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Federal/State Relations Under the Clean Air Act: The Supreme Court Takes Two Cases

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Summary

Recently, the Supreme Court agreed to hear two cases involving federalism issues under the Clean Air Act (CAA). In *Alaska Dep't of Environmental Conservation v. EPA*, the Court will wrestle with whether EPA can enforce a Prevention of Significant Deterioration (PSD) provision in the CAA contrary to a prior state determination under its EPA-approved PSD program. In *Engine Manufacturers Ass'n v. South Coast Air Quality Mgmt. Dist*., the issue is the preemptive scope of the CAA program regulating mobile sources of air pollution. Why the Court has taken these cases is unclear, given that they present no constitutional issues but only narrow questions of statutory construction. Nor is there a direct split in the circuit courts. Perhaps the current Court's demonstrated interest in federalism issues is part of the reason.

It is noteworthy enough when the Supreme Court agrees to hear a case involving a particular statute; agreeing to take *two* in a short span of time is even more so. On February 24, 2003, the Court granted certiorari in *Alaska Dep't of Environmental Conservation v. EPA*,[1] a case dealing with EPA's enforcement and oversight authority over state determinations under the Clean Air Act (CAA).[2] On June 9, 2003, the Court granted certiorari in *Engine Manufacturers Ass'n v. South Coast Air Quality Mgmt. Dist*.,[3] a case addressing the preemptive scope of the CAA program regulating mobile sources of air pollution. Not only do both cases involve the same statute, they also both involve the same broad theme: the allocation of authority between the federal and state governments under the CAA.[4]

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[1] 298 F.3d 814 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 1253 (Feb. 24, 2003) (No. 02-658).

[2] 42 U.S.C. §§ 7401-7671q.

[3] 309 F.3d 550 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2274 (June 9, 2003) (No. 02-1343).

[4] It is the absence of such a federalism theme that leads us not to include in this report a *third* case involving a federal environmental statute that recently was accepted by the Court. In South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 280 F.3d 1364 (11th Cir. 2002), cert. granted, 71 U.S.L.W. 3798 (June 27, 2003) (No. 02-626), the question presented is whether
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Alaska Dep't of Environmental Conservation v. EPA

In this case, the issue before the Supreme Court is – may EPA issue CAA noncompliance orders to a company, where such orders effectively overrule a state permit, issued to the same company for the same activity, under the state's EPA-approved clean air program?

Some background may be useful. In areas of the United States where the air is cleaner than the CAA's national standards require, the Act limits the extent to which air quality will be allowed to deteriorate down to those standards. This CAA program is called "Prevention of Significant Deterioration (PSD)."[5] The PSD program is implemented in each state having a PSD area by, among other things, a permit program for major new and modified sources of emissions in that area.[6] This PSD permit program is run by EPA, unless the state opts to include an EPA-approved PSD program in its state implementation plan (SIP). Whoever runs the program, federal government or state, persons seeking to construct major new and modified sources of emissions in a PSD area must commit to using "best available control technology" (BACT).[7]

Alaska is a PSD area with respect to nitrogen dioxide. Under the state's EPA-approved SIP, the state rather than EPA is the PSD permit issuer. As the CAA requires, the state's SIP demands BACT.

In *Alaska DEC*, that state determined that a mining company's application for a PSD permit – needed for new electric generators it wished to install – satisfied BACT. EPA disagreed, however, and issued a noncompliance order stating that Alaska's authorization of the company's new generators violated the CAA and Alaska's SIP. Alaska issued the PSD permit anyway, prompting two further orders from EPA preventing the mining company from installing the new generators until it demonstrated to EPA compliance with BACT requirements in the CAA and Alaska SIP. Alaska and the mining company sought judicial review of these EPA orders in the Ninth Circuit.[8] They argued that EPA's noncompliance orders exceeded its CAA authority because the orders effectively invalidated a state permit issued under an EPA-approved SIP.

The Ninth Circuit held for EPA. It ruled that the CAA "compel[s] the conclusion that the administrative orders [fall] within the EPA's enforcement and oversight

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[4] (...continued)
pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant from a point source so as to trigger the requirement of a NPDES permit under the Clean Water Act. Though the case involves the application of a federal statute to a state agency, the Clean Water Act issue could have been raised by any water-pumping entity, not merely governmental ones.

[5] CAA Title I, Part C.

[6] CAA § 165(a); 42 U.S.C. § 7475(a).

[7] CAA § 165(a)(4); 42 U.S.C. § 7475(a)(4).

[8] Under CAA section 307(b), a petition for review of any final action of the EPA Administrator that is locally or regionally applicable may be filed only in the United State Court of Appeals for the appropriate circuit, rather than the district court. 42 U.S.C. § 7607(b).

authority." The court saw the Act's language and legislative history as straightforwardly supporting this conclusion.

As to the Act's language, CAA section 113(a)(5) says that whenever EPA finds that a state "is not acting in compliance with any requirement" of the Act relating to new sources, it may "issue an order prohibiting the construction or modification of any major stationary source ...."[9] Targetting only PSD, CAA section 167 commands EPA to "take ... measures, including the issuance of an order ... to prevent the construction or modification of a major emitting facility which does not conform to the requirements of" the CAA portion establishing the PSD program. The BACT requirement fits both sections: it is *both* a CAA requirement relating to new sources under section 113(a)(5) and a requirement of the PSD portion of the CAA under section 167. Thus, the court found EPA's orders to be authorized by both sections. As to the Act's legislative history, the court perceived a steady progression since original enactment of the CAA in 1963 toward greater federal oversight of state activity.

The counter-arguments of Alaska and the mining company were rejected. They argued that because section 169(3) gives the state discretion to determine BACT, EPA lacks authority to veto that judgment based on a mere difference of opinion. The court responded that neither section 113(a)(5) nor section 167 contain any exemption for requirements that involve the state's exercise of discretion. Nor were the state and mining company successful in arguing that EPA can only review whether the state complied with "objective," as opposed to discretionary, requirements of the CAA. Whatever "objective" requirements means, said the court, it must include the state's provision of a reasoned justification for its BACT determination. This, concluded EPA, the state and mining company did not provide.

Moving past EPA's *authority* to revisit the state's BACT determination, the court addressed the *validity* of its conclusion that the determination was an abuse of discretion. EPA's determination, it held, was not arbitrary and capricious. In particular, the state's apparent motivation for rejecting Selective Catalytic Reduction – appreciation of the mining company's contribution to the local economy – is not an accepted justification under the approach it used to determine BACT. Hence, EPA's orders were sustained.

Engine Manufacturers Ass'n v. South Coast Air Quality Management District

In this case, the issue before the Supreme Court is whether the CAA preempts rules of a state's air quality management district saying that when local operators of vehicle fleets purchase or replace their fleet vehicles, they may acquire only those vehicles that the district has designated.

Here we are dealing not with "stationary sources" of air pollution, as in *Alaska DEC*, but rather with "mobile sources" – i.e., vehicles. A key difference between how the CAA treats these two basic source categories is the degree to which state standards are preempted. The CAA disavows any preemption of state *stationary-source* emission standards that are stricter than federally required. In sharp contrast, the Act generally

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[9] 42 U.S.C. § 7413(a)(5).

prohibits state *mobile-source* emission standards entirely. CAA section 209(a) says that states may not adopt "any standard relating to the control of emissions from new motor vehicles ... ," nor require any approval "relating to the control of emissions from any new motor vehicle as condition precedent to the initial retail sale ...." [10]

There are exceptions, however. CAA section 209(b) offers a preemption waiver, applicable solely to California, where that state determines that its standards will be at least as protective as the federal ones and EPA, on application for the waiver, makes no adverse findings.[11] In addition, CAA section 177 allows states with EPA-approved nonattainment plans to "piggyback" onto the California emission standards.[12] That is, they may adopt emission standards for new vehicles that are stricter than the federal ones as long as their standards are identical to California's for the model year in question.

Turning to the facts, the California legislature authorized the South Coast Air Quality Management District (SCAQMD) to adopt fleet rules to reduce auto pollution in this highly polluted area (including Los Angeles). In 2000, SCAQMD adopted six rules, each of which mandates that when certain local operators of fleets purchase or replace their fleet vehicles, they may acquire only those specific vehicles that SCAQMD has designated as meeting its requirements. For example, Fleet Rule 1192 requires public transit fleet operators with 15 or more vehicles to acquire alternative-fuel heavy-duty vehicles when procuring or leasing vehicles, with some exemptions.

Plaintiffs, two trade associations with an interest in diesel fuel use, argued that the Fleet Rules violate CAA section 209(a) in two ways: (1) they constitute preempted "standard[s] relating to the control of emissions from new motor vehicles," and (2) they establish preempted "condition[s] precedent" to the sale of new motor vehicles.

The federal district court rejected both arguments.[13] First, it said, the Fleet Rules do not set a "standard relating to the control of emissions." Asserted the court: "Rather than imposing any numerical control on new vehicles, the rules regulate the purchase of previously-certified vehicles."[14] To be sure, there is case law finding CAA preemption of New York and Massachusetts laws requiring that a certain volume of vehicle *sales* in those states be zero-emission vehicles.[15] It does not follow, however, said the court, that a rule regulating the *purchase* of vehicles is such a standard. The Fleet Rules are not standards; plaintiffs may continue to sell any vehicle that is otherwise certified in California. Furthermore, CAA section 246 expressly recognizes, in the court's view, that

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[10] 42 U.S.C. § 7543(a).

[11] 42 U.S.C. § 7543(b).

[12] 42 U.S.C. § 7507.

[13] 158 F. Supp. 1107 (C.D. Cal. 2001).

[14] Id. at 1117.

[15] American Automobile Mfrs. Ass'n v. Cahill, 152 F.3d 196 (2d Cir. 1998) (New York); Ass'n of International Automobile Mfrs., Inc. v. Commissioner, 208 F.3d 1 (1st Cir. 2000) (Massachusetts).

Fleet Rules must be established in areas with very high pollution, and authorizes restrictions on the purchase of fleet vehicles.[16]

Second, California's Fleet Rules, said the district court, do not establish prohibited conditions precedent to the sale of new motor vehicles. The rules, it noted, regulate the purchasing and leasing, not the sale, of vehicles by fleet operators. They merely require such operators to choose from among the least polluting of state-certified vehicles. Importantly, the court pointed out that the rules impose no new emission requirements, and thus do not run afoul of Congress' concern underlying motor-vehicle emission standard preemption – namely, that auto manufacturers not have to build engines to comply with a multiplicity of state standards.

Finally, the court rejected plaintiffs' argument that the Fleet Rules violate CAA section 177. Section 177, it held, applies only to non-California "opt-in" states – not to California itself.

On appeal to the Ninth Circuit, the district court's non-preemption ruling as to section 209 was affirmed, but with no discussion.[17] (The holding of section 177 non-applicability was not appealed.)

Comments

In both *Alaska DEC* and *Engine Mfrs. Ass'n*, the only issue that is before the Supreme Court is the federal-state one – the EPA override authority in *Alaska DEC*, and the preemption issue in *Engine Mfrs. Ass'n*. Other issues in the two cases have fallen by the wayside. The cases fall squarely into the long line of decisions dating to the early 1990s in which the current Court, or at least the five justices regarded as generally conservative, has shown intense interest in federalism issues. While most of these Supreme Court decisions address federalism in a constitutional context (under the Commerce Clause, Tenth Amendment, or Eleventh Amendment), a few, like *Alaska DEC* and *Engine Mfrs. Ass'n*, are solely statutory construction cases.[18] *Alaska DEC* and *Engine Mfrs. Ass'n* also tap into the rich body of debate and case law as to how the federal-state partnership envisioned by Congress in the CAA and other similar federal environmental programs should play out in specific situations.

That said, from a federalism perspective the lower-court decisions in *Alaska DEC* and *Engine Mfrs. Ass'n* point in opposite directions, the former taking the federal side, the latter the "states rights" position. Looking at the decisions from another perspective, however, they are in harmony, in the sense that both decisions take the "environmental" side of the argument.

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[16] 42 U.S.C. § 7586.

[17] 309 F.3d 551 (9th Cir. 2002).

[18] The most recent statutory environmental federalism decision of the Supreme Court is Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). *SWANCC* involved the scope of the United States' wetlands permitting authority under the Clean Water Act – specifically, whether that authority extended to certain "isolated waters." The Court held that it did not.

It is anyone's guess, of course, why the Supreme Court takes a case. As mentioned, *Alaska DEC* and *Engine Mfrs. Ass'n* present no constitutional issues. Nor is there in either instance a direct split in the circuit courts. Perhaps the Court's interest was piqued by the shared federalism theme, and intensified by the environmental context. Perhaps it is the forum below, the Ninth Circuit, which has suffered a high Supreme Court reversal rate in the past.

Oral argument in both cases is scheduled early in the Court's upcoming term, beginning October, 2003.