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NEWS RELEASE



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U.S. Supreme Court Rules Against Alaska in Red Dog Mine Case

(Juneau, AK) –In a 5-4 decision, the United States Supreme Court ruled today against the Alaska Department of Environmental Conservation (ADEC) in the Red Dog Mine case. The majority opinion, authored by Justice Ginsburg and joined by Justices Stevens, Souter, Breyer, and O’Conner, holds that the Clean Air Act provides the Environmental Protection Agency (EPA) with the authority to disapprove a state agency’s discretionary choice of the “best available [pollution] control technology” for permits subject to that Clean Air Act requirement.

“We anticipated a split decision, but we are obviously disappointed that the fifth vote on the court did not swing our way,” said Alaska Attorney General Gregg Renkes. “This close decision deals a blow to the authority delegated to states by Congress in the Clean Air Act.”

The Court made clear that “nothing in our decision today invites or permits EPA to achieve unfair advantage” when objecting to state permit decisions, and that EPA will not be able to engage in unreasonable conduct because “the federal courts sit to review EPA actions.” The Court emphasized that the Clean Air Act gives state agencies “considerable leeway” in making appropriate permitting decisions.

“Alaska sought and gained primary responsibility for the air permitting program to provide a predictable and stable regulatory environment,” said Ernesta Ballard, Commissioner of the Department of Environmental Conservation. “This case and its outcome have the potential to significantly disrupt that environment. The burden is on the state to assure that this does not happen.”

In a dissenting opinion, authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justices Scalia and Thomas, Justice Kennedy wrote that the majority erred “by failing to hold that EPA, based on nothing more than its substantive disagreement with the State’s discretionary judgment, exceeded its powers in setting aside Alaska’s [pollution control technology] determination.” In their view, today’s decision represents “a great step backward in Congress’ design to grant States a significant stake in developing and enforcing national environmental objectives” and “relegat[es] States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect.” As the dissent noted, state agencies should be “trusted to do their part” in the common fight against pollution, and any

distrust by EPA of state agencies “is inconsistent with the Act’s clear mandate that States bear the primary role in controlling pollution.”

“The dissenting justices recognized the important fact that states are more responsive to local conditions, and can better strike the balance between preserving environmental quality and encouraging resource development,” said Renkes. “Protecting the environment must be a cooperative effort by both the state and federal governments. We hope that the EPA will seek to work together with, rather than against, ADEC and other state agencies entrusted by Congress to carry out this important job.”

The court’s decision mandates that Alaska improve its regulatory and permit review process. State decisions must clearly document how it has applied a test of reasonableness. The state must demonstrate transparently how it balances the criteria required under the Clean Air Act in designating Best Control Technology. The three primary criteria are environmental, economic, and energy impacts of the proposed alternative. In this way, the state believes it can maintain the predictability and stability of a state run program that is intended by the Act.

The dispute between the EPA and ADEC arose four years ago when Teck Cominco Alaska, Inc., operator of the Red Dog Mine in Northwest Alaska, applied to the state for a new diesel power generator permit. In locations where national air quality standards have been attained or are unclassifiable, the Clean Air Act requires states with EPA approved air pollution programs to determine what is the best available pollution control technology that should be applied to new major pollution sources, or to existing sources going through a major modification.

“Regrettably, the outcome may have been different had the State’s technical analyses been more coherent and uniformly conveyed through the chronology of several preliminary and final state permit documents,” Ballard said.

After prolonged negotiations regarding the appropriate technology, the EPA and ADEC reached an impasse, with EPA ordering ADEC not to issue the permit. Believing that EPA exceeded its authority in vetoing the state permit, ADEC issued it anyway, which elevated the dispute to the federal courts. The state argued that the Clean Air Act gives states with approved programs broad discretion to make permitting decisions.

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