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## Alaska Wilderness League v. U.S. EPA

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*Alaska Wilderness League v. U.S. EPA*, 727 F.3d 934 (9th Cir. 2013)

Maxwell Kirchhoff

**I. ABSTRACT**

In this case, the Ninth Circuit deferred to the EPA’s interpretation of a statute concerning whether increment requirements were applicable to a temporary source pollutant. The court held that Shell Offshore, Inc. was not required to analyze the potential impact of an offshore drill barge, the Kulluk, under the Clean Air Act. Additionally, the plaintiffs’ challenge concerning the Kulluk’s impact on ambient air was defeated pursuant to *Resisting Environmental Destruction on Indigenous Lands, REDOIL v. EPA*.

**II. INTRODUCTION**

In *Alaska Wilderness League*<sup>1</sup>, the United States Court of Appeals for the Ninth Circuit ruled in favor of defendants, the Environmental Protection Agency (“EPA”) and Shell Offshore, Inc. (“Shell”), regarding whether increment requirements were applicable to a temporary source.<sup>2</sup>

The plaintiffs, eight environmental groups (collectively “Alaska Wilderness”), brought suit using the interaction between state and federal law under the Clean Air Act (“Act”). The Act makes clear that both federal and state regulators must take responsibility to control and improve the nation’s air quality.<sup>3</sup> As such, states are required to submit for the EPA’s approval state implementation plans (“SIP”) that advance the attainment and maintenance of national ambient air quality standards propagated by the EPA.<sup>4</sup>

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<sup>1</sup> *Alaska Wilderness League v. U.S. EPA*, 727 F.3d 934 (9th Cir. 2013).

<sup>2</sup> *Id.* at 935.

<sup>3</sup> *Id.* at 935-36.

<sup>4</sup> *Id.* at 936.

Specifically, the Act requires sources, even those operating temporarily in given locations, to obtain permits demonstrating compliance with its standards.<sup>5</sup> Additional preconstruction permitting requirements are also required in clean air areas under the Prevention of Significant Deterioration program (“PSD”).<sup>6</sup> The PSD imposes increment standards in clean air areas by prohibiting total pollution from exceeding certain levels over established baselines in given regions.<sup>7</sup> Temporary sources may also be subjected to increment standards under the Act’s permit requirement and condition statute, 42 U.S.C. § 7661c(e), which allows permitting authorities to issue permits for “similar operations at multiple temporary locations .”<sup>8</sup>

The circuit court addressed two issues raised by Alaska Wilderness: (1) whether increment requirements were applicable to the Kulluk; and (2) whether the Kulluk was properly granted a 500-meter exemption from ambient air standards.<sup>9</sup>

### **III. FACTUAL AND PROCEDURAL BACKGROUND**

In 2011, the EPA issued three permits to Shell which were later consolidated into one permitting document (the “Permit”).<sup>10</sup> The Permit allowed Shell to “construct operate, and conduct ‘pollutant emitting activities’ associated with the Kulluk in the Beaufort Sea off Alaska’s North Slope.”<sup>11</sup> The EPA released a statement of basis before issuing the Permit, which stated the EPA would not require Shell to review the emissions effect on the increment for the Kulluk's area of operation.<sup>12</sup> The EPA reached this result because their reading of § 7661c(e)

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (citing *Alaska, Dep’t of Env’tl. Conservation v. EPA*, 298 F.3d 814, 816 (9th Cir. 2002)).

<sup>7</sup> *Alaska Wilderness League*, 727 F.3d at 936.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 936, 939-40.

<sup>10</sup> *Id.* at 936.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

demonstrated increment requirements were not applicable to the Kulluk.<sup>13</sup> Additionally, the Permit reported the EPA's decision to exempt the Kulluk from ambient air standards.<sup>14</sup> The exemption was made conditional on the establishment of a U.S. Coast Guard safety zone and public access control program to "restrict public access to the waters within 500 meters of the Kulluk."<sup>15</sup>

Alaska Wilderness challenged the increment and ambient air conclusions in the Permit before the Environmental Appeals Board ("EAB"), claiming the EPA erred when it applied a "source-based" instead of a "geography-based" interpretation of increment standards.<sup>16</sup> The EPA concluded increment standards applied to temporary sources only if the PSD would apply them on a similar stationary source, while Alaska Wilderness maintained increment standards applied to all sources any time they are established for a geographic area.<sup>17</sup> Next, Alaska Wilderness contended the ambient air exception deviated from its agreed upon definition which required a physical barrier to exclude the public from accessing the area.<sup>18</sup> The EAB rejected both challenges, after which Alaska Wilderness filed a timely petition.

#### **IV. ANALYSIS**

Before analyzing Alaska Wilderness' challenges, the court determined the EAB Decision was entitled to *Chevron* deference.<sup>19</sup> Under *Chevron*, if Congress has spoken to the matter at hand, the court and agency must give effect to the intent of Congress.<sup>20</sup> If however, the statute is silent or ambiguous regarding the matter at hand, the court must determine if the agency's

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<sup>13</sup> *Alaska Wilderness League*, 727 F.3d at 936-37.

<sup>14</sup> *Id.* at 937.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Alaska Wilderness League*, 727 F.3d at 937 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

<sup>20</sup> *Id.* (citing *Sierra Club v. EPA*, 671 F.3d 955, 961-62 (9th Cir. 2012)).

answer is based on a permissible construction of the statute.<sup>21</sup> The court held that *Chevron* deference was appropriate because the EAB decision was a formal adjudication and Congress explicitly granted the EPA the authority to promulgate regulations for the Kulluk's operating region.<sup>22</sup>

Next, the court found the EPA's "source-based" interpretation was a reasonable interpretation of § 7661c(e).<sup>23</sup> The EPA argued increment requirements were applicable as a function of geography *and* whether the PSD would require increment analysis for a specific source if it were stationary.<sup>24</sup> Under that interpretation, the Kulluk did not trigger the analysis requirement, as the PSD imposes it only if the SIP requires it or if the source is a "major emitting facility."<sup>25</sup> Because § 7661c(e) was ambiguous in the use of the term "applicable," the court turned to and relied upon an incorporated subchapter, 42 U.S.C. § 7473, to show that while permissible increment levels were established by geographic area, the subchapter was silent as to how these requirements would apply to minor temporary sources like the Kulluk.<sup>26</sup> More importantly, the court found two other provisions in the subchapter that imposed increment requirements on source rather than geography.<sup>27</sup> Therefore, the court found the EPA's interpretation was consistent with congressional design regarding the plain language of § 7661c(e) and it deferred to the EPA's reasonable interpretation.<sup>28</sup>

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<sup>21</sup> *Id.* at 938 (citing *Sierra Club*, 671 F.3d at 962 (9th Cir. 2012)).

<sup>22</sup> *Id.* at 938.

<sup>23</sup> *Id.* at 939.

<sup>24</sup> *Id.* at 938.

<sup>25</sup> *Alaska Wilderness League*, 727 F.3d at 938 ("It is [...] undisputed that the Kulluk is not a 'major emitting facility'; 'Alaska's SIP [did not apply an] increment requirement [...] to a minor PSD source like the Kulluk if it were stationary.'").

<sup>26</sup> *Id.* at 938.

<sup>27</sup> *Id.* at 939 (citing 42 U.S.C. §§ 7471, 7475(a)(3)(A)).

<sup>28</sup> *Id.*

Lastly, the court held *Resisting Envtl. Destruction on Indigenous Lands, REDOIL v. EPA*<sup>29</sup> directly controlled on the issue of the ambient air exception afforded to the Kulluk.<sup>30</sup> In *REDOIL*, Shell applied for permits to emit pollutants concerning a drillship, the Discoverer, along with an associated fleet.<sup>31</sup> When the EPA granted Shell's permits it approved Shell's request for a 500-meter radius ambient air exception.<sup>32</sup> The exception was described in a 1980 letter from former EPA Administrator Douglas Costle. The letter provided: "an exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers."<sup>33</sup> The *REDOIL* court reasoned that because the EPA conditioned Shell's permit and ambient air exception on the establishment of a zone that precludes public access, the grant was consistent with the regulation.<sup>34</sup> Since the EPA granted the same exemption on the same condition in *Alaska Wilderness League*, the court there disregarded Alaska Wilderness' ambient air contention.<sup>35</sup>

## **V. CONCLUSION**

In *Alaska Wilderness League*, the Ninth Circuit Court of Appeals relied on *Chevron* in deferring to the EPA's interpretation of a section of the Clean Air Act in considering whether a drill barge was subject to increment requirements under the Act. Further, the court upheld its decision in *REDOIL* to allow ambient air exemptions, even though the EPA did not have occasion to consider sources like the Kulluk when Costle's letter was written.

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<sup>29</sup> *Resisting Environmental Destruction on Indigenous Lands, REDOIL v. EPA*, 716 F.3d 1155 (2012).

<sup>30</sup> *Alaska Wilderness League*, 727 F.3d at 940.

<sup>31</sup> *REDOIL*, 716 F.3d at 1158.

<sup>32</sup> *Id.* at 1164.

<sup>33</sup> *Id.* at 1165.

<sup>34</sup> *Id.*

<sup>35</sup> *Alaska Wilderness League*, 727 F.3d at 940.