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The Supreme Court Revisits the Environment: Seven Cases Decided or Accepted in the 2003-2004 Term

Robert Meltz, American Law Division

September 7, 2004

Abstract. In the Supreme Courts 2003-2004 term, concluded June, 2004, the Court accepted for review seven environmental cases an unusually large number. The reason for this renewed interest in environmental cases at this particular time is, of course, speculative; the Court does not explain why it accepts cases. In any event, five decisions were rendered, and two cases set for oral argument in the 2004-2005 term. This report reviews the cases and then comments on them.

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Summary

In the Supreme Court's 2003-2004 term, concluded June, 2004, the Court accepted for review seven environmental cases — an unusually large number. Five decisions were handed down during the term, and two cases were carried over to the upcoming 2004-2005 term.

Of the five decided cases, three involve the Clean Air Act (CAA). *Alaska Dep't of Environmental Conservation v. EPA* asked whether EPA may issue CAA enforcement orders that effectively overrule a permit issued by a state under its EPA-approved air program. The Court said yes, though only by a 5-4 margin. In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, the Court held that the CAA preempts a state from compelling local vehicle fleet operators to buy new vehicles from the state's list of low-emission models. And *Dep't of Transportation v. Public Citizen* spoke to whether DOT safety regulations whose promulgation allowed Mexican trucks greater range in the United States must be preceded by environmental analyses under the CAA and National Environmental Policy Act. Because DOT lacks discretion to prevent the truck movement, said the Court, the added emissions from that movement did not have to be considered.

The other decided cases are, first, *South Florida Water Management District v. Miccosukee Tribe of Indians*, holding that a point source of discharges into U.S. navigable waters must obtain a Clean Water Act permit despite the fact that the point source itself did not add the pollutants in the discharged water. Second, *Norton v. Southern Utah Wilderness Alliance* clarified the availability of judicial review of federal agency inaction under the Administrative Procedure Act, which allows review of agency action "unlawfully withheld."

Environmental cases to be heard in the 2004-2005 term are *Cooper Industries, Inc. v. Aviall Services, Inc.*, addressing when contribution actions are available under the Superfund Act, and *Bates v. Dow Agrosciences, LLC*, which wrestles with the scope of federal preemption of state law under the Federal Insecticide, Fungicide and Rodenticide Act.

It is not apparent why the Court has chosen this moment to enlarge its environmental docket. No unifying theme is apparent in the accepted cases, and why some of them piqued the Court's interest is perplexing. There are some commonalities, however. All seven cases raise principally statutory, rather than constitutional, issues. The results, in the cases decided so far, lean against the "environmental" side, though not exclusively so. And three of the seven cases turn on the nature of the federal-state relationship, a favorite theme of the current Court.

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In the Supreme Court's 2003-2004 term, concluded June, 2004, the Court accepted for review seven environmental cases — an unusually large number.[1] The reason for this renewed interest in environmental cases at this particular time is, of course, speculative; the Court does not explain why it accepts cases. Five of the cases were decided during the 2003-2004 term, and two carried over to the 2004-2005 term. This report reviews the cases and then briefly comments.[2]

I. Cases Decided During the 2003-2004 Term

EPA oversight of state programs under the Clean Air Act: *Alaska Dep't of Environmental Conservation v. EPA*

The broad concern of *Alaska DEC* is EPA's authority to oversee state administration of the Clean Air Act (CAA), and in particular to enforce the act contrary to state determinations. The precise issue is whether EPA may issue CAA noncompliance orders to a company, where such orders *effectively overrule a state permit* issued to the company under the state's EPA-approved CAA implementation plan. The CAA provisions at issue are section 113(a)(5),[3] EPA's general enforcement authority, and section 167,[4] its specific enforcement authority for Prevention of Significant Deterioration (PSD) areas.[5]

Alaska is a PSD area for nitrogen dioxide. Under the state's EPA-approved CAA plan, the state rather than EPA issues the "PSD permits" required for constructing major new sources of nitrogen dioxide emissions in the state. In the present case, Alaska DEC found that a mining company's application for a PSD

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[1] The author appreciates the assistance of Judith Derenzo, a summer intern with the American Law Division, in the preparation of this report.

[2] *See also* Note, *Case Comments: U.S. Supreme Court Environmental Cases, October 2003 Term*, 28 Harv. Envtl. L. Rev. no. 2 (2004).

[3] 42 U.S.C. § 7413(a)(5).

[4] 42 U.S.C. § 7477.

[5] The PSD program in the CAA seeks to prevent air that is already *cleaner* than national ambient standards under the act require from deteriorating down to those standards. It applies as well to areas deemed unclassifiable due to lack of information. 42 U.S.C. § 7471.

permit — for new electric generators it wished to install — satisfied the CAA's requirement that Best Available Control Technology (BACT) be installed. EPA disagreed, however. The state agency issued the PSD permit anyway, prompting orders from EPA that prevented the mining company from installing the new generators until it demonstrated — to EPA — compliance with BACT. The state and the company then challenged the EPA orders in the Ninth Circuit. That court ruled for EPA, holding that the orders were within its CAA authority.[6]

The Supreme Court affirmed 5-4.[7] EPA had rationally construed the act's text, the majority said. The enforcement authority granted EPA in sections 113(a)(5) and 167 is "capacious." And though EPA's many guidance pronouncements asserting oversight authority over states are not entitled to deference, since they are not legally binding, they still warrant "respect." The Court majority rejected Alaska DEC's argument that EPA could only insist that the state make *some* BACT determination, not review its reasonableness once made. Still, the majority admonished, EPA must accord the state's BACT determination considerable deference. Only when the state's determination is not based on "a reasoned analysis" may EPA step in to ensure that CAA requirements are met. The agency, concluded the Court, adhered to that limited role here.

The Court majority also rejected Alaska DEC's argument that even though EPA may review state determinations for a reasoned analysis, it may only enforce before state agencies and state courts. Federal courts have jurisdiction also, said the majority, as is typical for federal enforcement of federal statutes.

Clean Air Act preemption of state efforts to lower vehicle emissions: *Engine Manufacturers Ass'n v. South Coast Air Quality Mgmt. District*

The issue before the Court here was whether the CAA preempts rules of a state agency requiring that when local operators of vehicle fleets buy fleet vehicles, they buy only those vehicles the district has designated, based on their low emissions.

The South Coast Air Quality Management District in California encompasses an area (including Los Angeles) with major air pollution problems. The District adopted six rules, each mandating the above-noted vehicle purchase limitation for a particular type of fleet operator (some public, some private). Four of the rules require the purchase or lease of alternative-fuel vehicles; the other two, the purchase or lease of either alternative fuel vehicles or vehicles that meet emission standards set by a state agency.

Before the district court, trade associations argued that the fleet rules violated CAA section 209(a),[8] which prohibits states from adopting "standard[s] relating to the control of emissions from new motor vehicles . . . ." The fleet purchasing rules,

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[6] 298 F.3d 814 (9th Cir. 2002).

[7] 124 S. Ct. 983 (2004).

[8] 42 U.S.C. § 7543(a).

they argued, functioned as precisely such standards. The district court saw things differently, however, holding that section 209(a) only bars the states from applying emission standards to manufacturers, not purchasers.[9] Moreover, the court said, the CAA "explicitly protects the authority of states to regulate air pollution."[10] The Ninth Circuit affirmed without discussion.[11]

In the Supreme Court, the United States filed an amicus brief on the side of the Engine Manufacturers Association, arguing for preemption. This position prevailed, 8-1.[12] Based on the "ordinary meaning" of CAA section 209(a), the Court held that the provision precluded state emission standards for *both* the manufacture and purchase of vehicles. Although the Court did not declare that all the fleet rules were preempted, it said that "it appears likely at least certain aspects of the fleet rules are preempted."[13] The Court vacated the judgment below and remanded the case due to remaining questions as to the application and scope of the fleet rules.

Legal cause under the National Environmental Policy Act and Clean Air Act: *Department of Transportation v. Public Citizen*

This case concerns three motor carrier safety regulations, issued in 2002 by the Federal Motor Carrier Safety Administration (FMCSA) within DOT. Together, the regulations will permit Mexico-domiciled motor carriers to operate within the United States beyond the current limited border zones. The regulations carry out U.S. obligations under the North American Free Trade Agreement (NAFTA).

The case turns on FMCSA's determination that there was no need for environmental analysis of two of the three safety regulations under the National Environmental Policy Act (NEPA) beyond a preliminary environmental assessment, and no need for any environmental analysis at all of the third regulation. Petitioners, environmental groups and truckers' unions, claimed that FMCSA's failure to prepare a full environmental impact statement (EIS), addressing the environmental effects of increased cross-border operations of Mexican motor carriers, violated NEPA. They argued that issuance of the regulations was the legal cause of the increased cross-border operations, since appropriation act provisions barred registration of Mexican motor carriers for travel in the interior U.S. until such issuance. Petitioners also asserted that FMCSA's failure to make a "conformity determination," to ensure that the regulations are consistent with CAA state implementation plans, violated that act.[14]

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[9] 158 F. Supp. 2d 1107 (C.D. Cal. 2001).

[10] *Id*. at 1110.

[11] 309 F.3d 551 (9th Cir. 2002).

[12] 124 S. Ct. 1756.

[13] *Id*. at 1764.

[14] CAA § 176(c)(1); 42 U.S.C. § 7506(c)(1).

The Ninth Circuit said that FMCSA had been arbitrary and capricious in refusing to do the NEPA and CAA analyses.[15] As to NEPA, the regulations constituted "major federal action significantly affecting the quality of the human environment," the NEPA phrase triggering a federal agency's duty to prepare an EIS.[16] For example, FMCSA had failed, the court said, even to consider whether any negative health effects could be associated with the increased diesel exhaust emissions resulting from the regulations. As to the CAA, the court held that the regulations did not fall within regulatory exemptions from the conformity-determination requirement. The court instructed FMCSA to prepare a full EIS and CAA conformity determination for all three regulations.

The Supreme Court unanimously reversed.[17] It found that the President's decision pursuant to NAFTA to lift the longstanding moratorium on Mexican motor-carrier certification, not the FMCSA's safety regulations, was responsible for potential emission changes. Once the moratorium was lifted and the safety regulations promulgated, the FMCSA had no choice under the governing statute but to issue registrations to qualifying motor carriers. An agency's actions do not constitute a legally relevant cause of an effect if the agency is unable to prevent that effect due to its limited statutory authority. Since there was not a "reasonably close causal relationship" between the regulations and the environmental effects, FMCSA was not required to consider those effects in its NEPA documents.

As regards the CAA, the Court held that a full conformity determination also was not required. EPA regulations say that "a conformity determination is required where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed" a specified level.[18] The increased Mexican truck emissions are not a *direct* result of FMCSA's regulations, said the Court, because they will not occur at the same time or place as the promulgation of the regulations — EPA's definition of "direct emissions." Nor are the emissions an *indirect* result because FMCSA cannot practicably control, nor maintain control, over them — EPA's definition of "indirect emissions." Therefore, it was unnecessary for FMCSA to consider the increased emissions from Mexican trucks in deciding whether to conduct a full conformity determination.

Discharge permits under the Clean Water Act: *South Florida Water Mgmt. District v. Miccosukee Tribe of Indians*

This case addresses the backbone of the Clean Water Act (CWA) regulatory program — its requirement that the "discharge of a pollutant" from a point source into navigable waters be pursuant to a National Pollutant Discharge Elimination

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[15] 316 F.3d 1002 (9th Cir. 2003).

[16] NEPA § 102(2)(C); 42 U.S.C. § 102(2)(C).

[17] 124 S. Ct. 2204 (2004).

[18] 40 C.F.R. § 93.153(b).

System (NPDES) permit.[19] The issue for the Court was whether a point source comes under this permit requirement *when the point source itself did not add the pollutants in the discharged water.*

The South Florida Water Management District operates a pumping station that receives water from a canal draining a large mixed-use area, then pumps the water into an undeveloped wetland. Both areas are historically part of the Everglades. The tribe and an environmental group asserted that the District was violating the CWA by operating the pump, an admitted point source, without a NPDES permit. The District responded that because the "discharge of a pollutant" that requires a permit is defined in the CWA as "any *addition* of a pollutant to navigable waters,"[20] the pumping station was not covered, since it did not itself add the pollutants to the pumped water.

The Indian tribe won in the district court.[21] A "discharge of pollutants" for CWA purposes existed, the court said, because water containing pollutants was being pumped to a separate water body to which it would not have flowed naturally. That the pumping station did not itself add the pollutants to the pumped water is irrelevant to whether a "discharge" occurred. The Eleventh Circuit affirmed, on the same rationale.[22]

The Supreme Court unanimously rejected the District's argument,[23] affirming the decision below.[24] NPDES coverage, it held, is triggered notwithstanding that the point source did not itself generate the pollutant. Having answered the question on which the Court granted certiorari, however, the Court proceeded to address two others. The first was the "unitary waters" argument, pressed chiefly by the United States as amicus on the District's side. In determining whether there has been an "addition" of a pollutant, the United States contended, all navigable waters in the nation should be regarded as one. So viewed, moving water from one water body to another is not an "addition," hence requires no permit. The Court was highly skeptical of this argument, but left the issue open for resolution on remand to the appellate court below.

The second argument addressed by the Court and not in the petition was the District's contention (agreed to by the United States) that the canal drainage area and the wetland are not distinct bodies of water at all, but are hydrologically connected parts of a single water body. No NPDES permit is required to move water from one area of a water body to another. This time the Court appeared amenable to the argument, but finding that factual issues remained unresolved, remanded for further factual development by the district court.

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[19] CWA § 402(a); 33 U.S.C. § 1342(a).

[20] CWA § 502(12); 33 U.S.C. § 502(12). Emphasis added.

[21] 1999 Westlaw 33494862 (S.D. Fla. Sept. 30, 1999) (unpublished).

[22] 280 F.3d 1364 (11th Cir. 2002).

[23] 124 S. Ct. 1537 (2004).

[24] 280 F.3d 1364 (11th Cir. 2002).

Judicial review of public lands management: *Norton v. Southern Utah Wilderness Alliance*

This case raises an important question as to the availability of judicial review under the Administrative Procedure Act (APA). The issue for the Court was whether federal court authority under APA section 706(1)[25] to "compel agency action unlawfully withheld or unreasonably delayed" extends to certain types of agency failure to act — here, in connection with the Bureau of Land Management's (BLM's) management of off-road vehicle (ORV) use in Wilderness Study Areas.

More particularly, plaintiffs sought 706(1) review of BLM's alleged failure to (1) manage the Wilderness Study Areas "so as not to impair the suitability of such areas for preservation as wilderness," a mandate of the Federal Land Policy and Management Act[26] (FLPMA); (2) implement provisions in its FLPMA land-use plans regarding ORVs, and (3) take a "hard look" at whether, under NEPA, the agency should do supplemental environmental analysis for areas where ORV use had increased. The district court rejected use of section 706(1) for these purposes, but a divided Tenth Circuit reversed.[27] Regarding the first claim, for example, the Tenth Circuit found that despite BLM's discretion in deciding *how* its nonimpairment duty would be carried out, the duty itself is indisputably nondiscretionary. This satisfies the "unlawfully withheld" phrase of 706(1), and confers subject matter jurisdiction on the reviewing court.

The Supreme Court reversed again,[28] unanimously finding against APA jurisdiction. Section 706(1) review is available, it held, in only a tightly defined circumstance: when there is "a *discrete* agency action that [a federal agency] is *required* to take."[29] This requirement is fatal, said the Court, to plaintiffs' claims. As to the first claim, the Court cannot order BLM to manage ORVs in accordance with FLPMA's non-impairment mandate, since that mandate leaves the agency much discretion. Moreover, plaintiffs allege only a general program deficiency, a charge that lacks the specificity required for 706(1) review.

Plaintiffs' second claim, that BLM failed to carry out its land use plans, does not satisfy the "*required* to take" prong of the section 706(1) availability rule. Land use plans under FLPMA act only to "guide[] and constrain[] actions, but [do] not (at least in the usual case) prescribe them."[30] Projections of agency action in land use plans, such as the one before the Court, are not a legally binding commitment.

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[25] 5 U.S.C. § 706(1).

[26] FLPMA § 603(c); 43 U.S.C. § 1782(c).

[27] 301 F.3d 1217 (10th Cir. 2002). The dissenting judge concurred in the majority's endorsement of plaintiffs' NEPA claim.

[28] 124 S. Ct. 2373 (2004).

[29] *Id*. at 2379 (emphasis in original).

[30] *Id*. at 2383.

The third claim, involving NEPA, did not need to be reached. The Court had no need to address whether breach of a NEPA duty is actionable under section 706(1), it concluded, because here there was no NEPA duty in the first place. The EIS supplementation demanded by plaintiffs is necessary only if there remains "major federal action" to occur. Although the approval of the BLM land use plan in this case is a major federal action, that action is now complete. There is no ongoing federal action that could require supplemental EIS analysis.

II. Cases Accepted During the 2003-2004 Term for Decision During the 2004-2005 Term

"Contribution" actions under the Superfund Act: *Cooper Industries, Inc. v. Aviall Services, Inc.*

This case deals with the availability of contribution actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund Act"). By way of background, contribution actions are those brought by liable parties, often in the tort context, asserting that some or all of the party's liability should be reimbursed by other liable parties. The specific issue presented by *Cooper* is whether CERCLA section 113(f)(1),[31] the authority for contribution actions under that statute, is available when *no civil action has been brought by the federal government* — that is, the United States has not ordered the party seeking contribution to clean up (under CERCLA section 106[32]) or reimburse the United States' cleanup costs (under CERCLA section 107(a)[33]).

Aviall bought contaminated property from Cooper. After the state ordered Aviall to clean up, it began to do so. Important here, the federal EPA never contacted Aviall or designated the property as contaminated. To recover some of its cleanup costs, Aviall sued Cooper seeking contribution under CERCLA and damages under state law theories. (Under CERCLA, both Aviall and Cooper are liable parties.)

Both the district court and a Fifth Circuit panel (2-1) held that under CERCLA 113(f)(1), the liable party seeking contribution must have a pending or adjudged federal cleanup or cost-recovery order against it. The en banc Fifth Circuit reversed, over a three-judge dissent, asserting that the great majority of circuits disagreed with the panel majority.[34] Acknowledging that reasonable minds could disagree, it found that the most reasonable interpretation of section 113(f)(1) was that it allowed a liable party to sue for contribution under federal law at any time, not only "during or following" — the words of 113(f)(1) — a cleanup or cost recovery action.

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[31] 42 U.S.C. § 7413(f)(1).

[32] 42 U.S.C. § 9606.

[33] 42 U.S.C. § 9607(a).

[34] 312 F.3d 677 (5th Cir. 2002).

After the Court granted certiorari on January 9, 2004,[35] the United States filed an amicus brief disputing the en banc decision and urging reversal. The case has been set for oral argument on October 6, 2004.

Pesticide Act preemption of state tort law claims: *Bates v. Dow Agrosciences, LLC*

The issue before the Supreme Court in this case is whether — and if so, to what extent — the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA, or "Pesticide Act") preempts state tort law claims, here for crop damage. The pivotal FIFRA provision is section 136v(b),[36] which seeks through preemption to ensure a uniform nationwide approach to pesticide labeling. It declares succinctly that a state shall not impose "any requirements for labeling or packaging in addition to or different from those required under this act."

Dow Agrosciences LLC produces Strongarm, a herbicide for controlling certain weeds around peanut crops. Strongarm is properly registered with the U.S. EPA under FIFRA. In 2000, Dow began to receive letters from peanut growers contending that the herbicide was highly toxic, stunted plant growth, and failed to control weeds in peanut crops. The letters threatened to sue, but Dow struck first by filing suit for declaratory judgment against 29 of the growers. Dow sought, among other things, a judicial declaration that FIFRA preempted the farmers' state law claims.

The district court endorsed all of Dow's arguments.[37] Neither the growers' breach of implied and express warranty claims, nor their Texas Deceptive Trade Practices Act and fraud claims, nor their negligence claims escape section 136v(b)'s preemptive reach. Though the growers assert that their claims are based on remarks made by Dow representatives, rather than Strongarm's label, such remarks mostly restated label information. Thus, the growers' claims essentially challenge the label — seeking to impose precisely what 136v(b) preempts: "requirements for labeling ... in addition to or different from those required under [FIFRA]." (In addition, the breach of warranty claims are foreclosed by Strongarm's label provisions, which disclaim any implied warranty and provide only a limited express warranty.)

The Fifth Circuit affirmed.[38] First, contrary to the growers' argument, state labeling requirements related to product *effectiveness* are within the scope of section 136v(b). That EPA has elected not to impose labeling regulation as to product effectiveness does not avoid preemption of a claim that has the effect of imposing labeling requirements. Second, the growers' claims (for breach of warranty, fraud, Deceptive Trade Practices Act violation, defective design and negligence) are

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[35] 124 S. Ct. 981 (2004).

[36] 7 U.S.C. § 136v(b).

[37] 205 F. Supp. 2d 623 (N.D. Tex. 2002).

[38] 332 F.3d 323 (5th Cir. 2003).

sufficiently related to the content of the Strongarm label that a judgment against Dow here would induce it to alter the label. Again, that is what section 136v(b) forbids.

On petition for certiorari, the United States was invited by the Supreme Court to offer its views. Its amicus brief argued that the Fifth Circuit ruled correctly in finding FIFRA preemption of the growers' state law tort claims, and that review by the Court was unwarranted. Notwithstanding, the Court granted certiorari on June 28, 2004.[39] Oral argument has not yet been scheduled.

III. Comments

The cases decided by the Court in the 2003-2004 term, and those to be argued next term, present a diverse picture. No unifying substantive theme is apparent. Further, why some of the cases were of interest to the Court is perplexing: many of them involve issues of narrow focus, with no accompanying split in the circuit court decisions.

There are commonalities, however. First, all seven cases raise statutory rather than constitutional issues (or mostly so in the two preemption cases: *Engine Manufacturers Ass'n* and *Bates*). This is a principal reason why there is no unifying theme among the cases; statutory issues tend to be specific to the statute under which they arise. In this regard, *Norton* may be the most important of the cases, since the statute construed there, the Administrative Procedure Act, is the basic charter for accessing judicial review of federal agency action, and the issue in the case, when agency *inaction* is reviewable, is a ubiquitous one in administrative law.

Second, in six of the seven cases (all except *Bates*) the decision of the court below adopted the more "environmental" side of the argument. Given that the Supreme Court typically does not take cases in order to affirm, this initially caused some concern in the environmentalist camp that the Court's conservative bloc was set to reign in environmental programs. The results, in the five cases decided so far, have indeed largely tilted against the environmental positions advanced, but not exclusively so. Nor were the conservative justices alone in their votes. In three of the five decisions, the "non-environmental" position was endorsed by the Court unanimously (*Dep't of Transportation* and *Norton*) or by 8-1 (*Engine Manufacturers Ass'n*). And in the NEPA rulings (*Dep't of Transportation* and *Norton*), the decisions merely continue an unbroken string of defeats for the "environmental" position over three decades of Supreme Court NEPA litigation.

Third, in all four cases in which the United States is not a party (*Engine Manufacturers Ass'n*, *Miccosukee Tribe*, *Cooper Industries* and *Bates*) — and thus is under no litigation constraint to adopt a particular position — it has filed amicus briefs urging the "non-environmental" position.

Finally, three of the seven cases inquire into the nature of the federal-state relationship (*Alaska DEC*, *Engine Manufacturers Ass'n*, and *Bates*), presumably

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[39] 124 S. Ct. 2903 (2004).

reflecting the Court's continuing interest in federalism issues, and environmental federalism in particular.[40] Of the two decided so far (*Alaska DEC* and *Engine Manufacturers Ass'n*), the Court ruled for the federal side in each, though only by 5-4 in *Alaska DEC*. In the two that are preemption cases (*Engine Manufacturers Ass'n* and *Bates*) — again, instances where the United States is not a party — the Department of Justice also took the position that the federal law prevailed. Thus, in the cases reviewed here, there has been a consistent endorsement of the federal side of the federalism argument by both Court and Administration. At least in the case of the Administration, this pro-federal pattern may reflect the tension in the two preemption cases between two Administration priorities — shifting power to the states and reducing regulatory burdens — and the Administration's decision to go with the latter here.

[40] For the *constitutional* side of the Court's interest in environmental federalism, see Robert Meltz, *Constitutional Bounds on Congress' Ability to Protect the Environment* (CRS Report RL30670, last updated December 18, 2002).