x) from the new generator unit. The state agency had argued that it had complied with the CAA's BACT provisions, and that the Act did not give EPA the authority to second-guess a state agency's decision as to what sort of pollution control equipment represents BACT. As it reached the Court, the controversy centered on whether EPA possessed the authority to reject a state agency's designation of BACT under the PSD program. What follows are excerpts of the brief of a group of amicus curiae—Environmental Defense, the National Parks Conservation Association, the Northern Alaska Environmental Center, and Alaska Community Action on Toxics—in support of respondent EPA. After the excerpt are some comments on the Court's opinion in *ADEC* and its impact.

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The state of Alaska challenged orders of EPA pursuant to §§113(a)(5) and 167 of the CAA prohibiting construction of a new power generation unit, known as MG-17, operated by Teck-Cominco, Inc. (Cominco), at the Red Dog Mine in Northwest Alaska. EPA issued the orders after concluding that Cominco's permit, granted by petitioner as permitting authority, failed to comply with the Act's requirement that major emitting facilities install BACT to prevent significant deterioration of air quality.[3] Alaska approved the use of a control technology approximately one-third as effective as another it had identified as technically feasible, environmentally preferable, and economically affordable, on the basis of unspecified "competitive impacts" and the company's "contributions" to the region.[4] The U.S. Court of Appeals for the Ninth Circuit upheld EPA's authority to enforce the BACT requirement.[5]

The Court agreed that the Act's language, structure and history demonstrate that EPA may enforce the substance of the BACT requirement when a state has failed to do so. Alaska wrongly portrayed BACT as a kind of legislative afterthought that gives states "sole discretion"[6] to allocate pollution-control burdens, subject only to procedural requirements and ambient air quality standards like the PSD increments. In fact, however, BACT is an essential feature of the PSD program, intended to provide pollution controls beyond those necessary to comply with the PSD increments and other air quality standards.[7] The U.S. Congress intended BACT to "force" the adoption of new control technologies, to counter states' tendency to underprotect air quality in order to attract or keep industry, and to preserve air quality in adjacent states and on special federal lands such as national parks.[8]

In its ruling, the Court stressed that in CAA §§113(a)(5) and 167, Congress gave EPA authority to take enforcement action when the Agency concludes that a proposed major emitting facility fails to meet any "requirement" of the PSD program.[9] A facility's obligation to install BACT is such a requirement, and the legislative history of the 1977 Amendments pointedly confirms EPA's enforcement authority.[10]

The CAA

The CAA Amendments of 1970,[11] were enacted "to protect and enhance the quality of the Nation's air resources so as to

Sean H. Donahue is a solo appellate practitioner in Washington, D.C., and, in the 2003-2004 and 2004-2005 academic years, a visiting professor of law at Washington and Lee University. From 1997-2001, he served as an appellate attorney in the Environment and Natural Resources Division of the U.S. Department of Justice. He was the principal author of the amicus brief excerpted in this Article.

1. 124 S. Ct. 983, 34 ELR 20012 (2004).
2. 42 U.S.C. §§7413(a)(5), 7477.
3. *Id*. §7475(a)(4); *ADEC*, 124 S. Ct. at 997.
4. *See ADEC*, 124 S. Ct. at 989.
5. Alaska v. EPA, 298 F.3d 814, 32 ELR 20793 (9th Cir. 2002).
6. Brief of Petitioner, *ADEC*, at 27.
7. *See* 42 U.S.C. §7475(a).
8. *See id*. §7470.
9. 124 S. Ct. at 993, 994 n.4.
10. *Id*.
11. Pub. L. No. 91-604, 84 Stat. 1676.

promote the public health and welfare and the productive capacity of its population."[12] They represented "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution,"[13] and followed a series of prior congressional efforts[14] to encourage states to address that problem.[15] Still, Congress preserved a central role for the states, establishing an intricate "partnership," under which the states could, if they chose, assume responsibility for implementing some of the Act's central regulatory programs.[16]

Subject to qualifications required by its notorious complexity, the Act adopts two basic approaches to structuring the federal-state partnership.[17] One is to establish federal goals for air quality while leaving states discretion to select measures necessary to meet the federal air quality goals. This approach is exemplified in the 1970 Amendments' provision for national ambient air quality standards (NAAQS).[18] States were to prepare and submit for EPA review and approval state implementation plans (SIPs) providing for implementation, maintenance, and enforcement of the NAAQS,[19] but state plans could include "whatever mix of emissions limitations" on existing pollution sources the state chose to meet the national standard.[20]

Congress has typically taken a markedly different approach, based on "direct federal regulation," for new or expanded stationary sources.[21] For such sources, the Act imposes technology-based national standards to "force" the development of new control technologies,[22] and to constrain states' incentives to underprotect air quality to attract business and to shunt pollution onto other jurisdictions. For example, the new source performance standards (NSPS), introduced in 1970, require new and modified sources to meet technology-based standards set by EPA based on "the best system of emission reduction . . . adequately demonstrated."[23]

As discussed below, this fundamental distinction between state discretion to set and allocate controls for existing sources and federal technology-based requirements for new or modified sources is reflected in the PSD program.

The PSD Program

In *Sierra Club v. Ruckelshaus*,[24] the Court held that the Act's purpose to "protect and enhance" the nation's air quality,[25] prohibited EPA or states from allowing substantial increases in air pollution levels in relatively "clean" areas meeting the NAAQS. In response, in 1974, EPA promulgated an administrative "prevention of significant deterioration" program under which new or expanded pollution sources would be required to adopt the "best available control technology."[26]

Congress enacted a statutory PSD program as part of the comprehensive 1977 Amendments.[27] To ensure that states did not allow air pollution levels in "clean air" areas to degrade toward "bare compliance" with the NAAQS, as Prof. Craig Oren notes the program "requires that each new or expanded 'major emitting facility' in 'clean air areas' use the 'best available control technology' (BACT) for minimizing additional air pollution [and] also establish[es] 'increments' that limit the cumulative increase in pollution levels over the 'baseline concentrations' in clean air areas."[28] The PSD requirements are supplemental to other obligations under the Act; to comply with its PSD obligations, a facility must also comply with the NAAQS, NSPS, and other statutory standards.[29]

The PSD provisions establish a preconstruction permitting requirement for new or modified "major emitting facilities."[30] "There are in practice two major requirements" for obtaining a permit: installing BACT and demonstrating that applicable PSD increments will not be exceeded.[31] The increments are maximum allowable increases and concentrations of designated pollutants that serve to "limit the cumulative increase" in pollutant levels (measured against baseline concentrations specific to each clean air area).[32] In addition, each major emitting facility to be constructed or modified is "subject to the best available control technology for

12. 42 U.S.C. §7401(b). The 1970 Amendments amended the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. The Act was again comprehensively amended in 1977, Pub. L. No. 95-95, 91 Stat. 685, and 1990, Pub. L. No. 101-549, 104 Stat. 2399. It is codified at 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
13. Union Elec. Co. v. EPA, 427 U.S. 246, 256-57, 6 ELR 20570 (1976); *see ADEC*, 124 S. Ct. at 991.
14. *See* Train v. Natural Resources Defense Council, 421 U.S. 60, 63-67, 5 ELR 20264 (1975).
15. *See, e.g.*, Arnold W. Reitze Jr., *The Legislative History of U.S. Air Pollution Control*, 36 HOUS. L. REV. 679, 684-702 (1999); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1155-57 (1995). On pre-1970 state regulation, see DAVID P. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS §§1.08-1.12 (rev. ed. 1991); 1 SENATE COMM. ON PUBLIC WORKS, 93d Cong., *A Legislative History of the Clean Air Act Amendments of 1970*, at 123-25 (Comm. Print 1974). On other rationales for federal regulation, see Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of Federal Environmental Policy*, 86 YALE L.J. 1196, 1212-13 (1977), and Daniel Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).
16. General Motors Corp. v. United States, 496 U.S. 530, 532, 20 ELR 20959 (1990); *see* 42 U.S.C. §7401(a)(3) (CAA provision dating from 1963 Act stating that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments").
17. *See* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1193-96 (1995).
18. 42 U.S.C. §§7408, 7409(a); *ADEC*, 124 S. Ct. at 991.
19. 42 U.S.C. §7410.
20. Train v. Natural Resources Defense Council, 421 U.S. 60, 79, 5 ELR 20264 (1975).
21. CURRIE, *supra* note 15, §3.01, at 3-2.
22. *See* Union Elec. Co. v. EPA, 427 U.S. 246, 257, 6 ELR 20570 (1976).
23. 42 U.S.C. §7411(a)(1).
24. 344 F. Supp. 253, 2 ELR 20262 (D.D.C.), *aff'd*, 2 ELR 20656 (D.C. Cir. 1972), *aff'd by equally divided Court sub nom*. Fri v. Sierra Club, 412 U.S. 541, 3 ELR 20684 (1973).
25. 42 U.S.C. §7401(b)(1); Alaska Dep't of Envtl. Conservation v. EPA, 124 S. Ct. 983, 992, 34 ELR 20012 (2004).
26. *See* 1 WILLIAM H. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER §3.21 (1986).
27. 42 U.S.C. §§7470-7479; *ADEC*, 124 S. Ct. at 992.
28. Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 IOWA L. REV. 1, 3 (1988) (citations omitted); *ADEC*, 124 S. Ct. at 993.
29. 42 U.S.C. §7475(a)(3).
30. *Id*. §7475. *See also id.* §7479(1); 40 C.F.R. §51.166(b)(4).
31. Oren, *supra* note 28, at 22-23.
32. 42 U.S.C. §§7473, 7479(4). *See* 40 C.F.R. §51.166(b), (c). Increments depend on an area's classification. *See* 42 U.S.C. §§7472-7474. Class I areas, subject to the most stringent increments, include most national parks and other special federal lands; Class II areas include most "clean air" areas; and Class III areas are permitted the greatest degree of degradation. States may reclassify areas subject to certain limitations.

each pollutant subject to regulation under this chapter emitted from, or which results from, such facility."[33] Section 169(3) defines BACT as

> an 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 . . . .[34]

EPA and Alaska regulations reflect the statutory definition.[35] EPA uses the "top-down" approach to determining BACT, as reflected in the new source review (NSR) workshop manual and many permitting decisions.[36] Under that approach, the applicant must identify all "available" technologies; eliminate those shown to be technically infeasible; then select the technology most effective at reducing emissions, unless proven energy, environmental, or economic impacts require its rejection in favor of the next most effective technology.[37]

The PSD permitting program may be administered by states with EPA-approved PSD programs or by EPA itself.[38] In either case, PSD permit applications must be reviewed and analyzed "in accordance with regulations promulgated by the Administrator," and there must be a public hearing.[39] Like the NSPS and other CAA requirements for new and modified sources, PSD is a component of EPA's NSR program.[40] As explained below, as part of the PSD program enacted in 1977, Congress gave EPA express authority to take enforcement action to prevent the construction of a facility in violation of the Act.[41]

The 1990 Amendments

The 1990 Amendments expanded the scope of CAA §113(a)(5), which now provides that "[w]henever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of this chapter relating to the construction of new sources or the modification of existing sources," the Administrator may issue an order prohibiting the construction or modification of a source, issue an administrative penalty order, or commence a civil action.[42] Because the PSD program[43] is part of the designated "chapter,"[44] §113(a)(5) gives EPA authority to enforce any "requirement" of the PSD provisions.[45]

EPA has long acknowledged that state permitting authorities have discretion in determining BACT, and has disclaimed any power to "second-guess" reasonable state judgments. But that discretion is not a license to ignore the statutory text or BACT's intended function in the PSD program. Alaska's account of BACT as hopelessly standardless[46] is incompatible with the statutory text and BACT's technology-forcing function. Its argument that EPA's remedy for an arbitrary BACT determination is to seek state review would have, without statutory warrant, created an anomalous system for enforcement of a federal statute.

In issuing Cominco's PSD permit, Alaska acted inconsistently with its own determinations that selective catalytic reduction (SCR) technology is far more protective of the environment than the low NO_x technology petitioner ultimately endorsed, and that SCR is technically feasible and economically affordable. Alaska based its decision on vague and undocumented concerns about "socioeconomic impacts" and "world competitiveness," reasoning that would eviscerate the BACT requirement. EPA, as the Court declared, acted within its express statutory powers in taking enforcement action.

EPA's Statutory Authority to Enforce the Substance of the BACT Requirement

The Plain Language of the Act's Enforcement Provisions Authorizes EPA to Enforce Any PSD "Requirement"

The Court agreed that the CAA grants EPA authority to enforce any PSD requirement, and that "in keeping with the broad oversight role [§§]113(a)(5) and 167 vest in EPA, the Agency [ ] may review permits to ensure that a State's BACT determination is reasonably moored to the Act's provisions."[47] The Court's reasoning is consistent with the

33. 42 U.S.C. §7475(a)(4).

34. *Id*. §7479(3).

35. *See* 40 C.F.R. §§51.166(b)(12), 52.21(b)(12); 18 AAC §50.990(13) (1997); *ADEC*, 124 S. Ct. at 994.

36. *See* In re General Motors, Inc., PSD Appeal No. 01-30, ELR Admin. Mat. 41249 (EAB Mar. 6, 2002) (citing decisions). The manual is a 1990 draft guidance from EPA's Office of Air Quality Planning and Standards. *See ADEC*, 124 S. Ct. at 994 (noting that Alaska used EPA's recommended top-down methodology in determining BACT).

37. *Id*. EPA's Environmental Appeals Board has stated that "a strict application of the top-down methodology" is not mandatory for state permitting authorities, but that in evaluating the "rationality and defensibility of BACT determinations by permitting authorities," EPA has "required an analysis that reflects a level of detail in the BACT analysis comparable to the methodology in the NSR Manual." *Id*. (citing decisions). *See also* In re Steel Dynamics, Inc., PSD Appeal Nos. 99-4, 99-5, ELR Admin. Mat. 41238 (EAB June 22, 2000) ("top-down analysis is not a mandatory methodology, but it is frequently used by permitting authorities to ensure that a defensible BACT determination, involving consideration of all requisite statutory and regulatory criteria, is reached").

38. 42 U.S.C. §§7410(a)(2)(C), (c), 7471. *See* 40 C.F.R. §§51.166, 52.21, 52.96(a) (Alaska program approval).

39. 42 U.S.C. §§7475(a)(2), 7475(e)(3).

40. *See* 40 C.F.R. §§51.165, 51.166, 52.22, 52.24, pt. 51 app. S; 67 Fed. Reg. 80186, 80187-88 (Dec. 31, 2002).

41. *See* CAA §167, 42 U.S.C. §7477. Congress broadened §167 in 1990 to cover facility modifications. *See* 104 Stat. 2399, 2684.

42. 42 U.S.C. §7413(a)(5). Before 1990, §113(a)(5) was limited to violations in nonattainment areas. *Id*. §7413(a)(5) (1988).

43. *Id*. §§7470-7492.

44. Chapter 85, 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.

45. The 1990 Amendments added Title V of the Act, 42 U.S.C. §§7661a-7661f, under which each "major source" of air pollutants must obtain an "operating permit" consolidating all its CAA obligations. *See id*. §7661a, 7661c(a); 40 C.F.R. §70.1(b); *id.* pt. 70 (EPA Title V regulations); Virginia v. Browner, 80 F.3d 869, 873, 26 ELR 21245 (4th Cir. 1996). States administering Title V must submit proposed permits to EPA for review. 42 U.S.C. §7661d(a); 40 C.F.R. §70.8(a). If EPA objects within 45 days that the permit "is not in compliance with the requirements of [the CAA]," the permitting authority "may not issue the permit." 42 U.S.C. §7661d(b)(1, 2), (c); 40 C.F.R. §70.8(c). Unless the deficiency is cured, EPA "shall issue or deny the permit in accordance with the requirements" of the CAA. 42 U.S.C. §7661d(c). EPA may "terminate, modify, or revoke and reissue" operating permits. *Id*. §7661d(e).

46. Brief of Petitioner, *ADEC*, at 24.

47. Alaska Dep't of Envtl. Conservation v. EPA, 124 S. Ct. 983, 1000, 34 ELR 20012 (2004).

maxim that statutory construction "begins" with the statutory text and "ends there as well" when the text yields a "clear answer."[48] A statute "is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."[49]

As the Court noted, the Act provides a "clear answer" to the question of EPA enforcement authority. The orders EPA issued to Cominco on February 8 and March 7, 2000, were authorized under CAA §167, which allows EPA to enforce by administrative order or otherwise "the requirements" of the Act's PSD provisions. Section 167 provides that "[t]he Administrator shall, and a State may, 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 [part C, codifying the PSD program]."[50]

EPA likewise had express statutory authorization under §113(a)(5) of the Act for the December 10, 1999, finding and order it issued to petitioner.[51] Section 113(a)(5) authorizes EPA to take enforcement action when it finds that a state "is not acting in compliance with any requirement or prohibition of [the CAA] relating to the construction of new sources[.]"[52] EPA, however, withdrew the order portion of the December 10 document on April 25, 2000, because petitioner had already (and in defiance of EPA's action) issued Cominco a PSD permit.[53]

BACT Is Integral to the Act and Is a Binding National "Requirement"

Confronted with statutory language plainly authorizing EPA to enforce PSD "requirements" and requiring new and modified major emitting sources to install BACT, Alaska was forced to argue before the Court that the "only 'BACT requirement' pertinent here" is the requirement that a permit "contain a BACT limitation devised by the state after considering the applicable factors."[54] Alaska maintained that as long as the state reaches *some* BACT determination and complies with the PSD permitting procedures; and as long as the facility will not exceed the governing ambient air quality standards (such as the PSD increments and NAAQS), the state has necessarily complied with the Act.[55] As for the substance of the BACT requirement, Alaska's position was *de gustibus non est disputandem*. The BACT determination, Alaska asserted, is fraught with "case-specific policy judgments" that make it as subjective and standardless as "asking different people to pick the 'best' car."[56]

As the Court correctly noted,[57] all this bears little resemblance to that requirement as established by Congress. Reading Alaska's account and its summation at oral argument, one might forget that the Act "requires" BACT in order "to minimize emissions."[58] It does not subject facilities to "whatever-technology-the-state-adopts-after-holding-a-hearing-and-discussing-the-statutory-factors."[59] Instead, it subjects facilities to "the best available control technology."[60] The Court agreed[61] that the text rebuts Alaska's claim[62] that the BACT standard is one of uncabined subjectivity: BACT is "an emissions limitation based on the *maximum degree of reduction* of each pollutant . . . 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[.]"[63] The strong, normative[64] terms "maximum" and "achievable"—also used in the 1977 Amendments' standards for new sources in nonattainment areas,[65] and the Act's technology-based standard for hazardous emissions[66]—are inconsistent with petitioner's reading of BACT as inviting the freedom and even caprice of consumers making automotive purchases.

When the 95th Congress wanted to restrict EPA's authority to enforcing "procedural" requirements, it knew how to say so.[67] No such limitation, however, is found in §§113(a) or 167.[68] This is unsurprising: given BACT's centrality to the PSD program, it would have been odd for Congress to have empowered EPA to block construction due to a faulty hearing but not an arbitrary choice of control technology.[69]

48. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999).
49. King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991). The Alaska majority noted that it gave "that unexceptional principle effect by attending both to the unequivocal grant of supervisory authority to EPA in §§113(a)(5) and 167, and to the statutory definition on permitting authorities discretion contained in the BACT definition, 42 U.S.C. §7479(3)." *ADEC*, 124 S. Ct. at 1002.
    The Ninth Circuit had concluded that EPA's orders represented "final action" reviewable under 42 U.S.C. §7607(b)(1). A panel in another circuit subsequently held that EPA compliance orders nonfinal and unreviewable, reasoning that the CAA cloaks such orders with serious legal consequences without giving regulated entities a meaningful opportunity to challenge their factual or legal basis. Tennessee Valley Auth. (*TVA*) v. Whitman, 336 F.3d 1236, 33 ELR 20231 (11th Cir. 2003). The *TVA* decision is faultily reasoned and incorrectly decided. The Act does not support the panel's pivotal conclusion that Congress sought to preclude parties from disputing the factual or legal foundation of EPA compliance orders in judicial enforcement proceedings. Here, by comparison, the Ninth Circuit construed the statute to require review of the underlying merits of EPA compliance orders and directed the Agency to submit a complete administrative record for review by the court of appeals, withdraw its orders, or file an enforcement action in district court. The Court in *ADEC* agreed that EPA's orders constituted reviewable "final action." *ADEC*, 124 S. Ct. at 987.
50. 42 U.S.C. §7477.
51. *ADEC*, 124 S. Ct. at 991.
52. 42 U.S.C. §7413(a)(5).
53. *See ADEC*, 124 S. Ct. at 997.
54. Brief of Petitioner, *ADEC*, at 22.
55. *Id*. at 22-23.
56. *Id*. at 24.
57. *See ADEC*, 124 S. Ct. at 1006.
58. S. Rep. No. 95-127, at 29.
59. *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558, 8 ELR 20288 (1978) (noting "essentially procedural" nature of the National Environmental Policy Act, 42 U.S.C. §§4321-4347, ELR Stat. NEPA §§2-209).
60. 42 U.S.C. §7475(a)(4).
61. *See ADEC*, 124 S. Ct. at 990.
62. Brief of Petitioner, *ADEC*, at 25-26.
63. 42 U.S.C. §7479(3) (emphases added).
64. *See ADEC*, 124 S. Ct. at 1000.
65. 42 U.S.C. §§7501(3), 7503(a)(2) ("lowest achievable emissions rate").
66. *Id*. §7412(d)(2) ("maximum degree of reduction . . . achievable").
67. *See* 42 U.S.C. §7474(b)(2) (EPA may reject state's redesignation of PSD area classification if "such redesignation does not meet the procedural requirements of this section").
68. *See ADEC*, 124 S. Ct. at 1004. The Title V provisions authorizing EPA to block proposed operating permits, *id*. §7661d(b), similarly fail to restrict EPA to "procedural" violations of the PSD provisions, indicating that Congress in 1990 did not accept Alaska's view that the substance of BACT determinations lies within the "sole discretion" of the state.
69. *ADEC*, 124 S. Ct. at 1004.

Alaska's understanding[70] of the BACT "requirement" as purely procedural was, even before the Court's ruling, not shared by other courts, administrative agencies, or Congress. The prior leading decision referred to "BACT requirements" and to BACT as "[o]ne of the principal substantive prerequisites to obtaining a PSD permit"[71]; EPA's and Alaska's regulations refer to "BACT requirements,"[72] and the 1977 Senate Report refers to BACT[73] as a "national requirement" and confirms that EPA may "go to court to stop a permit for activities which . . . did not comply with the requirements of this section, including the use of best available control technology."[74] BACT is a substantive standard that states consenting to implement the PSD program must apply, not just consider.[75] It is a no less a "requirement" than the Act's other technology-forcing obligations, like "lowest achievable emissions rate,"[76] or "best system of emissions reduction . . . adequately demonstrated."[77]

While making liberal use of the 1977 legislative history for the undisputed point that states with approved PSD programs determine BACT,[78] Alaska ignored passages that expressly confirm EPA's oversight and enforcement authority. The same 1977 Senate Report that rates a "passim" in Alaska's brief filed with the Court explains that

> *the [EPA] Administrator's role is one of monitoring state actions. States have authority to issue construction permits to new major emitting facilities in clean air areas. The Administrator thus could go to court to stop a permit for activities which would exceed the increments of pollution or which otherwise did not comply with the requirements of this section [setting forth the PSD program], including the use of best available control technology*. But the Administrator could not and should not attempt to burden this section with unnecessary regulations and guidelines. The Administrator should tell the States the basis for his review. When asked, [EPA] should become involved at an early date in particularly difficult permit applications so that States and localities will know of any potential differences.[79]

Despite statutory text and legislative history confirming EPA's enforcement authority, Alaska wrongly insisted that the PSD program is part of an "overall approach"[80] in the Act in which EPA sets "national standards to achieve and maintain clean air," and states "decide how to allocate the available increments among competing sources."[81] Similarly, Alaska argued[82] that PSD increments are analogous to the NAAQS and the BACT determination resembles states' authority under the 1970 Amendments to select "whatever" controls they choose[83] for existing sources as long as the federal air quality standards are satisfied.

For new and modified facilities, the Act's "overall approach" has never been as Alaska described. To the contrary, the 1970 Amendments not only established the nationwide NSPS, but also called for technology-forcing emissions limitations for hazardous air pollutants,[84] automobiles,[85] and aircraft.[86] In 1977, Congress added new national, technology-based standards for new and modified stationary sources in both "clean air" and nonattainment areas.[87] A structure combining technology-forcing federal standards and optional state implementation backed by EPA enforcement authority—rather than open-ended state discretion—has been the Act's "overall approach" for new and modified sources.

Mischaracterizing BACT as (at best) a mechanism for states to meet the PSD increments, Alaska disregarded the intended function of the BACT requirement and its centrality to the PSD program. The 1977 Amendments established a "*national requirement that each new major facility to be located in a clean air area install the best available control technology*."[88] Facilities' obligation to install BACT is separate and distinct from their obligation to comply with the PSD increments: each major emitting source that complies with the increments must *also* implement BACT.[89] Because pollution controls "ultimately determine the emissions from a source, an accurate BACT analysis is essential to a successful PSD review."[90] BACT was specifically intended to produce pollution control beyond that necessary to meet the PSD increments: as explained in the Senate Report, BACT would compel the "rapid adoption of improvements in tech-

70. Brief of Petitioner, *ADEC,* at 22.

71. Alabama Power Co. v. Costle, 636 F.2d 323, 358, 407, 10 ELR 20001 (D.C. Cir. 1979).

72. *See*, *e.g.*, 40 C.F.R. §§51.166(s)(4); 52.21(v)(4); 18 AAC §50.375.

73. S. Rep. No. 95-127, at 12.

74. *Id*.

75. *Cf.* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 764, 12 ELR 20896 (1982).

76. 42 U.S.C. §7503(a)(2).

77. *Id.* §7411(a).

78. Brief of Petitioner, *ADEC*, at 18, 30-33.

79. S. Rep. No. 95-127, at 12 (emphasis added). *See also id*. at 36 (Administrator may take "measures that would be necessary to prevent the issuance of a permit for a new source if it did not comply with the [PSD] requirements"); H.R. Rep. No. 95-564, at 153 ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit."). As Sen. Edmund Muskie (D-Me.) put it: "Once a State adopts a permit process in compliance with this provision, [EPA's] role is to seek injunctive relief or other judicial relief to assure compliance with the law." 123 Cong. Rec. S9169 (daily ed. June 8, 1977).

80. Brief of Petitioner, *ADEC*, at 26.

81. *Id*. at 17.

82. *Id*. at 27.

83. Train v. Natural Resources Defense Council, 421 U.S. 60, 79, 5 ELR 20264 (1975).

84. As amended, 42 U.S.C. §7412.

85. *Id*. §§7521-7544.

86. *Id*. §7571.

87. *Id*. §7502(c). Alaska was again off the mark when it suggested, *see* Brief of Petitioner, *ADEC*, at 26-27, that the early NAAQS/SIP model represents some universal template for federal-state relations under the federal environmental statutes. Federal-state relationships vary enormously both between statutes and within particular statutory schemes on basic matters like standard setting, program approval and revocation, permitting authority, enforcement, and preemption. *See* Dwyer, *supra* note 17.

88. S. Rep. No. 95-127, at 12 (emphasis added).

89. *See* 42 U.S.C. §7475(a). Reviewing a state's BACT determination, EPA Administrator William Reilly rejected a similar argument, explaining that the Act "separates issues of overall air quality from issues of technology" and that, in contrast to the requirements that facilities comply with the increments, BACT is "principally a technology-forcing measure that is intended to foster rapid adoption of improvements in control technology." In re Columbia Gulf Transmission Co., PSD Appeal No. 88-11, 2 EAD 824, 827 (Adm'r 1989). "Both of these provisions," the Administrator explained, "must be satisfied by an applicant seeking a PSD permit, and compliance with one provision does not relieve or lessen an applicant's burden of complying fully with the other." *Id.*

90. National Comm'n on Air Quality (NCAQ), To Breathe Clean Air 157 (1981) [hereinafter NCAQ]. The NCAQ was established by 1977 Amendments to undertake an independent analysis of air pollution programs. 91 Stat. 685, 785 (1977).

nology as new sources are built," while the increments would operate as a "second level of protection" and a "second stimulant to improved controls" on air pollution.[91] Alaska's treatment of BACT would, if adopted, have gone far toward reading it out of the statute.

An independent BACT requirement is essential to maintaining the increments themselves. Congress adopted BACT in part to "minimize the consumption of PSD increments and thus expand the affected area's potential for future economic growth."[92] "If the allocation were left entirely to the states, they might give the whole pie to the first comers and create irresistible pressures to relax the ambient limits themselves."[93]

Congress intended BACT, as "[p]ossibly the most important" of the 1977 Act's many technology-fostering measures, to spur "improvements in the technology of pollution control."[94] Alaska's treatment of BACT as a "subjective" appeal to states' "sole discretion" ignored the technology-forcing philosophy that was "fundamental"[95] to the adoption of BACT and congressional efforts in the 1977 Amendments "to accelerate technological innovation in the control of air pollution."[96] A scheme that gave states unfettered discretion to adopt pollution control technologies for particular sources would not perform this vital "forcing" function.[97] Had BACT been left to states' "sole discretion,"[98] little would have been accomplished. Before 1977, states already had ample authority under their police powers and the CAA's savings clause[99] to impose more stringent emissions limitations on new and modified sources in clean air areas. A federally unenforceable invitation to consider various factors would have provided states no new incentive to force development of new control technologies.

As the *ADEC* Court noted,[100] the state's approach was also inconsistent with Congress' intent through the PSD program to ensure that "economic growth will occur in a manner consistent with the preservation of existing clean air resources,"[101] and "to prevent competition for industry to be waged among States on the basis of air quality."[102] "Without national guidelines for the prevention of significant deterioration," Congress feared, firms would "play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls."[103] The PSD program was intended to forestall a "flight of industry—and jobs" from dirty air to relatively clean air areas, and "to protect States choosing to retain clean air resources from 'environmental blackmail' by industrial sources that may attempt to play one State off another with threats to locate or relocate plants in States with weaker environmental requirements."[104] Leaving the states, as Alaska urged, with "sole discretion" to select their own version of the "best" technology would have reinforced the interjurisdictional pressures Congress was trying to restrain. State permitting authorities would scarcely take an ambitious view of what level of control technology is "achievable" if they knew that competing jurisdictions had "sole discretion" to choose their own versions of BACT. Indeed, the National League of Cities and the National League of Counties supported the 1977 PSD legislation precisely because of "the competitive struggle that exists among States and localities for new industry."[105]

Finally, giving states "sole discretion" over the substance of control technology choices is in tension with Congress' intent through the PSD program to protect federal parklands, wilderness areas, and other areas of "special national or regional . . . value,"[106] as well as the air resources of neighboring states.[107] Congress had time-tested reasons to provide for a federal "backup" role regarding state BACT determinations: states have limited incentives to protect resources belonging to the nation as a whole or to other states.[108] By denying federal enforcement authority, Alaska sought to attribute to Congress a "conspicuous[ ] fail[ure]" to "provide EPA with the authority needed to achieve the statutory goals."[109]

91. S. Rep. No. 95-127, at 18. By prescribing the categorywide NSPS as a minimum for BACT, the statutory PSD program ended EPA's prior practice of equating BACT with NSPS. *See* Craig N. Oren, *Clearing the Air*, 9 Va. Envtl. L.J. 45, 75 (1989).

92. NCAQ, *supra* note 90, at 157.

93. Currie, *supra* note 15, §7.08, at 7-21. *See also* 122 Cong. Rec. S3905 (Mar. 22, 1976) (BACT would "prevent the first source moving into an area from using up the full increment") (quoting article by Sen. Pete Domenici (D-N.M.)); S. Rep. No. 95-127, at 31. Indeed, the NCAQ found that "a program requiring best available control technology alone (without the increment system) would result in emissions growth equivalent to that obtained through the current program with increments, if best available control technology determinations were made in a manner consistent with its current definition." NCAQ, *supra* note 90, at 23. *See* Rodgers, *supra* note 26, at 375-76 (the NCAQ study suggests that "BACT is the cake and the increments the mere frosting").

94. S. Rep. No. 95-127 at 17-18. *See* 42 U.S.C. §§7501(3), 7503(a)(2) ("lowest achievable emissions rate" for new sources in nonattainment areas), 7502(c)(1) ("reasonably available control technology" for existing sources in nonattainment areas), 7491(g)(2) (requiring "best available retrofit technology" for existing sources impairing visibility in national parks and certain other clean air areas); *Columbia Gulf Transmission Co*. (discussing BACT's "technology-forcing" role). The Senate Report noted that the technology-forcing provisions of the 1970 Amendments had brought about "positive changes" by stimulating "more effective, less-costly systems to control air pollution." S. Rep. No. 95-127, at 17-18.

95. *See* S. Rep. No. 95-127, at 10.

96. *Id*.

97. *See* Union Elec. Co. v. EPA, 427 U.S. 246, 257, 6 ELR 20570 (1976).

98. Brief of Petitioner, *ADEC*, at 27.

99. 42 U.S.C. §7416.

100. *ADEC*, 124 S. Ct. at 1000.

101. 42 U.S.C. §7470(3).

102. H.R. Rep. No. 95-294, at 141 (1977). *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 452 U.S. 264, 282, 11 ELR 20569 (1981).

103. H.R. Rep. No. 95-294, at 134.

104. *Id.* at 133, 140.

105. *Id.* at 133, 135, 152, 202.

106. 42 U.S.C. §7470(2).

107. *Id.* §7470(4). *See* Craig N. Oren, *The Protection of Parklands From Air Pollution: A Look at Current Policy*, 13 Harv. Envtl. L. Rev. 313, 321-27 (1989).

108. *See* Missouri v. Holland, 252 U.S. 416, 435 (1920); Missouri v. Illinois, 200 U.S. 496, 520-21 (1906); McCulloch v. Maryland, 17 U.S. 316, 431-35 (1819). *See also* 42 U.S.C. §7474(b) (federal land manager's role in state reclassification decisions).

109. E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112, 133, 7 ELR 20191 (1977). The importance of a federal oversight role is particularly apt in the case of the Red Dog Mine. It is located in an otherwise pristine and scenic region of Alaska, five miles from the Noatak National Preserve, which protects a spectacular mountain-ringed river basin containing an intact Arctic ecosystem. According to the National Park Service, which is responsible for managing the preserve, vegetation in the area is likely to be sensitive to nitrogen deposition.

The "Case-by-Case" Nature of Permitting Authorities' BACT Determinations Does Not Defeat EPA's Enforcement Authority

The *ADEC* Court rejected[110] the state's attempt, despite the plain statutory language establishing EPA's authority to enforce PSD requirements, attempts to create an exemption to the text by arguing[111] that the "case-by-case" nature of the BACT determination shows that Congress intended to commit the substance of BACT entirely to states. But, in fact, the facility-specific BACT inquiry was intended to produce more effective pollution control and accommodate local differences in raw materials or plant configuration that might make a technology "unavailable" in a particular area. Case-by-case BACT evaluation ensures that permits incorporate "the latest technological developments," in contrast to "the stagnation that occurs when everyone works against a single national standard for a new source."[112] Whereas the rigid NSPS standard "must take into account what is best for the weakest performer in a category," case-by-case identification of BACT "can take advantage of the control potential of the particular proposed source."[113] It was not intended to give states "sole discretion" to subordinate air quality to other priorities.

BACT determinations are guided by administrable factors—"maximum" pollution reductions, consideration of energy, environmental, and economic impacts, and specified abatement techniques.[114] The case-by-case application of these factors resembles other determinations that agencies and courts regularly confront; it may not always point to a "single, objectively 'correct' BACT determination"[115] but it does rule out a range of *unreasonable* determinations that if adopted present appropriate occasions for EPA action.[116] Certainly nothing about BACT makes it so unsuited to EPA review as to require the manufacture of an implied exception to EPA's enforcement authority.[117]

Similarly groundless[118] was Alaska's effort[119] to elicit from Congress' reference to the "permitting authority"—usually the state, but not infrequently EPA itself—an implied intent to preclude EPA enforcement. Had Congress wished to foreclose EPA oversight, it readily could have so provided.[120] But CAA §§113(a)(5) and 167 empower EPA to enforce the "requirements" of the PSD provisions, and neither contains any limitation for BACT or for state-issued permits. To be sure, Congress intended to allow states with EPA-approved PSD programs to determine BACT for individual sources, a function previously performed by EPA alone.[121] But it does not follow that Congress thereby intended to exempt states from EPA enforcement. Sections 113(a)(5) and 167 show that it did not.[122]

EPA Has Understood Its Limited Role in Reviewing State PSD Determinations, and Disavowed Any Power to "Second-Guess" Reasonable State BACT Determinations

The Court concluded[123] that Alaska was off the mark when it accused EPA of asserting a power to "second-guess" petitioner's BACT determination.[124] EPA has long acknowledged that its enforcement authority respecting BACT is circumscribed.[125] EPA has disavowed any power to "second-guess" state BACT determinations, and has repeatedly acknowledged its limited oversight and enforcement role.[126] It adhered to that limited role in explaining why Alaska's BACT determination was "arbitrary" and contrary to the state's *own* findings.[127] EPA's limited but vital role in enforcing BACT is consistent with a scheme that "places primary responsibilities and authority with the States, backed by the Federal Government."[128]

Nor was there merit to petitioner's warning that EPA could upset state BACT determinations "months, even years, after a permit has been issued."[129] EPA's exercise of its enforcement powers is subject to judicial review.[130] EPA could not engage in the conduct hypothesized by petitioner "while the federal courts sit" to review EPA's actions.[131]

Relegating EPA to an Appeal Before a State Agency or Court Is Inconsistent With the Statute and Would Create an Ungainly Procedure for EPA Oversight and Enforcement

There is nothing unduly "awkward"[132] about Congress'

110. *ADEC*, 124 S. Ct. at 1004.
111. Brief of Petitioner, *ADEC*, at 21-22, 28-29.
112. S. Rep. No. 95-127, at 18.
113. Oren, *supra* note 28, at 33.
114. 42 U.S.C. §7479(3).
115. *See* Brief of Petitioner, *ADEC*, at 23.
116. *ADEC*, 124 S. Ct. at 1002.
117. *Id*.
118. *Id*. at 1003.
119. Brief of Petitioner, *ADEC*, at 25.
120. *ADEC*, 124 S. Ct. at 1003.
121. S. Rep. No. 95-127, at 8. EPA did not contend that §§113(a) and 167 "require EPA approval," *see* Brief of Petitioner, *ADEC*, at 25, of state BACT determinations. Instead of *requiring* EPA to approve BACT determinations, §§113(a)(5) and 167 *authorize* EPA to act in those rare instances when a state has acted arbitrarily. *ADEC*, 124 S. Ct. at 990. *See*, *e.g.*, 57 Fed. Reg. 28093 (June 24, 1992) ("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.").
122. *See also* S. Rep. No. 95-127, at 36 ("Once the State submits an adequate [PSD program], [EPA's] role is restricted to assuring compliance with the law.").
123. *ADEC*, 124 S. Ct. at 1003.
124. Brief of Petitioner, *ADEC*, at i, 21, 35.
125. *See* Memorandum from Michael S. Alushin, Associate Enforcement Counsel for Air, U.S. EPA (July 15, 1988) (recognizing that BACT determination involves "the exercise of judgment," but stating that EPA may pursue enforcement action if determination is "not based on a reasonable analysis").
126. As it noted in approving Virginia's PSD program, "EPA may not intrude upon the significant discretion granted to states under [NSR] programs, and will not 'second guess' state decisions." 63 Fed. Reg. 13795, 13796 (Mar. 23, 1998). EPA inquires whether the state's decision rested "on reasonable grounds properly supported on the record, described in enforceable terms, and consistent with all applicable requirements." *Id. See also, e.g.*, 58 Fed. Reg. 15422, 15426 (Mar. 23, 1993).
127. *ADEC*, 124 S. Ct. at 997.
128. S. Rep. No. 95-127, at 29.
129. *ADEC*, 124 S. Ct. at 1004; Brief of Petitioner, *ADEC*, at 35.
130. *See* 42 U.S.C. §§7607(b)(1), 7413(b); *ADEC*, 124 S. Ct. at 1002.
131. *See* Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). *Cf.* United States v. AM Gen. Corp., 34 F.3d 472, 475 (7th Cir. 1994) (upholding dismissal of enforcement action where EPA did not act until well after facility received PSD permit and completed plant modifications).
132. Brief of Petitioner, *ADEC,* at 35.

decision to subject states' decisions in implementing the PSD program to EPA's oversight and enforcement authority, to be followed by an opportunity for federal judicial review of any final EPA actions in particular instances. Such policy considerations are no defense against plain statutory language.[133]

Nor is there anything unusual about authorizing EPA (subject to judicial review) to oversee state implementation of the BACT requirement. Similar federal oversight roles abound under the CAA and other federal statutes. EPA reviews SIPs, and federal courts of appeals then review EPA's actions,[134] even though those state plans involve discretion-laden policy judgments. Section 209(b)(1) of the CAA provides that the Administrator shall deny a state's request for a waiver of the Act's preemption of state auto emissions standards if EPA concludes that the state's determination that conditions for a waiver exist is "arbitrary and capricious."[135] Under the Clean Water Act (CWA), federal courts review EPA's decisions to approve or set aside state-promulgated water quality standards.[136] Indeed, it is the claim of "sole discretion" to apply the federal BACT standard unsuccessfully advanced by Alaska that diverges from the norm under federal environmental laws.

Alaska acknowledged[137] that EPA itself can take "appropriate action" under CAA §§113(a)(5) and 167 when a state has failed to issue *any* BACT determination; granted a permit that allows violations of NSPS or ambient standards; denied a hearing; or failed to conduct the statutorily required analysis of the proposed source. After a discreet interval of pages, however, the state alleged in its brief[138] that, if EPA disputes the *substance* of a state BACT determination, its only recourse is to file a state administrative appeal and seek review in state court. The Court wisely rejected the state's argument.[139] Alaska did not explain whether, under the procedural approach it envisioned, the state court then would apply federal law, some unspecified state law, or whether (as Alaska suggested),[140] the BACT definition simply has no legally binding substance (rendering *any* appeal a fool's errand). Alaska complained[141] that EPA improperly "bypassed" or "short-circuited" this putative review scheme.

Congress has not traditionally been in the practice of subjecting federal agencies charged with enforcing federal law to exclusive state jurisdiction.[142] Among other defects, Alaska's approach would have required EPA to litigate in two fora at once—federal courts for procedural violations, and state courts for claims of substantively unlawful misapplications of the BACT standard. Such a scheme would hardly be conducive to "certainty and finality" or "cl[arity]"[143] in the permitting process. As the Court emphasized,[144] the statute refutes Alaska's petitioner's contention that the same Congress committed the core of the BACT decision—the choice of control technology and explanation for that choice—to the unreviewable discretion of state agencies and courts.[145]

EPA Properly Determined That the Permit Issued by Alaska Was Arbitrary and Inconsistent With the Act

The question presented to the Court was whether EPA has the "authority" to take enforcement action with respect to the Red Dog PSD permit. The answer to that question was "yes." The Court did not need not reach the further issue of whether EPA properly exercised its authority on the facts. Yet the Court did address that issue, stressing that Alaska's own reasoning demonstrates that its BACT determination for MG-17 violated the statute. Under the top-down approach the ADEC purported to apply, the state repeatedly determined, and before the Court did not dispute, that SCR is between two and three times as effective as "Low NO_x" technology at reducing NO_x emissions.[146] Tracking the statutory factors,[147] top-down analysis proceeds to consider whether the top-ranked technology is technically and economically feasible. The ADEC established that SCR was technically feasible and never deviated from this finding.[148] On May 4, 1999, petitioner found that SCR was also economically feasible, with a control cost-effectiveness of about $1,600 per ton, well within the established range for NO_x BACT determinations.

At Cominco's urging, however, the ADEC reversed course in its September 1, 1999, report, deeming SCR's costs "excessive."[149] The ADEC, however, never significantly altered its estimate that SCR cost-effectiveness was about $2,000 per ton nor disputed that this value fell within the established range for NO_x BACT. Cominco never presented any evidence that the capital cost of SCR would seri-

133. *See* 42 U.S.C. §§7413(a)(5), 7477. *See* RODGERS, *supra* note 26, §3.36, at 523 ("For better or worse, this forum that places EPA in an appellate position reviewing 'major' state permits is the principal source of recorded law on compliance orders.").

134. *See* 42 U.S.C. §§7410(a), (k), 7607(b); Union Elec. Co. v. EPA, 427 U.S. 246, 252, 6 ELR 20570 (1976).

135. 42 U.S.C. §7543(b)(1). *See* Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095, 9 ELR 20581 (D.C. Cir. 1979).

136. *See* 33 U.S.C. §1313(c); American Wildlands v. Browner, 260 F.3d 1192, 1196, 31 ELR 20860 (10th Cir. 2001).

137. Brief of Petitioner, *ADEC*, at 34.

138. *Id*. at 36.

139. *ADEC*, 124 S. Ct. at 1002.

140. Brief of Petitioner, *ADEC*, at 24-25.

141. *Id*. at 19, 36, 37.

142. *ADEC*, 124 S. Ct. at 999; *cf.* AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 n.6, 385 n.10 (1999). There is apparently no comparable regime in any federal environmental statute. The McCarran Amendment, 43 U.S.C. §666, contains an express waiver of federal immunity and rests on considerations unique to general water rights adjudications. *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983). State water quality certifications under §401 of the CWA are reviewable only in state court, but §401 expressly incorporates state law, 33 U.S.C. §1341(d). *See* PUD No. 1 of Jefferson County. v. Washington Dep't of Ecology, 511 U.S. 700, 24 ELR 20945 (1994). BACT determinations, by contrast, rest exclusively on federal law.

143. Brief of Petitioner, *ADEC*, at 35, 36.

144. *ADEC*, 124 S. Ct. at 1002.

145. 42 U.S.C. §7413(a)(5), 7477. *See also* S. REP. No. 95-127, at 12. Alaska also pointed, *see* Brief of Petitioner, *ADEC*, at 38, to language ensuring "interested persons, including representatives of the Administrator" an opportunity to participate in PSD permit hearings. 42 U.S.C. §7475(a)(2). This language guarantees EPA a chance to participate in state hearings, thereby encouraging early mediation of any disagreements with the state. *See* S. REP. No. 95-127, at 12. It does not, however, purport to limit the enforcement authorities described in §§113(a)(5) and 167.

146. *See ADEC*, 124 S. Ct. at 988-89 (SCR achieves 80-90% reductions in emissions); *id*. at 994 (30% for Low NO_x).

147. 42 U.S.C. §7479(3).

148. In its September 28, 1999 letter to the ADEC, EPA informed the state that Wartsila, the manufacturer of Cominco's generators, had provided it with a list of 33 facilities that had installed SCR on more than 50 of their engines.

149. *See ADEC*, 124 S. Ct. at 996.

ously impair the profitability of the mine, and refused to provide this information when EPA requested it.[150] In its final report, the ADEC stated that

> [a]nother perhaps better way to determine BACT is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant did not present this information. Therefore, no judgment can be made as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine.[151]

To explain its about-face, the ADEC stated that Cominco's mine provides jobs for people in a depressed region, and that the ongoing expansion ensured that it "will continue to influence and benefit the residents and the economy of this region."[152] The ADEC explained that it had "chosen to consider the direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts for the foremost consideration to judge economic impacts."[153] In this opaque language lurk rationales that would, if permissible, eviscerate the PSD program. First, the ADEC's reliance on competitiveness impacts and job losses was baseless given its statement a page earlier that *"no judgment can be made* as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine."[154] More fundamentally, petitioner's stated grounds for decision are contrary to the statute's focus on what is "achievable" and BACT's intended function as a meaningful technology-forcing standard to counter interstate competitive pressures to lower air quality requirements.

If states could reject effective and "available" technologies based on undocumented claims about "boost[ing]" the local economy and "world competitiveness"[155] the BACT requirement would mean little. Surely *most* "major emitting facilities"—which by definition emit hundreds of tons of pollutants per year,[156] and under the proposed permit, almost 4,000 tons per/year of NO_x,[157]—are subject to "world competition." By relying on the massive Red Dog facility's "socioeconomic impacts," Alaska flouted Congress' intent in the PSD program "to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air."[158] As the Court appropriately concluded,[159] the Act cannot be read to excuse facilities from installing effective control technology by invoking competitive conditions that are ubiquitous in a market economy.

The ADEC changed course based on a desire to "support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region" and to reward Cominco for its "unique and continuing impact on the economic diversity of this region[.]"[160] Whatever the precise contours of permitting authorities' discretion, concerns like these cannot be lawful rationales to reject otherwise more effective and available control technologies. States then would have unbridled discretion to adopt dramatically less effective control technologies based on a bare desire to reward local businesses. Alaska's solicitude for a local company at the expense of air quality illustrates the kinds of local pressures that led Congress to impose BACT as a national requirement and stands as an example of why EPA enforcement authority expressly provided for in §§113(a) and 167 of the Act is essential in maintaining the integrity of the PSD program.

The Court's Decision

In an opinion authored by Justice Ruth Bader Ginsburg, joined by four other Justices, the Court in *ADEC* upheld the Ninth Circuit's judgment in favor of EPA. The Court concluded that, in asserting the power to "review permits to ensure that a State's BACT determination is reasonably moored to the Act's provisions," EPA had "rationally construed the Act's text."[161] The Court reasoned that EPA's position that it has the power to "check" unreasonably lax BACT determinations by states found support in the legislative history of the 1977 Amendments, which demonstrated that Congress was concerned about local and interjurisdictional pressures that might deter state regulators from adopting strong pollution control members upon industry.[162] It also noted that EPA's asserted power to overturn unreasonable state BACT determinations position was no new

150. *Id*. at 1008. It is not self-evident that installing SCR would adversely affect Cominco's "competitiveness," let alone the regional economy. Cominco's 1999 annual report lists its revenues as $1.645 billion, and its operating profits from zinc operations as $234 million. *See* 1999 Annual Report, *at* http://www.teckcominco.com/investors/reports/clt/clt-99-ar.pdf (last visited June 26, 2003). The report described the Red Dog Mine as the company's "flagship operation," holding "approximately 23% of the world's zinc mine reserves," the "largest and richest ever discovered," and "key" to Cominco's "strategic efforts to become the world's lowest cost and most profitable zinc producer." *Id.* at 2. Teck-Cominco's annual report lists its 2002 revenues as $2.187 billion. *See* http://www.teckcominco.com/investors/reports/ar2002/tc-2002-highlights.pdf (last visited June 26, 2003).

151. *See* Joint Appendix (J.A.), *ADEC*, at 116; *see also id.* at 207.

152. *Id*. at 208. *See ADEC*, 124 S. Ct. at 997. Alaska also reprised before the Court an argument it expressly rejected in the permitting proceedings, namely, that Cominco's agreement to install Low NO_x on existing generators MG 1, 2, 3, and 5 meant that the net emissions of the project as permitted were lower than if Cominco had installed SCR on MG 17 only. As EPA explained, see J.A., *ADEC*, at 96-97, and as Alaska acknowledged, *id.* at 111-12, 199, the CAA and implementing regulations do not allow for such an approach. "Netting" can be used to exempt modified sources from PSD review requirements if there will be no significant project-wide increase in emissions. *See* 40 C.F.R. §§51.166(b)(3), 52.21(b)(2)(i). Cominco, however, was proposing an expansion that would result in a net increase in NO_x emissions of 1,100 tons per year. J.A., *ADEC*, at 169. (The BACT threshold for NO_x emissions is 40 tons per year.) Furthermore, Cominco had an independent legal imperative to install Low NO_x controls on units 1,2,3, and 5. Once Cominco sought to have the operating caps removed from these units, leading to pollution increases, it had to use Low-NO_x technology to keep pollution from these units below previously permitted levels. *Id*. at 139. Had Cominco declined to do so, these units would have been aindependently subject to BACT. *Id*. at 129, 139.

153. J.A., *ADEC*, at 208.

154. *Id*. at 207; *ADEC*, 124 S. Ct. at 989.

155. J.A., *ADEC*, at 207-08; *ADEC*, 124 S. Ct. at 997.

156. *See* 42 U.S.C. §7479(1).

157. J.A., *ADEC*, at 156-57.

158. Alabama Power Co. v. Costle, 636 F.2d 323, 353, 10 ELR 20001 (D.C. Cir. 1980).

159. *ADEC*, 124 S. Ct. at 997.

160. J.A, *ADEC*, at 208; *ADEC*, 124 S. Ct. at 997.

161. *ADEC*, 124 S. Ct. at 1000.

162. *Id.* at 1000-01.

invention, but had been articulated in agency guidance documents dating back to 1983.[163] The majority reasoned that, while EPA had not expressed its view in regulations or other sources possessing the force of law, and hence did "not qualify for the dispositive force described in *Chevron*," EPA's consistently held views on the scope of its authority to reject unreasonable state BACT determinations "'nevertheless warrant respect.'"[164]

The Court rejected the ADEC's argument that the CAA's definition of BACT committed the selection of control technologies in PSD areas entirely to state agencies' discretion:

> Understandably, Congress entrusted state permitting authorities with initial responsibility to make BACT determinations "case-by-case." [42 U.S.C. §7479(3)]. A state agency, no doubt, is best positioned to adjust for local differences in raw materials or plan configurations, differences that might make a technology "unavailable" in a particular area. But the fact that the relevant statutory guides—"maximum" pollution reduction, considerations of energy, environmental, and economic impacts—may not yield a "single, objectively 'correct' BACT determination," [Brief for Petitioner, *ADEC*, at 23], surely does not signify that there can be no unreasonable BACT determinations. Nor does Congress' sensitivity to site-specific factors necessarily imply a design to preclude in this context meaningful EPA oversight under [42 U.S.C. §§] 113(a)(5) and 167. EPA claims no prerogative to designate the correct BACT; the Agency asserts only the authority to guard against unreasonable designations.[165]

The Court rejected as implausible the ADEC's view that Congress intended EPA to have the power to issue compliance orders when a state had failed to impose *any* BACT requirement, but at the same time had *precluded* EPA from "verifying substantive compliance with the BACT provisions."[166]

The *Alaska* Court emphasized, however, that state authorities retain broad discretion to balance the various factors relevant to BACT determinations, and EPA's authority to reject a state's selection of control technology is correspondingly narrow. Citing EPA's own statements concerning its "limited role," the Court explained that EPA may step in "only when a state agency's BACT determination is 'not based on a reasonable analysis of the record.'"[167] The Court noted that counsel for EPA had conceded at argument that the ADEC could revisit its BACT determination in the present case, and might permissibly renew its choice of technologies provided the choice was supported by a supplemented administrative record.[168]

The Court rejected the ADEC's submission that EPA's sole means of challenging a state agency's BACT determination is by seeking review in state court. Justice Ginsburg reasoned that it would be "unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court," and refused "to read such an uncommon regime into the act's silence."[169] The Court explained that, whether the federal government issues a stop construction order or instead pursues a civil enforcement action, "the production and persuasion burdens remain with EPA and the underlying question a reviewing court resolves remains the same: Whether the state agency's BACT determination was reasonable, in light of the statutory guides and the state administrative record."[170]

Finally, the Court agreed with the Ninth Circuit that EPA had not been arbitrary or capricious in finding that "ADEC's acceptance of Low NO_x for MG-17 was unreasonable given the facts found."[171] The Court noted that the ADEC had relied on the alleged economic impacts of SCR technology on the mine operations, the state agency had also expressly acknowledged that it had made no determination as to the impact of SCR on the mine's profitability or competitiveness—matters on which the mine operator had refused to provide evidence.[172] "Absent evidence of that order," the Court explained, "ADEC lacked cause for selecting Low NO_x as BACT based on the more stringent control's impact on the mine's operation or competitiveness."[173] Concluding that EPA "has supervisory authority over the reasonableness of state permitting authorities' BACT determinations and may issue a stop construction order,"[174] and that EPA had not act arbitrarily or capriciously in the exercise of that power, the Court affirmed the judgment of the court of appeals.

Justice Anthony M. Kennedy, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas, filed a dissenting opinion. Justice Kennedy argued that the statutory definition of BACT reflected a congressional intention to commit the choice of pollution control technology to the discretion of state authorities, and that Congress had not intended EPA to have "general supervisory authority" over state BACT determinations.[175] According to the dissent, EPA's position reflected an unwarranted "presumption that state agencies are not to be trusted."[176]

Justice Kennedy devoted much of his dissent to presenting an alternative account of the procedures that, in his view, should govern EPA objections to a state permitting authority's BACT determination. In his view, the proper forum for EPA to present any objections to an allegedly deficient state decision is review in state court—review that, Justice Kennedy noted, is specifically required by EPA itself as a precondition for states to obtain authority to administer the PSD program.[177] He also faulted EPA for not presenting its objections to the ADEC until after the close of the comment period designated by the agency.[178] Justice Kennedy argued that it was for state courts, not EPA, "to ferret out arbitrary and capricious conduct by state agencies."[179]

The dissent also argued that the majority's approach could present separation-of-powers and federalism problems in a case where EPA opted to issue a stop construction

163. *Id.* at 1001.
164. *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 234 (2001)).
165. *Id.* at 1002.
166. *Id.* at 1002-03.
167. *Id.* at 1003.
168. *Id.* at 1009.
169. *Id.* at 1004.
170. *Id.* at 1005 (citation omitted).
171. *Id.* at 1007.
172. *Id.*
173. *Id.* at 1008.
174. *Id.* at 1009.
175. *Id.* at 1012 (Kennedy, J., dissenting).
176. *Id.*
177. *Id.* at 1013.
178. *Id.*
179. *Id.*

order after a state court had reviewed and upheld a permitting authority's BACT decision, thereby undermining the "judicial independence" of state courts.[180]

Justice Kennedy also argued that the majority's ruling would have "broader implications" for federal-state relations beyond the PSD program:

> The CAA is not the only statute that relies on a close and equal partnership between federal and state authorities to accomplish congressional objectives. See, e.g., New York v. United States, 505 U.S., at 167 (listing examples). Under the majority's reasoning, these other statutes, too, could be said to confer on federal agencies ultimate decisionmaking authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect. Cf. Alden v. Maine, 527 U.S. 706 (1999). If cooperative federalism, Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 289 (1981), 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 the ministerial tasks of information gathering and making initial recommendations, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight.[181]

For the dissenters, then, the *ADEC* decision is a serious blow to state authority and prestige under environmental statutes providing for "cooperative federalism."

The Impact of *ADEC*

ADEC is an important decision if only because the PSD program is one of the most broadly applicable CAA programs; most states have obtained EPA approval to administer the program; and state permitting authorities' BACT determinations are a core feature of the program. In holding that EPA retains a limited oversight role allowing the Agency to issue administrative stop-construction orders when it concludes that a state's BACT determination lacks a rational basis, the Court confirmed a power that EPA had long asserted. That power is, in the Agency's view, an important check against underprotective BACT determinations. EPA's ultimate power to challenge a state agency's decision, and to have that challenge adjudicated in a federal court (whether upon judicial review of an EPA stop-construction order, as occurred in *ADEC*, or in a civil action initiated by EPA itself), serves as an important backdrop for negotiations between the facility, the state agency, and EPA.

But the immediate impact of *ADEC* is quite modest. After all, EPA had long asserted the power in question, and no court (state or federal) had denied EPA's power to act under §§113(a)(5) and 167. Moreover, EPA has seldom found it necessary to challenge a state permitting authority's compliance with the BACT requirement. As the majority noted in *ADEC*, EPA's use of its authority to challenge state's BACT determinations has been "restrained and modest"—resulting in "only two other reported judicial decisions" in the entire life of the PSD program, one of which predated the 1990 Amendments expanded EPA's enforcement powers under §113(a)(5).[182] Under the majority's ruling, EPA will have to make strong showing in order to establish that a state permitting authority has exceeded its authority: it will have to show that the state agency's decision was "arbitrary" and that the agency exceeded the "considerable leeway" granted to states under the statute. A mere disagreement with the state's technical or economic judgments, will not be enough. The extreme nature of the facts in *ADEC* itself also serve to limit EPA intervention to only the most exceptional cases: the ADEC had expressly relied on the economic impacts of what it admitted was an environmentally superior technology, while at the same time expressly admitting that it did not know what those economic impacts were (in large part because the permittee had refused to provide supporting information). It seems unlikely that cases like this, rare in the history of the PSD program so far, will recur with any frequency.[183]

Another factor that serves to limit the impact of *ADEC* in practice is that EPA's newly upheld authority to perform a limited substantive review of BACT determinations is a power, not a duty. Nothing in the Court's opinion compels EPA to issue stop-construction orders or bring civil actions when it confronts a dubious state decision. As a practical matter, EPA is constrained by many factors—including finite agency resources, congressional oversight, a desire not to alienate state agencies with whom it has constant dealings, and the sheer difficulty of demonstrating "arbitrariness" by the state—that will counsel restraint in exercising its newly reaffirmed powers. True, §167 speaks in mandatory terms, suggesting that EPA "shall" take actions to block construction of a facility that fails to comply with the CAA's PSD provisions.[184] However, the threshold determination as to whether such a violation has occurred surely involves a measure of discretion, and in most situations citizen suitors[185] would be hard-pressed to establish that EPA had violated a mandatory duty to issue a stop-construction order where the state had issued a PSD permit. An administration's views about the desirability of a showdown with the state surely play a role; it is unclear, for example, whether EPA would have challenged ADEC's BACT determination had the Bush Administration, rather than its predecessor, been in place at the relevant time.

Although there is reason to view the impact of the *ADEC* decision as limited, an adverse ruling would have been quite a blow to EPA. It would have meant that, provided the state included something labeled a BACT determination, EPA's only means of challenging that determination would have been to resort to state court, a forum unfamiliar to federal agencies and—particularly where the state judiciary is elected—one subject to the same parochial pressures that

180. *Id*. at 1015 (citing Hayburn's Case, 2 Dall. 409 (1792), and Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), which hold that judgments of Article III courts cannot be subject to revision by the Executive or congressional action, respectively). *But cf. ADEC*, 124 S. Ct. at 1003 n.14 (majority's suggestion that res judicata principles could preclude EPA from taking enforcement action after a state court had upheld the state permitting authority's decision).

181. *ADEC*, 124 S. Ct. at 1018.

182. *See id*. at 1003 n.14 (citing Allsteel, Inc., v. EPA, 25 F.3d 312 (6th Cir. 1994), and Solar Turbines Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989)).

183. By the same token, one hopes that one feature of *ADEC* that cut against EPA—and that aroused the pique of the state agency and the dissenting Justices—will not be present in many other cases: here I refer to EPA's failure to make its concerns with the state's BACT determination known until after the close of the state's comment period. *See ADEC*, 124 S. Ct. at 1013 (Kennedy, J., dissenting).

184. *See id*. at 1016 (Kennedy, J., dissenting).

185. *See* 42 U.S.C. §7604.

may lead state agencies to underregulate emissions sources. Since EPA had asserted the power to review state BACT determinations for some time, and since there was no contrary authority in the lower courts, the Court's decision to take the case and reverse the Ninth Circuit would have reflected a stern judicial rebuke to EPA's exercise of power against states under the PSD or similar programs. The federalism concerns voiced at the end of Justice Kennedy's dissent likely explain why the Court granted certiorari in this case despite the absence of the "circuit split" normally required in statutory cases.

The arguments by the *ADEC* dissenters and others[186] that the *ADEC* decision will signal an important shift toward federal interference with state authority under environmental programs other than PSD, seem quite strained. *ADEC* turns almost entirely upon the particular wording of the specific statutory provisions at issue—principally the interaction of the CAA's definition of BACT with EPA's express authority to enforcing the "requirements" of the Act under §§113(a)(5) and 167. Because each of the many "cooperative federalism" environmental statutes contain its own distinctive wording, *ADEC* thus is unlikely to have much bearing upon future challenges to EPA authority under these other regimes. The relations between EPA and the states under major programs—such as EPA review of SIPs under the CAA, or of state water quality certification and national pollutant discharge elimination system (NPDES) permits under the CWA, are the subject of their own developed bodies of law.

As for whether *ADEC* reflects a blow to the dignity and authority of states acting under delegated federal environmental authority, again there is some reason to question the dissent's dire assessments. This is not an instance in which the federal agency is imposing an intrusive mandate on an unwilling state: the PSD program, like other cooperative federalism programs, gives states the choice whether to assume responsibility or instead to leave that responsibility to the federal agency. Acceptance of delegated authority invariably involves an agreement by the state to submit to a significant degree of federal regulation and oversight. As noted, the extent of EPA intervention authorized under *ADEC* is really quite limited. While there is surely some cost to the state's range of discretion when EPA effectively sets aside a state BACT determination, the instances of such action presumably will continue to be rare.

The "limited but vital" oversight role for EPA described in *ADEC*,[187]—designed to check only clear regulatory failures by the state, and subject to judicial review—need not be seen as an affront to the competence or neutrality of state administrators. Rather it can be seen as a means of facilitating state administration of the federal program. EPA's oversight role can counteract the pressures faced by states who must regulate large companies who may threaten to leave if they face new regulatory burdens, and of providing assistance to each state that its neighbors will not be able to siphon off business or export pollution costs by underenforcing BACT for facilities within their borders. Indeed, it was such concerns that led a group of 12 states (together with another state's principal environmental agency) to file an amicus brief supporting EPA in *ADEC*.[188] A group of 11 states filed an amicus brief supporting Alaska.[189] Cooperative federalism schemes depend upon a high degree of goodwill and coordination among federal and state administrators; but a default rule that gives the federal agency power to check state departures from the statutory design is neither unusual nor necessarily insulting to states' dignity. In some cases the possibility of an EPA compliance order or civil enforcement suit may provide state regulators with an important form of "cover" against political influence at the state level.[190]

While *ADEC* confirms EPA's authority to issue an administrative order when it concludes that the state's BACT determination is unsupported by the record or otherwise arbitrary, it did not clear away all legal barriers to EPA's enforcement authority in CAA cases. Indeed, even as *ADEC* was pending before the Court, the U.S. Court of Appeals for the Eleventh Circuit handed down *Tennessee Valley Authority (TVA) v. Whitman*.[191] In *TVA*, the court dismissed the Tennessee Valley Authority's (TVA's) challenge to an administrative compliance order under §113(a) of the CAA[192] on the basis that the process for issuing such orders violates the Due Process Clause, thereby (in the court's view) precluding such orders from having the concrete legal effect that would be required for such an order to be reviewable as "final agency action." Understandably, the Eleventh Circuit's holding has caused concern at EPA and introduced a new element of uncertainty into the CAA enforcement scheme. Several months after *ADEC* came down, the Court denied the U.S. Solicitor General's petition for certiorari in *TVA*. The Court's refusal to review a decision purporting to hold a federal statute unconstitutional was unusual, but may have

186. *See* Matthew Cohen, *Fading Federalism and Source-Specific SIP Limits*, 18 Nat. Resources & Env't 39, 45 (2004).

187. *See ADEC*, 124 S. Ct. at 1003 (quoting legislative history).

188. *See* No. 02-658, *ADEC*, Brief of Amici Curiae Vermont, California, Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Wisconsin, and the Pennsylvania Department of Environmental Protection in Support of Respondents, at 7 (EPA oversight role "ensures a reasonable level of consistency among BACT determinations nationwide" so that states will not have to "choose between maintaining a high level of air quality and promoting industrial development within their borders," and "protects states and their citizens from regional increases in air pollution caused by unsupported BACT determinations").

189. *See* No. 02-658, *ADEC*, Brief of Amici Curiae states of North Dakota, Wyoming, Alabama, Delaware, Iowa, Nebraska, Nevada, Oklahoma, South Dakota, Utah, and Virginia in Support of Petitioner.

190. *But cf.* New York v. United States, 505 U.S. 144, 168-69, 21 ELR 21500 (1992) (referring to potential blurring of state versus federal responsibility for regulatory mandates as a civic evil to be averted).

191. 336 F.3d 1236, 33 ELR 20231 (11th Cir. 2003).

192. 42 U.S.C. §7413(a).

193. *ADEC*, 124 S. Ct. at 999.

rested on the prudential consideration (urged by TVA in opposing the petition) that EPA should not be allowed to obtain review of a judgment in which petitioner EPA had (technically) prevailed (since TVA's suit challenging the order was dismissed, as EPA had urged on more conventional finality grounds). *TVA* and *ADEC* do not directly conflict: the Court in *ADEC* expressly noted that no due process objections were presented in that case.[193] However, there is at least some tension between the Eleventh Circuit's reasoning in *TVA* and the *ADEC* decision, in which the Court upheld an EPA administrative compliance order without expressing any qualms about its constitutionality.