No. 02-658

IN THE
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska—which had been delegated permitting authority under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq*.—in conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs.

PARTIES TO THE PROCEEDING

Petitioner State of Alaska, Department of Environmental Conservation, and Teck Cominco Alaska, Inc. were petitioners in the Ninth Circuit below. The United States Environmental Protection Agency ("EPA"), and Carol M. Browner and Chuck Clarke in their official capacities as Administrator of the EPA and Regional Administrator of the EPA's Region 10, respectively, were originally named as respondents below. Ms. Browner and Mr. Clarke have since been succeeded by Christie Whitman and L. John Iani, respectively.

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OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 298 F.3d 814 and reproduced in the appendix to the petition for certiorari ("Pet. App.") at 1a. The Ninth Circuit's prior opinion concluding that it had jurisdiction over this case is reported at 244 F.3d 748 and reproduced at Pet. App. 17a. The Ninth Circuit's order requesting supplemental briefing is reproduced at Pet. App. 24a. The orders of the United States Environmental Protection Agency ("EPA") are reproduced at Pet. App. 26a, 38a, and 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 30, 2002. Pet. App. 1a. The petition for certiorari was filed on October 25, 2002, and was granted on February 24, 2003. 123 S. Ct. 1253. The jurisdiction of the Ninth Circuit was based on 42 U.S.C. § 7607(b)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 165(a)(4) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*., provides, in pertinent part:

> (a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this [Act] emitted from, or which results from, such facility * * *. [42 U.S.C. § 7475(a)(4).]

Section 169(3) of the CAA provides, in pertinent part:

> (3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this [Act] 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 * * *. [42 U.S.C. § 7479(3).]

These and other pertinent statutory and regulatory provisions are reproduced in full in the addendum hereto.

INTRODUCTION

Described as an "experiment in federalism," *Michigan* v. *EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (quotation omitted), the Clean Air Act ("CAA") assigns to the States an important—indeed *primary*—role in air pollution prevention and control. One of the States' principal responsibilities under the Act is to prevent the degradation of air quality in those areas where national clean air standards have been attained. To this end, the CAA prohibits the construction or modification of a "major emitting facility" in any attainment area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined in the CAA as "an emission limitation based on the maximum degree of reduction of each [regulated] 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 * * *." *Id*. § 7479(3) (emphasis added). The "permitting authority" in this case—and in most cases arising under this provision—is the State. *See* Pet. App. 3a.

The CAA by its terms thus gives the States the authority to determine BACT for a particular source, and allows the States broad discretion in making that determination. This is confirmed by the Act's legislative history: "The decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility *with the State*, to be determined in a case-by-case judgment. It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted, depending on site." S. Rep. No. 95-127, at 31 (1977) (emphases added).

In this case, the State of Alaska issued a permit for the construction of a new electric generator at the Red Dog Mine, located in Northwest Alaska some 100 miles north of the Arctic Circle. In accordance with the CAA and the State's own regulations, the State determined that a particular

technology—"Low NOx"—was BACT to control nitrogen oxide emissions from the new generator. In making that determination, the State spent eighteen months engaged in the permitting process—with required public comment and review—and prepared extensive technical analyses specifically considering alternative technologies and their associated "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). *See* J.A. 159-224. The State considered but rejected an alternative technology—Selective Catalytic Reduction ("SCR")—primarily due to cost considerations. J.A. 200-208. Nevertheless, the State's decision resulted in emissions levels that complied with all standards promulgated by the EPA. Moreover, because the operator of the mine had agreed to install Low NOx on other generators not subject to BACT review, the State's decision was likely to result in *lower* overall NOx emissions than if the more costly SCR had been selected as BACT for the new generator.

The EPA, however, "disagree[d]" with the State's decision to select Low NOx, rather than SCR, as BACT for the new generator. J.A. 97, 118. Rather than challenge the State's decision through the available state review process, the EPA issued a series of orders prohibiting the construction of the generator. The EPA, however, had no authority to do so. Because BACT is "key" to the States' ability to "manage their allowed internal growth" under the CAA, *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 364 (D.C. Cir. 1980), Congress decided to make the determination of BACT "strictly a State and local decision." S. Rep. No. 95-127, at 31. Nothing in the Act gives the EPA the authority to override a State's discretionary judgment as to what constitutes BACT for a particular source.

The EPA has the authority to issue orders to enforce any "requirement" of the Act, *see* 42 U.S.C. §§ 7413(a)(5), 7477, but the only pertinent "requirement" here is that the state-issued permit contain a BACT limitation, set by "the permit-

ting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." *Id*. § 7479(3). There is no dispute that the permit at issue here contains such a limitation, and no dispute that the limitation was determined by the State after considering the applicable factors. *See* J.A. 157-158; 200-211. The EPA disagrees with the State's determination in this particular instance, and would set a different BACT limitation, but that does not mean that the State in any sense violated a "requirement" of the Act in issuing the permit with the BACT limitation that it—"the permitting authority"—had selected. The EPA's contrary view plainly usurps authority that the CAA vests with the States, upsetting the balance of power that Congress carefully sought to establish under the Act. Because the Ninth Circuit below erred in sanctioning that result, the judgment below should be reversed.

STATEMENT OF THE CASE

Statutory and Regulatory Background. The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that "air pollution prevention * * * and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id*. § 7407(a) ("Each State shall have the *primary* responsibility for assuring air quality within the entire geographic area comprising such State") (emphasis added). Thus, while the CAA assigns the EPA the responsibility for establishing national ambient air quality standards ("NAAQS") for certain pollutants, *see id*. § 7409, the Act assigns the States the responsibility for implementing them. *See id*. §§ 7407(a), 7410(a).

To this end, the CAA requires each State to adopt and submit for the EPA's approval a state implementation plan

("SIP") that provides for the attainment and maintenance of the NAAQS. *See id*. § 7410(a). If a State does not have an approved SIP in place, the Act requires the EPA to adopt and implement a federal implementation plan. *See id*. § 7410(c). The EPA may delegate to a State the authority to implement and enforce any part of such a federal plan. *Id*. § 7410(c)(3).

Areas of the country "that meet[] the [NAAQS] for a [given] pollutant" (attainment areas) or for which insufficient information exists to determine whether the NAAQS have been met (unclassifiable areas) are known as "clean air" areas. *Id*. § 7407(d)(1)(A)(ii), (iii).[1] The CAA establishes maximum allowable increases (or increments) of certain pollutants in such clean air areas. *Id*. § 7473; *see* 40 C.F.R. § 51.166(c) (establishing increment for nitrogen dioxide). To ensure in part that those increments are not exceeded, the Act requires that each SIP contain emission limitations and such other provisions as may be necessary "to prevent significant deterioration of air quality" in clean air areas, including a Prevention of Significant Deterioration ("PSD") permit program. *Id*. §§ 7410(a)(2)(C), 7471. The Act provides that no "major emitting facility" may be constructed or modified in a clean air area without a PSD permit. *Id*. § 7475(a)(1).

The Act also provides that no major emitting facility may be constructed or modified unless "the proposed facility is subject to the best available control technology [or "BACT"] for each pollutant subject to regulation under [the Act]

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[1] Clean air areas are divided into three categories: (1) class I areas, which include certain national parks and wilderness areas; (2) class II areas, which are intended to accommodate "moderate" growth; and (3) class III areas, which are intended to accommodate "intensive major industrial growth." *See* 42 U.S.C. §§ 7472, 7474(a); H.R. Rep. No. 95-294, at 152-153 (1977). The Red Dog Mine is located in a class II area; Alaska has no class III areas. *See* 18 Alaska Admin. Code § 50.015(c)(2).

emitted from, or which results from, such facility." *Id*. § 7475(a)(4). BACT is defined as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] 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 * * *. [*Id*. § 7479(3) (emphasis added).]

As the legislative history of the Act's PSD provisions makes clear, the determination of BACT is "key" to a State's ability to manage "growth" within its borders. S. Rep. No. 95-127, at 31 (1977). For this reason, Congress "place[d] this responsibility *with the State*, to be determined in a case-by-case judgment." *Id*. (emphasis added). "It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted, depending on site." *Id*. (emphasis added). The "flexible approach" adopted by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." *Id*. (emphasis added). The determination of BACT is "strictly a State and local decision"—"[f]lexibility and State judgment are [its] foundations." *Id*.

The Red Dog Mine. For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange- and red-stained creekbeds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to

the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish Setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted "Red Dog" Creek. Mark Skok, *Alaska's Red Dog Mine: Beating the Odds*, Minerals Today, at 8 (June 1991).

In 1980, Congress set aside the Red Dog Creek area pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601 *et seq*., for selection by the Northwest Arctic Native Association ("NANA")—a regional Native corporation established pursuant to ANCSA for the benefit of the Inupiat in Northwest Alaska. *See* Alaska National Interest Lands Conservation Act, Pub. L. 96-487, § 1418, 94 Stat. 2371, 2501-02 (1980); S. Rep. No. 96-413, at 258-259 (1979). NANA decided to lease the land for mineral development. In 1982, NANA entered into a partnership agreement with Teck Cominco Alaska, Inc. ("Cominco") to develop and operate what would become the Red Dog Mine. Skok, *supra*, at 8-9.

The Red Dog Mine, now the world's largest source of zinc concentrate, is located about 100 miles north of the Arctic Circle.[2] The remote and sparsely populated area is "one of the * * * harsh[est] and [most] inaccessible regions on earth." Skok, *supra*, at 6. No roads connect its eleven communities to each other or the outside world. From late May, when the ice on the rivers breaks, until October, boats are the area's main mode of transportation. Neal Fried & Brigitta Windisch-Cole, *A Profile: Northwest Arctic Borough*, Alaska Economic Trends, Vol. 19, No. 1, at 3 (Jan. 1999). In the winter, temperatures can drop to nearly ninety degrees below

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[2] Zinc is an anti-corrosive galvanizing agent used, among other things, in the manufacture of steel items ranging from nails and pipes to automobile bodies and bridge girders. Skok, *supra*, at 7.

zero (with average lows of about fifteen below), and the region is enveloped in darkness both night and day.

Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000. J.A. 207. The vast majority of the area's residents are Inupiat Eskimos whose ancestors have inhabited the region for thousands of years. Fried & Windisch-Cole, *supra*, at 4, 7. The region offers only limited year-round employment opportunities, particularly in the private sector; in the two years preceding Alaska's permit decision, the borough's unemployment rate was the highest in the State. J.A. 207.

The partnership agreement between NANA and Cominco provides for the training and employment of a local work-force, with caps on annual production to ensure long-term employment opportunities for the region. The agreement also provides for a committee of local Inupiat elders to oversee mining operations. The committee is authorized, for instance, to close the mine's road to protect migrating caribou. Royalty payments to NANA and its Inupiat share-holders—to be shared in part with all other Alaska Native corporations—are expected to total about $1 billion over the life of the mine. Skok, *supra*, at 7, 8-9. With nearly 600 workers, the mine's payroll represents over a quarter of the borough's wage base. Prior to the mine's opening, the average wage in the borough was well below the state average; a year after its opening, the borough's average exceeded that of the State. Fried & Windisch-Cole, *supra*, at 6.

Alaska's Permit Decision. The State of Alaska has been designated an attainment or unclassifiable area with respect to nitrogen dioxide, a regulated pollutant for which NAAQS have been established. *See* 40 C.F.R. §§ 50.11, 81.302; Pet. App. 3a. Alaska's SIP contains a PSD permit program,

approved by the EPA in 1983, which the State operates through its Department of Environmental Conservation ("ADEC"). *See* 40 C.F.R. § 52.96(a); Pet. App. 3a. Before a PSD permit will be issued for the construction of a new source within the State, Alaska's SIP requires "a demonstration that [a] proposed limitation represents the best available control technology for each air contaminant and for [the] source." 18 Alaska Admin. Code § 50.310(d)(3).[3]

Operating the Red Dog Mine in the harsh landscape of Northwest Alaska is not without its challenges. For instance, because no public utility serves the area in which the mine is located, the mine must generate its own electricity. J.A. 135. Currently, the mine is powered by six diesel-fired electric generators, designated "MG-1" through "MG-6," which were constructed pursuant to PSD permits issued by ADEC in 1988 and 1994. J.A. 166.

In April 1996, Cominco initiated a production rate increase ("PRI") project to boost the mine's output—and in the process create nearly 100 new jobs. Because the PRI project required the use of more electricity, Cominco in June 1998 submitted an application to ADEC for a new PSD permit, requesting, among other things, permission to increase emissions of nitrogen oxide ("NOx"), a precursor to nitrogen dioxide, from its MG-5 generator. Cominco's application proposed the use of "Low NOx"—a process that reduces NOx emissions by 30%—as BACT for the MG-5 generator. J.A. 191. In April 1999, Cominco amended its application, proposing to install Low NOx on all six of its existing generators—including the five not subject to BACT review—as well as on a proposed new generator, "MG-17,"

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[3] Alaska's SIP likewise defines "best available control technology" as "the emission limitation that represents the maximum reduction achievable for each regulated air contaminant, taking into account energy, environmental and economic impacts, and other costs." 18 Alaska Admin. Code § 50.990(13).

which, like MG-5, would be subject to BACT review. *See* J.A. 84.

In May 1999, ADEC issued a draft PSD permit and a preliminary Technical Analysis Report ("TAR") in which it accepted Cominco's amended proposal because it would reduce *total* NOx emissions from the seven generators to a level at least comparable to, and probably even *lower* than, that which would result were another control alternative evaluated during ADEC's review process—SCR—installed on only the MG-5 and MG-17 generators. J.A. 85-88. ADEC published the draft PSD permit and preliminary TAR for public comment and review.

The National Park Service filed comments, objecting to what it called Cominco's "unusual approach" and recommending that ADEC instead require SCR for all the generators, even those not subject to BACT review. In July 1999, after the close of the public comment period, *see* J.A. 248, the EPA commented on Cominco's application for the first time. The EPA stated that it "disagree[d]" with ADEC's BACT determination and believed instead that "SCR [was] BACT" for the MG-5 and MG-17 generators, J.A. 97—even though SCR had never before been determined to be BACT to reduce NOx emissions from a similar type of diesel-fired electric generator. *See* J.A. 142. In September 1999, after considering all public comment—including the EPA's belated input—ADEC issued a final draft permit and final draft TAR concluding that SCR was not economically feasible and that Low NOx was BACT for the MG-5 and MG-17 generators. *See* Pet. App. 5a. ADEC's final analysis, unlike the preliminary report, did not rely on emissions savings from the other generators in reaching this conclusion. J.A. 111-112.

In response to the EPA's continuing objections to ADEC's BACT determination, ADEC worked with the agency in an effort to resolve their disagreement. J.A. 197. Although the

dispute over BACT for the MG-5 generator was resolved when Cominco decided to restrict emission increases from the generator so as to avoid triggering BACT review, the parties could not agree on BACT for the proposed new generator, MG-17. *Id*.

After a period of unsuccessful negotiations, ADEC on December 10, 1999 issued the PSD permit and final TAR, in which ADEC spent nearly ten pages explaining the basis of its determination that Low NOx was BACT for the MG-17 generator. *See* J.A. 197-211. It is undisputed that ADEC's permit decision did not violate the NAAQS, the allowable PSD increments, or any other applicable emissions standard. Moreover, although not required by law to do so, ADEC followed the EPA's "top-down" approach—used in determining BACT by the EPA when it acts as the PSD permitting authority in those States that do not administer a PSD program.[4] Under that approach, ADEC (1) identified all NOx control technologies; (2) identified which technologies were technically feasible; (3) ranked the technically feasible control technologies in order of effectiveness; (4) considered the "energy, environmental, and economic impacts and other costs" of the technically feasible technologies, *see* 42 U.S.C. § 7479(3), and determined which to eliminate based on such impacts; and (5) selected Low NOx as the most effective technology not eliminated. *See* J.A. 197-211.

In specifically considering the "energy, environmental, and economic impacts and other costs" associated with SCR, ADEC discounted Cominco's contention that requiring SCR as BACT would have significant adverse environmental and energy impacts. J.A. 200-203. ADEC concluded, however,

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[4] As even the EPA has acknowledged, "top-down analysis is not a mandatory methodology." EPA 9th Cir. Br. 12 (quotation omitted). "Apart from the statutory criteria, neither EPA's regulations nor Alaska's SIP contains detailed procedures for determining what technology is BACT for a particular source." *Id*.

that SCR would have adverse economic impacts. To begin with, the cost of SCR to reduce NOx emissions from the MG-17 generator was "outside the range of costs being borne by similar sources under recent BACT determinations," J.A. 204—indeed, more than twice as costly per ton of NOx removed as the most expensive technology previously determined by ADEC to be BACT to reduce NOx from similar sources. J.A. 205-206. Because the mine generates all its own power—and thus acts as its own electric utility—ADEC also considered whether the costs of SCR for the MG-17 generator would be excessive for a rural Alaska utility. The cost of imposing SCR "would be equivalent to a 20% increase in the electric rate of the facility," which ADEC concluded would be a "disproportionate cost increase" for a utility and thus, by analogy, for a mine compelled to furnish its own power. J.A. 206.

Recognizing the mine's "unique and continuing impact" on the regional economy of the Northwest Arctic Borough, ADEC determined that in light of SCR's "excessive economic cost," J.A. 208—$2.9 million in capital costs with annual operating costs approaching $635,000—SCR was not economically feasible and that Low NOx was BACT for the MG-17 generator. J.A. 208, 211. Yet because Cominco had agreed to install Low NOx on *all* its generators, ADEC's permit decision was expected to result in *lower* overall NOx emissions than would occur if SCR—the EPA's preferred technology—were installed on only the MG-17 generator. *See* J.A. 85-87.

The EPA's Orders. In an attempt to prevent ADEC from issuing the final PSD permit to Cominco, the EPA on December 10, 1999, issued a finding of noncompliance and order to ADEC. Pet. App. 26a. According to the EPA, the final draft permit designating Low NOx as BACT for the MG-17 generator did not comply with the requirements of the CAA or Alaska's SIP relating to the construction or modification of new or existing sources. Pet. App. 36a. The

EPA ordered ADEC to withhold issuance of the final PSD permit—or, in the event that ADEC had already issued the permit, to "retract or render it ineffective"—until ADEC "satisfactorily document[ed] why SCR is not BACT for the [MG-17] generator" or otherwise demonstrated that the permit was in compliance with the CAA and Alaska's SIP. Pet. App. 36a-37a.

The EPA purported to issue its finding and order under Sections 113(a)(5) and 167 of the CAA. Pet. App. 26a. Section 113(a)(5) provides that whenever the Administrator "finds that a State is not acting in compliance with any requirement or prohibition of the [Act] 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 any major stationary source in any area to which such requirement applies." 42 U.S.C. § 7413(a)(5). Section 167 provides that the Administrator "shall * * * take such measures, including issuance of an order, * * * as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [the PSD provisions]." *Id.* § 7477.

On February 8, 2000, the EPA reiterated its finding against the State, J.A. 258, and issued an order to Cominco prohibiting the construction of the MG-17 generator until Cominco obtained a "valid" PSD permit from ADEC that complied with the CAA and the EPA's December 10, 1999 finding and order. Pet. App. 49a. Subsequently, on March 7, 2000, the EPA amended its February 8, 2000 order to allow Cominco to perform certain preliminary seasonal construction activities. Pet. App. 62a-63a. The amended order reiterated that Cominco was otherwise prohibited from commencing construction of the MG-17 generator. Pet. App. 62a.[5]

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[5] On April 25, 2000, the EPA withdrew the "Order portion" of the December 10, 1999 Finding of Noncompliance and Order

Proceedings Below. ADEC and Cominco subsequently petitioned for review of the EPA's finding of noncompliance and orders in the Ninth Circuit. *See* Pet. App. 1a. ADEC and Cominco argued that the EPA had no authority to issue the findings and orders under either Section 113(a)(5) or Section 167, because ADEC had not violated any "requirement" of the Act. To the contrary, they explained, ADEC had properly exercised its authority under the Act to "determin[e]" BACT on a "case-by-case basis," after taking the statutory factors into account. 42 U.S.C. § 7479(3). ADEC and Cominco also argued that, even if the EPA had the statutory authority to overturn a state BACT determination in some instances, the EPA had acted arbitrarily and capriciously in doing so here.

After initially rejecting the EPA's contention that the court lacked jurisdiction to consider the parties' challenges because the EPA's orders did not constitute "final agency action" under 42 U.S.C. § 7607(b)(1), Pet. App. 18a, the Ninth Circuit held in favor of the EPA. The Ninth Circuit concluded that "subjecting a facility to BACT" was a "requirement" under the Act, that "the EPA based its orders on the finding that ADEC had not complied with the BACT requirement," and that the orders therefore were authorized by Sections 113(a)(5) and 167. Pet. App. 9a.

Addressing ADEC and Cominco's contention that the EPA lacked the authority to veto ADEC's discretionary judgment based on its difference of opinion as to which technology was BACT, the Ninth Circuit stated that "[n]othing in the BACT definition of Section 169(3) limits the EPA's authority." Pet. App. 11a. In its view, the Act places only "*initial* responsi-

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against ADEC. Pet. App. 19a (quotation omitted). The EPA specifically noted that it was withdrawing "only the Order portion," and that the "December 10, 1999 and February 8, 2000 Findings under Section [113(a)(5)] remain unchanged * * *." *Id.* (quotation omitted).

bility with the state permitting authority" to determine BACT. *Id*. (emphasis added). *See also* Pet. App. 9a (noting that "ADEC, as the 'permitting authority,' made the *initial* BACT decision") (emphasis added). According to the court, "the EPA has the *ultimate* authority" to decide what constitutes BACT. Pet. App. 10a-11a (emphasis added).

The court then went on to hold that the EPA had not acted arbitrarily or capriciously in invalidating ADEC's permit decision because—the court concluded—ADEC had failed to provide "a reasoned justification for its elimination of SCR as a control option." Pet. App. 16a. First, the court concluded, the final TAR revealed "no recent permit decisions involving BACT determinations for diesel engines used as primary power generators," so ADEC could not determine whether the costs of SCR were "disproportionately high" compared to the costs of controls imposed in other recent decisions. Pet. App. 14a. Second, the court concluded, the final TAR revealed that the cost-effectiveness of SCR was within the range of the cost-effectiveness "of recent NOx control BACT decisions." *Id*. Third, the court ruled, ADEC's determination that the costs of SCR would be " 'disproportionate' " if imposed on a rural utility was irrelevant, because "Cominco does not, in fact, buy power from an electric utility." *Id*. (quoting J.A. 206).

Finally, the court concluded that ADEC's " 'foremost' " consideration in selecting Low NOx as BACT—the " 'direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts,' " Pet. App. 15a (quoting J.A. 208)—was not "an accepted justification" for determining BACT. Pet. App. 16a. In the court's view, ADEC's recognition of the mine's importance to the precarious economy of the Northwest Arctic Borough was "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits." *Id*.

SUMMARY OF ARGUMENT

I. The CAA is based on a "division of responsibilities" between the States and the federal government. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). Under this scheme of "cooperative federalism," the federal government is responsible for setting national standards to achieve and maintain clean air. The States are charged with the responsibility of setting specific emissions limitations for particular sources to ensure that the national standards are met. In clean air areas, the federal government determines the maximum allowable increases of emissions for certain pollutants; the States decide how to allocate the available increments among competing sources for economic development and growth. Determining BACT for particular sources is a key means by which the States weigh potentially competing demands for pollution control and economic development within the national limits set by Congress and the EPA.

BACT is defined in the CAA as "an emission limitation based on the maximum degree of reduction [of a regulated 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." 42 U.S.C. § 7479(3) (emphasis added). By its terms, the Act squarely places the responsibility for determining BACT with "the permitting authority"—*i.e.*, the State. By specifying that BACT is to be determined "on a case-by-case basis" after considering "energy, environmental, and economic impacts and other costs," the Act makes clear that the BACT decision reflects state policy judgments about how to reconcile competing priorities in the context of a particular permit. Deciding that a more stringent and more costly control is "best" for a particular source may reflect a judgment that the economic benefits of that particular expansion are worth consuming only so much of the available increment; deciding that a less stringent and less

costly control is "best" for a different source may reflect a different judgment about the value of that specific project. Congress intended the State, in determining BACT, "to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as anticipated and desired economic growth for the area." S. Rep. No. 95-127, at 31. Given the nature of these judgments, BACT "is strictly a State and local decision." *Id*.

The Ninth Circuit nevertheless held that the EPA had the "ultimate authority" to decide what constituted BACT in this case. Pet. App. 11a. The court reasoned that because Sections 113(a)(5) and 167 of the CAA give the EPA the authority to enforce any "requirement" of the Act's PSD provisions, *see* 42 U.S.C. §§ 7413(a)(5), 7477, the EPA had the authority to enforce "the BACT requirement" and thus overturn Alaska's permit decision. Pet. App. 9a. The flaw in this reasoning is readily apparent. The only "BACT requirement" pertinent here is that the state-issued permit contain a BACT limitation *determined by the State* after consideration of "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). It is undisputed that the permit issued by Alaska to Cominco contains such a limitation, and that it was set by the State after consideration of the applicable statutory factors. The EPA "disagrees" with the State's determination, J.A. 97, 118, and prefers its own "control technology of choice," J.A. 129, but that does not mean that the State has failed to comply with "the BACT requirement."

Because BACT is a discretionary judgment, involving the "case-by-case" prioritizing and weighing of potentially competing impacts and costs, there is no single, objectively "correct" BACT determination for any particular source. So long as a State does not set a limitation that allows emissions to exceed the national standards established by the federal government, the EPA has no authority to overturn a state

BACT determination that is based on consideration of the applicable factors. Indeed, had Congress intended the EPA to have the "ultimate authority" to decide what constitutes BACT for a particular source, there would have been no need for Congress to explicitly require EPA approval of state BACT determinations in one specified instance not applicable here. *See* 42 U.S.C. § 7475(a)(8).

None of this is to say that there is no cure for the problem the EPA alleges—that the States might make "unreasoned" BACT determinations. In fact, when it reviews proposed state PSD permit programs, the EPA insists they provide adequate administrative and judicial review provisions to guard against just such a prospect. The EPA's recourse in this case was not to unilaterally overturn the State's judgment, but to challenge Alaska's BACT determination through the available state review process. Allowing the EPA to bypass these procedures—as the Ninth Circuit below did—leads to incongruous results. For instance, there is nothing to prevent the EPA from invalidating a State's BACT determination at any time—months, even years, after a permit has issued—undermining the certainty and finality of the permitting process. Moreover, while the *EPA* should be required to demonstrate that the *State*'s decision was arbitrary or capricious, instead it is now the *State* that supposedly must demonstrate that the *EPA*'s action was arbitrary or capricious. The awkwardness of considering whether the EPA was arbitrary or capricious in deciding that the State was arbitrary or capricious should be the canary in the mine shaft, signaling that something is very much amiss.

II. Even if this Court were to conclude that the EPA has some authority to overturn a state BACT determination, the EPA still had no authority to do so here. The EPA's own interpretation of its authority under the CAA is that it may not interfere with a State's BACT determination where the State has provided a "reasoned justification" for its decision. Alaska plainly did so here. After devoting eighteen months

to processing Cominco's permit application, the State issued a final TAR in which it explained the basis of its conclusion that Low NOx was BACT for the MG-17 generator, including its reasons for rejecting SCR—the EPA's preferred technology. ADEC concluded that the cost-effectiveness of SCR was "outside the range of costs being borne by similar sources under recent BACT determinations," J.A. 204, and that SCR would have a "disproportionate" cost impact upon a rural Alaska utility, and thus by analogy upon a mine compelled by site-specific conditions to supply its own power. J.A. 206. Recognizing the "unique and continuing impact" of the Red Dog Mine on the local economy of the Northwest Arctic Borough, ADEC decided not to impose SCR's "excessive economic cost" on Cominco. J.A. 208.

At bottom, the EPA overturned the State's decision not because it believed that Alaska had failed to provide a "reasoned justification" for its BACT determination, but rather simply because the EPA preferred a different technology—SCR. That much is clear from the EPA's December 10, 1999 Finding of Noncompliance and Order itself, which nowhere states that ADEC had not provided a "reasoned justification" for its decision, but instead asserts, as a factual matter, that "SCR is BACT" for the type of generator at issue. Pet. App. 34a. In substituting its judgment for that of Alaska, however, the EPA plainly usurped the State's prerogative to determine BACT "on a case-by-case basis."

ARGUMENT

I. THE EPA HAS NO AUTHORITY UNDER THE CAA TO INVALIDATE A STATE BACT DETERMINATION THAT IS BASED ON CONSIDERATION OF THE STATUTORY FACTORS.

We begin with first principles. The EPA, a federal administrative agency, is "a creature of statute." *Guardians Ass'n* v. *Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 614 (1983) (O'Connor, J., concurring). As such, the EPA

"literally has *no* power to act * * * unless and until Congress confers power upon it." *Louisiana Public Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986) (emphasis added). *Accord Michigan* v. *EPA*, 268 F.3d at 1081 ("if there is no statute conferring authority, a federal agency has none"). Accordingly, "[i]f EPA lacks authority [to take particular action] under the Clean Air Act, then its action is plainly contrary to law and cannot stand." *Michigan* v. *EPA*, 268 F.3d at 1081. *See also* 5 U.S.C. § 706(2)(C).

The Ninth Circuit held that the CAA gives the EPA the "ultimate authority" to decide what constitutes BACT for a particular source. Pet. App. 11a. In its view, that conclusion is "compel[led]" by the plain language and legislative history of the Act. Pet. App. 7a. As we explain below, however, the plain language and legislative history of the CAA make clear that BACT is a determination to be made by the States, and the EPA has absolutely *no* authority to second-guess a State's BACT determination that—like Alaska's here—is based on consideration of the statutory factors. Because the EPA thus had no authority to invalidate Alaska's permit decision in this case, its action is "plainly contrary to law," and the Ninth Circuit decision below "cannot stand." *Michigan* v. *EPA*, 268 F.3d at 1081.

A. The Plain Language Of The CAA Makes Clear That BACT Is A Determination To Be Made By The States On A "Case-By-Case Basis."

1. The CAA provides that no major emitting facility may be constructed or modified in a clean air area unless "the proposed facility is subject to [BACT] for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). BACT is defined in the Act as "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation * * *, *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." *Id*. § 7479(3) (emphasis added).

By its terms, the CAA squarely places the responsibility for determining BACT with "the permitting authority"—*i.e.*, the State. As the plain language of the statute makes clear, a BACT determination is a discretionary judgment, involving the "case-by-case" weighing of several factors—"energy, environmental, and economic impacts and other costs." *Id*. A BACT determination in any given case will thus depend on how the State—"the permitting authority"—chooses to weigh the pertinent factors. Accordingly, the Act not only gives the States the authority to determine BACT for a particular source, but gives them broad discretion to do so.

The Ninth Circuit nevertheless held in this case that the EPA had the "ultimate authority" to invalidate Alaska's BACT determination. Pet. App. 11a. The court reasoned as follows: (1) Sections 113(a)(5) and 167 of the CAA give the EPA the authority to enforce any "requirement" of the Act, *see* 42 U.S.C. §§ 7413(a)(5), 7477; (2) "subjecting a facility to BACT" is a "requirement" of the Act, *id*. § 7475(a)(4); (3) the EPA found that the State had not complied with "the BACT requirement"; and (4) therefore, the EPA's invalidation of Alaska's BACT determination was authorized "by the plain language" of Sections 113(a)(5) and 167. Pet. App. 7a-9a.

The court's reasoning, however, is fundamentally flawed. The only "BACT requirement" pertinent here is that a state-issued PSD permit contain a BACT limitation, determined by the State "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). There is no dispute that the permit issued by Alaska to Cominco contains such a limitation, *see* J.A. 157-158, or that the limitation was set by the State after considering the applicable factors. J.A. 200-211. Thus, Alaska fully complied with "the BACT requirement,"

Pet. App. 9a, and the EPA had no authority under Section 113(a)(5) or Section 167 to override its decision. The EPA "disagrees" with Alaska's decision, J.A. 97, 118, and regards SCR as "the control technology of choice," J.A. 129, but that does not mean that the State has in any sense violated a "requirement" of the Act.

There are many "requirements" in the Act, including in the PSD provisions, that the EPA may enforce pursuant to Sections 113(a)(5) or 167. The CAA provides that a facility's emissions may not exceed the NAAQS, PSD allowable increments, or other applicable emission standards. *See* 42 U.S.C. § 7475(a)(3). The provision defining BACT itself, while specifying that BACT is determined by "the permitting authority," goes on to provide that "[i]n no event" may application of BACT result in emissions exceeding any performance standards promulgated by the EPA or any limits on hazardous pollutants. *See id*. § 7479(3). Other requirements are that a PSD permit be issued in the first place; that the proposed permit be subject to review and required analysis; and that interested persons—including "representatives of the Administrator"—be given an opportunity to submit written or oral presentations. *See id*. §§ 7475(a)(1), (2).

Should a State violate any of these requirements or prohibitions, the EPA may take appropriate action pursuant to Sections 113(a)(5) or 167. Such objective requirements, however, stand in sharp contrast to the determination of what BACT is for a particular source. BACT is a discretionary judgment based on the case-by-case weighing of the applicable statutory factors. Accordingly, there is no single, objectively "correct" BACT determination for any particular source—no "technology of choice" that applies without regard to case-specific policy judgments about how to balance competing impacts and costs.

For example, one State—experiencing little economic growth in the pertinent area and concerned about the impact of increased costs on a critically important employer—may select as BACT for that employer a less stringent and less costly technology that results in emissions consuming nearly all of (but not more than) the available increment for growth. Another State—experiencing vigorous economic growth and faced with many competing permit applications—may select as BACT for those applications a more stringent and more costly technology that limits the impact of any particular new source on the increment available for development. A third State—in which ecotourism rather than more industrial development is the priority—may select as BACT an even more stringent and more costly technology, effectively blocking *any* industrial expansion. In each case the State would have determined the maximum degree of pollution reduction achievable for the facility in question, given the priorities of the particular State and that State's decision about how to implement those priorities in the case of that particular facility. *See* S. Rep. No. 95-127, at 31 ("flexible approach" in determining BACT "allows the States * * * to judge how much of the defined increment of significant deterioration will be devoted to any major emitting facility").

Determining the "best" control technology is like asking different people to pick the "best" car. Mario Andretti may select a Ferrari; a college student may choose a Volkswagen Beetle; a family of six a mini-van. A Minnesotan's choice will doubtless have four-wheel drive; a Floridian's might well be a convertible. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on. Substituting one decisionmaker for another may yield a different result, but not in any sense a more "correct" one. So too here. Because there is no "correct" BACT determination for any particular source, the EPA cannot conclude that a State failed to include the "correct" BACT limitation in a

PSD permit, the way the EPA can conclude, say, that the State failed to require a PSD permit, that the State failed to include a BACT limitation at all in a PSD permit, or that the State issued a permit allowing emissions to exceed available increments.

The Ninth Circuit's erroneous conclusion proceeded from a faulty premise—that the State is only the "initial" BACT decisionmaker under the Act. *See* Pet. App. 11a ("It does not follow from the placement of *initial* responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA") (emphasis added); Pet. App. 9a ("ADEC, as the 'permitting authority,' made the *initial* BACT decision") (emphasis added). There is absolutely nothing in the CAA, however, that supports that notion. The statute expressly provides that "*the permitting authority*, on a case-by-case basis," shall determine BACT for a particular source. 42 U.S.C. § 7479(3) (emphasis added). Except in one specified instance—not applicable here—the Act nowhere requires the EPA to approve a State's BACT determination. *See id*. § 7475(a)(8).

Indeed, that one instance is the exception that proves the rule—that Congress otherwise did not intend the EPA to have the "ultimate authority" to determine BACT for particular sources. Pet. App. 11a. Section 165(a)(8) of the Act requires EPA approval of state BACT determinations for sources "in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area where no standard under [42 U.S.C. § 7411] has been promulgated * * * for such source category." 42 U.S.C. § 7475(a)(8). Thus, when Congress wanted to require EPA approval of a state BACT determination, it did so explicitly. *See*, *e.g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452-453 (2002) ("Where Congress wanted to provide for successor liability in the Coal

Act, it did so explicitly, as demonstrated by other sections in the Act").[6]

2. Congress's decision to make the States—and not the EPA—the arbiters of BACT is consistent with its overall approach under the CAA. Like numerous other federal statutory schemes, the CAA is based on the principle of "cooperative federalism." *See*, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 167-168 (1992) (citing examples). Such statutory schemes "allow[] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, *structured to meet their own particular needs*." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (emphasis added).

In recognizing the Act's "division of responsibilities" more than twenty-five years ago, this Court observed that the EPA "is plainly charged by the Act with the responsibility for setting the national ambient air standards." *Train*, 421 U.S. at 79. But "[j]ust as plainly," the Court emphasized, the EPA "is relegated by the Act to a *secondary* role in the process of determining and enforcing the *specific, source-by-source*

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[6] Indeed, when Congress wanted to give the EPA *any* kind of role at all in the PSD permitting process, it did so explicitly. Section 165(a)(2), for instance, specifies that "interested persons" who may submit comments on a proposed permit include "representatives of the Administrator." 42 U.S.C. § 7475(a)(2). In a similar vein, Section 165(d) provides the EPA with a role in reviewing PSD permit applications to ensure that a proposed facility's emissions will not adversely impact air quality in class I areas. *See id.* § 7475(d)(2)(B). If the EPA files a notice alleging the potential for such an impact, the State may not issue a PSD permit unless the facility demonstrates that its emissions will not cause or contribute to concentrations which exceed allowable increments for class I areas. *Id*. § 7475(d)(2)(C)(i).

emission limitations which are necessary if the national standards it has set are to be met." *Id*. (emphases added).

As the Court explained, "[t]he Act gives the [EPA] *no* authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Id*. (emphasis added). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations *it deems best suited to its particular situation*." *Id*. (emphasis added). *See also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

This basic division of responsibilities carried through to the PSD program. In *Alabama Power*, *supra*, the seminal case addressing the Act's PSD provisions, the D.C. Circuit acknowledged that the EPA "has the authority * * * to prevent or to correct a violation of the increments." 636 F.2d at 361. The court emphasized, however, that "the agency is without authority to dictate to the States their policy for management of the consumption of allowable increments." *Id*.

Because Congress decided that "air pollution prevention * * * and air pollution control *at its source* is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3) (emphasis added), it makes perfect sense that Congress would vest the States with the sole discretion to decide what constitutes BACT for a particular source. The EPA may believe that maintaining ultimate veto power over state BACT determinations is necessary to fulfill its oversight role under the CAA, *see* J.A. 148-149, 257, but Congress clearly thought otherwise. As Judge Posner observed in holding that the EPA could not bring an enforcement

action in the absence of statutory authority to do so, "[t]he primary responsibility for the Act's enforcement at the level of the individual plant has been lodged in the states rather than in the national EPA, so it would not be surprising if Congress did not equip the EPA with a complete quiver of enforcement arrows." *United States* v. *AM General Corp.*, 34 F.3d 472, 475 (7th Cir. 1994). *See also Michigan* v. *EPA*, 268 F.3d at 1084 ("we have before had occasion to remind EPA that its mission is not a roving commission to achieve pure air").

Moreover, even in clean air areas, Congress anticipated—and desired—continued economic development and growth. *See* 42 U.S.C. § 7470(3) ("insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources" among the purposes of the PSD provisions). Weighing the competing demands of economic growth and pollution control entails considering the cost of control. The EPA generally does not consider costs or the impact on economic growth in setting national standards, but the States do so in "deciding what emissions reductions will be required for which sources." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 470 (2001). *See id*. at 493 (Breyer, J., concurring) ("States may consider economic costs when they select the particular control devices used to meet the standards.").

By giving the States the authority to determine BACT "on a case-by-case basis," Congress ensured that the States would be able to effectively "manage their allowed internal growth" under the Act. *Alabama Power Co.*, 636 F.2d at 364. The flexible approach adopted by Congress—involving the weighing of "energy, environmental, and economic impacts and other costs"—allows state BACT determinations to reflect policy judgments about how to balance economic growth and pollution control in particular instances, while complying with national standards. "[A]ssuming such com-

pliance, growth-management decisions were left by Congress for resolution by the states." *Id*.

This case amply illustrates the wisdom of Congress's choice. The Red Dog Mine is the largest private employer in the Northwest Arctic Borough, where geography and the harsh environment pose unique employment challenges, offer few employment alternatives, and limit any concern about other industrial development that might compete with the mine for consumption of available increments. In making its BACT determination for the MG-17 generator—an essential component of Cominco's PRI project, expected to generate nearly 100 new jobs—the State of Alaska specifically considered "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). *See* J.A. 200-211. Recognizing the mine's "unique and continuing impact" on the economy of the borough, the State decided not to require a control with an "excessive economic cost." J.A. 208.

The EPA, operating out of its regional office in Seattle, Washington, had different priorities, desiring to promote its preferred "control technology of choice," J.A. 129, rather than limit the impact on the precarious economy of Northwest Alaska. The EPA thus overturned the State's BACT determination—even though the State's permit decision not only complied with the NAAQS and PSD increments but was likely to result in *lower* overall NOx emissions than if the EPA's preferred technology had been selected. If Alaska is not allowed the flexibility to make a BACT determination that is expected to result in cleaner air while taking into account local conditions in a community situated far above the Arctic Circle, it is difficult to imagine just what Congress had in mind in its "division of responsibilities" in the CAA. *Train*, 421 U.S. at 79.

B. The Legislative History Of The CAA Confirms That BACT Is "Strictly A State And Local Decision."

The legislative history of the CAA confirms that Congress intended to vest the discretion to determine BACT for particular sources in the States—and the States alone. The Act's PSD provisions were enacted as part of the Clean Air Act Amendments of 1977. For nearly a decade, federal air pollution control legislation had reflected a policy to prevent the significant degradation of clean air. *See* H.R. Rep. No. 95-294, at 103. In amending the CAA in 1977, Congress sought "to provide [a] clearer definition of [that] policy" and "more specific congressional guidance as to how [that] policy is to be implemented." *Id*. *See also* S. Rep. No. 95-127, at 28.

To this end, Congress established maximum allowable increments for certain pollutants in clean air areas, *see* 42 U.S.C. § 7473, and directed the EPA to establish increments or similar measures for others, *see id*. § 7476. Congress also established a preconstruction review and permitting process for all "major emitting facilities." *See id*. § 7475. The House Committee Report explains that "[t]he purpose of the State permit process is to provide that the allowable pollution increments and appropriate emission limitation for each source * * * will not be exceeded." H.R. Rep. No. 95-294, at 145.

The PSD provisions enacted by Congress were intended to strike a balance. Congress plainly sought to "protect clean air areas from deteriorating." S. Rep. No. 95-127, at 29. At the same time, however, Congress wanted to "permit[] the economic development necessary to achieve a steady improvement in our standard of living." *Id*. *See also* H.R. Rep. No. 95-294, at 147 (legislation "[p]rotects clean air resources while permitting both the economic development needed to assure a safe and secure life for all Americans, and the

domestic resource development essential for energy independence"). As the House Committee Report explains, "States and local governments (not Federal agencies) will determine appropriate policy after considering the multiple objectives of minimizing air pollution increases in clean air regions and permitting stable, long-term, commercial, industrial, and energy developments." *Id*. at 146.[7]

To allow the States to determine "how much more pollution will be allowed in clean air areas," *id*. at 147, Congress gave the States broad flexibility to classify most regions within their borders as class I (allowing "very small" increases over existing pollution), class II (allowing "moderately large" increases over existing pollution), or class III (allowing "large" increases over existing pollution). *Id*. at 142. *See* 42 U.S.C. §§ 7472, 7474. As the House Committee Report explains, "[b]y choosing a classification for an area, the State actually will be making a decision on the future pollution increases that will be allowed in that area." H.R. Rep. No. 95-294, at 143.[8]

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[7] The House Committee Report further elaborates:

> The committee purposely chose not to dictate a Federal response to balancing sometimes conflicting goals. It purposely chose not to dictate what State and local decisions on air quality deterioration must be. Maximum flexibility and State discretion are the bases of the committee's approach. The committee carefully balanced State and national interests by providing for a fair and open process in which State and local governments and the people they represent will be free to carry out the reasoned weighing of environmental and economic goals and needs. [H.R. Rep. No. 95-294, at 146.]

[8] In the 1977 amendments, Congress specifically "reject[ed] the approach" taken by the EPA in its then-current regulations, which would give the EPA "veto power over all State classifications which it deems 'arbitrary and capricious.' " H.R. Rep. No. 95-294, at 148-149. The House Committee explained that "unlike the administration's regulations, the bill does not authorize EPA to

The "key" to managing economic growth, however, is BACT. S. Rep. No. 95-127, at 31. For this reason, Congress "place[d] this responsibility *with the State*, to be determined in a case-by-case judgment." *Id*. (emphasis added).[9] The Senate Committee Report explains that the term is intended to have "*broad flexibility* in how it should and can be interpreted, depending on site," and that "[t]he weight assigned to [each of the statutory] factors is to be determined *by the State*." *Id*. (emphases added). The "flexible approach" adopted by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." *Id*. (emphasis added). In short, as the Senate Committee Report emphasizes, BACT is "strictly a State and local decision"—"[f]lexibility and State judgment are [its] foundations." *Id*.

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disapprove any State redesignation decision on the ground that it is 'arbitrary and capricious' or that environmental, health, or other factors should have been given more weight in the State's decision." *Id*. at 150. Congress chose "to remove from the States the threat of EPA 'second-guessing' the wisdom of every State decision * * *." *Id*.

The EPA's position in this case ascribes to the same Congress that expressly overturned the EPA's asserted authority to review state classification decisions it deemed "arbitrary and capricious" the unstated intent to subject the far more localized BACT determinations to just such review.

[9] The BACT requirement was added by Senate amendment. *See* S. Rep. No. 95-127, at 151; H.R. Conf. Rep. No 95-564, at 152 (1977). The EPA's regulations at the time required that new or modified sources be subject to BACT, as "specified *by the Administrator*," for certain pollutants. 40 C.F.R. § 52.21(2)(ii) (1976) (emphasis added). Recognizing the significance of this "key decision," Congress chose not to leave it in the hands of the EPA, but instead squarely "place[d] this responsibility *with the State*." S. Rep. No. 95-127, at 31 (emphasis added).

The legislative history of the Act's PSD provisions and of BACT in particular thus makes abundantly clear that Congress intended the States—"not Federal agencies"—to determine BACT, and that Congress intended the States to have "broad flexibility" in doing so. H.R. Rep. No. 95-294, at 146; S. Rep. No. 95-127, at 31. The Ninth Circuit below nevertheless held that the legislative history of the CAA "compel[led]" the conclusion that the EPA has the "ultimate authority" to decide what constitutes BACT for a particular source. Pet. App. 7a, 11a. Yet instead of addressing the most pertinent legislative history—*i.e.*, that *specifically* discussing BACT—the Ninth Circuit simply ignored it.

Moreover, nothing in the legislative history actually invoked by the court below even remotely supports its decision. The court cited both the 1970 amendment of the CAA, which "directed the EPA to publish NAAQS and the states to develop implementation plans to meet them," and the 1977 amendment, establishing the PSD program "to prescribe allowable levels of air quality degradation in clean air areas." Pet. App. 9a-10a. As discussed above, however, far from demonstrating that Congress intended to give the EPA "ultimate authority" over state BACT determinations, these chapters of the Act's history in fact suggest just the opposite. They make clear that Congress envisioned a division of responsibilities—in both the Act in general and the PSD provisions in particular—under which Federal authorities set minimum standards and the States weigh competing priorities "when they select the particular control devices used to meet the standards." *American Trucking*, 531 U.S. at 493 (Breyer, J., concurring).

The Ninth Circuit also cited Congress's enactment of Section 113(a)(5) in 1990—some thirteen years *after* Congress directed that BACT be determined by "the permitting authority, on a case-by-case basis." *See* Pet. App. 10a. The mere enactment of Section 113(a)(5), however, provides no support for the Ninth Circuit's decision. That provision

simply authorizes the EPA to enforce any "requirement" of the Act's PSD provisions. *See* 42 U.S.C. § 7413(a)(5). It does not have anything to say about what those requirements in fact are. There are many requirements in the PSD provisions that the EPA may enforce—that a permit be required, that the permit contain a BACT limitation, that allowed emissions not exceed the NAAQS or available increments. As explained, however, the only BACT "requirement" pertinent here is that a state-issued PSD permit contain a BACT limitation determined by the State "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." *Id*. § 7479(3). Section 113(a)(5) gives the EPA the authority to enforce that requirement. But it by no means gives the EPA the authority to do what it did here—invalidate a state permit decision simply because the EPA would weigh the pertinent factors differently than the decisionmaker Congress chose to make the BACT determination.

C. The EPA's Recourse In This Case Was Not To Unilaterally Overturn The State's BACT Determination, But To Challenge It Through The Available Review Process.

Importantly, none of this is to say that the EPA is without recourse when it believes a State has failed to provide a "reasoned justification" for its BACT determination. Pet. App. 16a. As noted, before a PSD permit may issue, the State must allow all interested parties, including "representatives of the Administrator," to submit comments on, among other things, "control technology requirements." 42 U.S.C. § 7475(a)(2). The EPA had ample opportunity to do so here. As required by the Act, Alaska had "transmit[ed] to the [EPA] a copy of [Cominco's] permit application * * * and provide[d] notice to the [EPA] of every action related to the consideration of [the] permit." *Id*. § 7475(d).

Under Alaska law, any "person" who participated in the public comment process on a proposed permit may pursue an administrative appeal of a permit decision, followed by judicial review. *See* Alaska Stat. §§ 44.62.560, 46.14.200; 18 Alaska Admin. Code § 50.315(f); Alaska R. App. P. 601(b). The term "person" includes "an agency of the United States." Alaska Stat. § 46.14.990 (20). Thus, in this case, the EPA was free to participate in the public comment process on Cominco's draft permit, and then, if it believed that the State had failed to adequately justify its final permit decision, challenge that decision through the State's review process.

Instead, the EPA elected to bypass these available procedures and unilaterally overturn Alaska's BACT determination. The Ninth Circuit below sanctioned that result, but the consequences of its decision suggest that it is clearly not right. To begin with, under the decision below, there is nothing to prevent the EPA from invalidating a BACT determination at any time—months, even years, after a permit has been issued. By that time, both the State and the source will have devoted a substantial amount of time and resources to the permitting process, and the source may also have already invested in costly technology approved by the State. In this case, for instance, ADEC and Cominco spent more than a year attempting to reach an agreement on BACT. *See* J.A. 131. Requiring the EPA to pursue available state administrative and judicial procedures—rather than allowing the EPA free rein to override a state BACT determination at any time—would bring certainty and finality to the permitting process. *See AM General*, 34 F.3d at 474-475 (refusing to allow the EPA to "mount a collateral attack" on a permit where the EPA had the "alternative remedy" of an administrative appeal followed by judicial review). *See also* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

Congress specified in unambiguous terms that BACT was to be determined by "the permitting authority"—*i.e.*, the State. The Ninth Circuit's decision that the State had only "initial responsibility" while the EPA had "ultimate authority" to make that determination, Pet. App. 10a-11a, introduces disabling uncertainty and confusion into the allocation of responsibility. *See*, *e.g.*, *Jerome B. Grubart*, *Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (jurisdictional rules should be clear and easy to apply). And the asserted reason for compromising the bright-line rule in the Act—the need to correct "unreasoned" state determinations—is hardly compelling, given the availability of state administrative and judicial review addressed to just that possibility.

The Ninth Circuit's decision—requiring the States to go into federal court to challenge the EPA's invalidation of a BACT determination—also improperly shifts the burden of persuasion from the EPA to the States, undermining the deference to which a State's decision is entitled. Had the EPA challenged Alaska's permit decision through the state review process, the *EPA* would have had to demonstrate that the *State*'s decision was arbitrary or capricious. *See*, *e.g.*, *Bering Straits Coastal Mgmt. Program* v. *Noah*, 952 P.2d 737, 741 (Alaska 1998). Because the EPA chose instead to unilaterally overturn the State's judgment, suddenly the *State* had to show that the *EPA*'s action was arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A). The procedural sleight-of-hand upheld by the Ninth Circuit also results in an awkward and unwieldy inquiry—whether the EPA acted arbitrarily or capriciously in deciding that the State had acted arbitrarily or capriciously. *See* Pet. App. 13a-16a; Opp. 21 n.11 (noting that "in enforcing a finding of noncompliance or order, EPA may have to convince a district court that the permitting authority arbitrarily or capriciously applied the BACT requirement," and that in cases like this one, the EPA "must

defend its finding of non-compliance under an arbitrary-or-capricious standard of review").

By allowing the EPA to short-circuit the state review process in this case, the Ninth Circuit also deprived Alaska of the opportunity to adequately defend its permit decision. Had the EPA pursued a state administrative appeal of Alaska's BACT determination, the State and Cominco could have presented evidence at an adjudicatory hearing in support of the State's decision. *See* 18 Alaska Admin. Code §§ 15.240, 15.270. That evidence would have been part of the administrative record on judicial review. *See*, *e.g.*, *Miners Advocacy Council, Inc.* v. *State of Alaska, Dep't of Envtl. Conservation*, 778 P.2d 1126, 1138-40 (Alaska 1989), *cert. denied*, 493 U.S. 1077 (1990); *Noey* v. *Department of Envtl. Conservation*, 737 P.2d 796, 799, 801-806 (Alaska 1987). Instead, the State's BACT determination was reviewed by the Ninth Circuit on an incomplete record. Even that court had the sense that something was amiss, intimating at one point its view that an enforcement action in district court, as opposed to review in the court of appeals, would "provide a preferable means of resolving the issues in this case, for the parties in that context [would] be able *to develop a full record on pertinent issues*." Pet. App. 22a (emphasis added).

The federal administrative record consists of materials "upon which the *EPA* relied in *its* determination that Selective Catalytic Reduction, and not Low NOx, is BACT for the MG-17 generator." *Id*. (emphases added). That record may not include all the materials upon which the *State* relied in making *its* BACT determination, even though that information is critical to a fair assessment of the State's decision. *See*, *e.g.*, *General Motors Corp.* v. *EPA*, 168 F.3d 1377, 1382 (D.C. Cir. 1999) ("when a permit has been issued by a state agency, it alone will have the information pertinent to an attack upon the decisionmaking process that led to the issuance of that permit").

The EPA's own view is "that existing law and regulations require an opportunity for state judicial review under approved PSD SIPs by permit applicants and affected members of the public." 61 Fed. Reg. 1800, 1882 (1996). According to the agency, the "opportunity for public review and comment, as provided in the statute and regulations, is seriously compromised where an affected member of the public is unable to obtain judicial review of an alleged failure of the state to abide by its PSD SIP permitting rules." *Id*.

The EPA thus regards the state review process as the means by which "interested persons" who have commented on a proposed permit may vindicate their interests. 42 U.S.C. § 7475(a)(2). Under the CAA, such "interested persons" include "representatives of the Administrator." *Id*. Thus, even the EPA's *own* view of the law suggests that the EPA's proper recourse in this case was to challenge Alaska's permit decision through the state review process, not quash it by regulatory fiat.[10]

[10] The EPA also has other remedies at its disposal to ensure compliance with the Act's requirements. For instance, if the EPA finds that violations of a SIP or permit program are so widespread that they appear to be the result of lax enforcement by the State, the EPA may assume enforcement of the plan or program. *See* 42 U.S.C. § 7413(a)(2). Similarly, if the EPA finds that a State's SIP is "substantially inadequate" to attain or maintain the NAAQS or to comply with any other requirement of the Act, the EPA may call for a SIP revision. *Id*. § 7410(k)(5). The EPA has never taken either of these actions against Alaska. The EPA's objection is limited to the particular BACT determination for this particular permit. Under the Act, such determinations about how to comply with national standards at the source level are for the State, not the EPA, to make.

II. EVEN IF THE EPA MAY INVALIDATE A STATE BACT DETERMINATION IN SOME CASES, IT HAD NO AUTHORITY TO DO SO HERE.

Even if this Court were to conclude that the EPA has some authority to review a State's BACT determination, the EPA still had no authority to invalidate Alaska's permit decision in this case. The CAA directs only that the States take into account "energy, environmental, and economic impacts and other costs" in determining BACT "on a case-by-case basis." 42 U.S.C. § 7479(3). The record in this case demonstrates that ADEC carefully considered each of the applicable factors and provided a reasoned explanation for its decision that Low NOx was BACT for the MG-17 generator. The EPA has stated that "if a state has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its decision, *EPA has no grounds on which to challenge a final substantive state decision*." Pet. App. 12a (quoting 1993 EPA legal opinion) (emphasis added and omitted). *See* Cert. Rec. 72-003. Thus, under the EPA's own view of its authority under the CAA, the EPA had no basis to intervene and overturn Alaska's permit decision in this case.

Alaska's BACT determination came after an eighteen-month process during which ADEC (1) carefully reviewed Cominco's application; (2) worked closely with Cominco to resolve permitting issues; (3) conducted independent research and prepared extensive technical analyses; (4) solicited and considered comments from interested members of the public, including belated input from the EPA; and (5) worked closely with the EPA in an attempt to resolve their disagreement on BACT for the MG-17 generator. *See* J.A. 159-224.

In its final TAR, ADEC spent nearly ten pages explaining the basis of its conclusion that Low NOx was BACT for the MG-17 generator. J.A. 197-211. As even the EPA has acknowledged, ADEC "provid[ed] a detailed accounting of

the process." J.A. 286. Although not required to do so, ADEC followed the EPA's "top-down" approach, under which ADEC identified all available NOx control technologies, ranking the technically feasible ones in descending order of NOx removal. ADEC then specifically considered "energy, environmental, and economic impacts and other costs" associated with SCR. 42 U.S.C. § 7479(3). *See* J.A. 200-208. Although ADEC discounted Cominco's claim that energy or environmental impacts warranted eliminating SCR, J.A. 200-203, ADEC determined that SCR would have adverse economic impacts.

ADEC first concluded that the cost-effectiveness of SCR was "outside the range of costs being borne by similar sources under recent BACT determinations." J.A. 204. Rejecting Cominco's higher cost estimates, ADEC estimated the capital costs of SCR to be $2.9 million and annual operating costs to be $635,000, translating into a cost-effectiveness of $2,100 per ton of NOx removed. *Id*. ADEC then examined an EPA clearinghouse database to determine the range of costs for similar diesel-fired electric generators in recent BACT determinations. Although there were "no recent BACT determinations for diesel engines used as primary power generation" listed, there were two 1996 BACT determinations for such sources that imposed controls with a cost-effectiveness of $432 per ton of NOx removed. J.A. 205. ADEC also reviewed its own recent BACT determinations for similar diesel-fired electric generators, and found that the cost-effectiveness of the controls imposed ranged between $0 to $936 per ton of NOx removed. J.A. 205-206. Thus, the costs of SCR "on a cost-per-ton removal basis"—$2,100 per ton of NOx removed—were "significantly higher" than the costs of the controls imposed in ADEC's recent BACT decisions for such sources, J.A. 206-207, and nearly twice as high as the $1,106 cost per ton of Low NOx. *See* Cert. Rec. 45-029.

Next, because the Red Dog Mine generates all its own power—and thus acts as its own electric utility—ADEC considered whether the costs of SCR would be prohibitive for a rural Alaska utility. ADEC estimated that the cost of SCR was 3 cents per kilowatt-hour, and that the average cost of electricity in rural Alaska was approximately 15 cents per kilowatt-hour. Because the imposition of SCR "would be equivalent to a 20% increase in the electric rate of the facility," ADEC concluded that the costs of SCR would be "disproportionate" for a utility and thus, by analogy, for a mine required by site-specific conditions to supply its own power. J.A. 206.[11]

Whatever the significance might be in other cases of SCR's relatively poor cost-effectiveness and its disproportionate cost as control technology on a primary energy source, ADEC concluded that such considerations warranted eliminating SCR as BACT in the unique situation of the Red Dog Mine. J.A. 207-208. Cominco had represented that the costs of SCR were "very significant, affecting Cominco's cost of production and competitiveness in world markets." J.A. 204. As ADEC noted, the Northwest Arctic Borough has "limited permanent year-round job opportunities" and an "historical[ly] high unemployment rate." J.A. 207. Indeed, in the preceding two years, "the Borough's unemployment rate ha[d] been the highest in the State." *Id*. The Red Dog Mine, however, has had "a dramatic [effect] [in] revers[ing] these historic trends for this region of the State." *Id*. Before the mine opened, "borough wages were well below state average wages." *Id*. Now, the mine "provides high paying year round employment." *Id*. Its payroll represents "over a quarter of the borough's" wage base, and its relationships

[11] Even though Cominco had not provided "detailed financial information" concerning the impact of SCR on its operations, ADEC could thus still conclude on a site-specific basis that the cost of SCR was "excessive." J.A. 207.

with contractors and vendors have further "boosted the borough's private sector economy." *Id*.

In recognition of the "unique and continuing impact" of the mine on the community of the Northwest Arctic Borough, J.A. 208, ADEC chose to select Low NOx rather than SCR as BACT. Yet because Cominco had agreed to install Low NOx on *all* its generators, ADEC's decision was nevertheless expected to result in *lower* NOx emissions than if ADEC had selected SCR as BACT for the MG-17 generator.[12]

This Court has made clear that an agency's explanation for a particular decision is "satisfactory" so long as the agency articulates a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation

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[12] Early in the permitting process, Cominco proposed to install Low NOx on all its generators, not just the MG-5 and MG-17 generators subject to BACT review at the time. *See supra* at 10-11. ADEC initially decided to accept Cominco's proposal, because it was likely to result in lower overall NOx emissions than if SCR were installed on only the MG-5 and MG-17 generators. J.A. 85-88. ADEC had conferred with the EPA and understood the agency to agree with this emissions-netting approach. *See* J.A. 244; Affidavit of Michele Brown ¶ 9 (Mar. 13, 2000). The EPA, however, later objected to ADEC's emissions-netting approach, even though the CAA directs the States to weigh "environmental" impacts in determining BACT "on a case-by-case basis." 42 U.S.C. § 7479(3). *See* J.A. 96-97.

In its final TAR, to accommodate the EPA's objection, ADEC did not rely on emissions savings in determining that Low NOx was BACT, but instead went through the foregoing analysis. J.A. 199, 200-208. Nevertheless, because Cominco had agreed to install Low NOx on all its generators if Low NOx were selected as BACT on MG-17, the State's permit decision was still likely to result in lower NOx emissions—at a fraction of the cost of SCR. J.A. 85-88.

omitted). ADEC's explanation of its reasons for rejecting SCR—that the costs of SCR were "excessive" both in terms of cost effectiveness and in terms of impact on a primary energy source, and that the unique situation of the Red Dog Mine warranted eliminating SCR on that basis—easily passes muster under that standard. Under the EPA's own view of the law, the EPA had no authority to disregard ADEC's "reasoned justification" and overturn the State's judgment.

In insisting that SCR—not Low NOx—was BACT, the EPA took issue with ADEC's economic impact analysis, asserting that, "in order to justify economic infeasibility," ADEC's analysis "should have gone beyond a review of cost-effectiveness to include an analysis of whether requiring Cominco to install and operate [SCR] would have any adverse economic impacts upon Cominco *specifically*." J.A. 127 (emphasis added). In its zeal to impose its "technology of choice," however, the EPA overlooked that ADEC had done just that in analogizing the mine to a rural Alaska utility, concluding that SCR would have a "disproportionate" impact on such a utility, and thus on the mine as well. *See* J.A. 116, 206.[13]

In any event, the CAA requires only that the States consider "energy, environmental, and economic impacts and other costs" in determining BACT for particular sources. 42 U.S.C. § 7479(3). It does not direct them to weigh or apply

[13] The EPA also noted that ADEC had found SCR "economically feasible" in its preliminary TAR. *See* J.A. 96. ADEC's decision at that time to accept Cominco's emissions-netting proposal, however, had mooted any need to consider the impact of SCR costs, and in fact ADEC in the preliminary TAR did not analyze recent BACT decisions for similar sources or the site-specific cost considerations of imposing SCR. *See* J.A. 235 (Cominco criticism of ADEC failure to analyze economic feasibility in preliminary TAR). The decision in the final TAR not to rely on emissions savings necessitated such analysis and led to a more informed weighing of economic impacts.

those factors in any particular manner. To the contrary, Congress intended the States to have "broad flexibility" in applying the statutory factors, and "[t]he weight assigned to such factors is to be determined *by the State*." S. Rep. No. 95-127, at 31 (emphasis added). ADEC's decision to gauge the economic impact of SCR in part by comparing its cost-effectiveness to "the range of costs being borne by similar sources under recent BACT determinations" was well within its discretion, J.A. 204, as was ADEC's decision to analogize the mine's primary power source to a rural Alaska utility. The EPA accordingly had no authority to force the State to consider "economic impacts" in a manner dictated by the EPA. *See American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1, 8-9 (D.C. Cir. 2002) (invalidating EPA rule requiring States to consider one of several enumerated statutory factors for determining best available retrofit technology ("BART") in a particular manner).

Moreover, the EPA's approach in criticizing ADEC's decision was itself contrary to the EPA's *own* published guidelines. According to the agency's New Source Review Workshop Manual—upon which "EPA and state permitting agencies widely rely," EPA 9th Cir. Br. 13 n.4—"[i]n the economic impact analysis, primary consideration should be given to quantifying the cost of control *and not the economic situation of the individual source.*" EPA, *New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting* (1990), at B.31 (Cert. Rec. 71-115) (emphasis added). *See also id*. ("the economic impact of [control] alternatives on the particular source under review should not be nearly as pertinent to the BACT decision making process as the average and, where appropriate, incremental cost effectiveness of the control alternative"). Sources "should demonstrate to the satisfaction of the permitting agency that costs of pollutant removal for the control alternative are disproportionately high when compared to the cost of control *for that particular pollutant*

and source in recent BACT determinations." *Id*. at B.32 (Cert. Rec. 71-116) (emphasis added). The EPA's Environmental Appeals Board (which hears challenges to PSD permits issued under the federal program) follows this approach: "We accept that cost-effectiveness is determined in most cases by showing that a control option * * * is either within or outside the range of costs being borne by similar sources under recent BACT determinations." *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 149 (EPA Envtl. App. Bd. 1994).

Applying the EPA's own criteria, ADEC determined that the cost of SCR on a per-ton-removal basis was nearly *double* that of the most expensive technology imposed as BACT to reduce NOx emissions from a similar type of diesel-fired electric generator in recent BACT determinations. J.A. 205-206. Indeed, although the EPA has maintained that the cost of SCR is "well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control," J.A. 150, the EPA has *never* been able to cite an example where SCR has been imposed as BACT to reduce NOx emissions from a similar source. *See* J.A. 142 ("EPA has not required SCR as BACT on a diesel-fired reciprocating engine in any case, nor has any state"). The EPA's inexplicable refusal to follow its own guidelines in this case practically defines arbitrary and capricious behavior. *See National Ass'n of Cas. & Surety Agents* v. *Board of Gov'rs of the Fed. Reserve Sys*., 856 F.2d 282, 287 (D.C. Cir. 1988) ("It is, of course, a fundamental precept of administrative law that agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.") (quotation and alteration omitted), *cert. denied*, 490 U.S. 1090 (1989).

The EPA may have analyzed the cost-effectiveness data differently than ADEC, and may not have found the utility analogy as compelling as ADEC did. In addition, the EPA

may not have been as concerned as ADEC to avoid imposing the higher costs of SCR on the only significant private sector source of year-round employment for hundreds of miles around. But the EPA cannot claim that ADEC's decision was "unreasoned." Nor can the EPA assert that ADEC's determination in any way results in emissions exceeding national standards or permitted increments. How to control emissions within those standards, without exceeding available increments, was for the State to decide.

The Ninth Circuit nevertheless held that the EPA had not acted arbitrarily or capriciously because, it concluded, ADEC *had*. Pet. App. 13a-16a. First, the court stated that the final TAR "reveals that there were no recent permit decisions involving BACT determinations for diesel engines used as primary power generators." Pet. App. 14a. That is erroneous; the final TAR specifically notes "four recent BACT determinations for diesel-electric generators used for primary power production" that imposed BACT controls with a cost-effectiveness ranging between $0 to $936 per ton of NOx removed. J.A. 205-206.

Compounding its error, the court next stated that "the cost-effectiveness of recent NOx control BACT decisions ranged from $0 to $7,000 per ton of NOx removed," and that the cost-effectiveness of SCR in this case was "well within the applicable range." Pet. App. 14a. The figure the court relied on, however, pertained to ADEC's recent BACT determinations for NOx control generally, not for NOx control for *similar* sources—*i.e.*, diesel-fired electric generators used for primary power generation. *See* J.A. 205-206. As just explained, the cost of controls for *similar* sources ranged between $0 to $936 per ton of NOx removed, less than half the estimated cost of SCR in this case—$2,100 per ton of NOx removed. As noted, the EPA itself considers cost-effectiveness in light of "the range of costs being borne by *similar* sources under recent BACT determinations." *In re*

Inter-Power of New York, Inc., 5 E.A.D. at 149 (emphasis added).

The court also cast aside ADEC's utility cost analysis, noting that "Cominco does not, in fact, buy power from an electric utility." Pet. App. 14a. Of course, that is just the point. The Red Dog Mine must supply its own electricity, and thus acts as its own utility. Because, as ADEC concluded, the costs of SCR would be "disproportionate" if imposed on a rural Alaska utility, by analogy those costs would be "disproportionate" if imposed on the mine. J.A. 206.

Lastly, the court turned to ADEC's consideration of the mine's importance to the local economy. The court was "uncomfortabl[e]" with this consideration, holding that it was not "an accepted justification" for rejecting SCR as BACT. Pet. App. 16a. But the CAA specifically directs that States consider "economic impacts" in determining BACT for a particular source. 42 U.S.C. § 7479(3). That includes the impact of a particular technology on "*anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis added). In recognizing the mine's importance to a region where few industries compete for the available increments, ADEC made precisely the sort of "growth-management decision[]" that was "left by Congress for resolution by the states." *Alabama Power*, 636 F.2d at 364.

* * *

The EPA's objection at the time it issued the orders in question was *not* that Alaska had failed to adequately explain its reasons for selecting Low NOx as BACT. Instead, the EPA simply preferred a different choice—SCR. That is clear from the EPA's December 10, 1999 Finding of Noncompliance and Order, which nowhere states that ADEC failed to provide a "reasoned justification" for selecting Low NOx, but instead simply asserts, in the "Findings of *Fact*" no less, that "SCR is BACT for the Wartsila diesel generators." Pet.

App. 30a (emphasis added), 34a. Far from appreciating that the determination of BACT is a policy-laden discretionary judgment to be made by someone else on a case-by-case basis after prioritizing and weighing a non-exclusive list of impacts and costs, 42 U.S.C. § 7479(3), the EPA view is that, as a *factual* matter, SCR is the "control technology of choice" and that "[o]nce a control technology has been determined to be BACT on a particular *type* of source, *i.e.*, an internal combustion engine, generally, that control technology should be considered economically feasible." J.A. 127, 129 (emphasis added). Indeed, despite Congress's unambiguous intent that the BACT determination be "strictly a State and local decision" made on a "case-by-case" basis "depending on site," S. Rep. No. 95-127, at 31, and Congress's decision "not to dictate a Federal response to balancing sometimes conflicting goals," H.R. Rep. No. 95-294, at 146, the EPA twice purported to justify its order substituting SCR as BACT on the ground that the EPA had a "responsibility to ensure national consistency." J.A. 148, 303. When it came to BACT, however, Congress had a different idea, and left that determination—"on a case-by-case basis"—to the States.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq*. provides, in pertinent part:

§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

* * *

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments;

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

* * *

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

* * *

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

* * *

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * *

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not

meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

* * *

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of

such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promul-gated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

* * *

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within

such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to

any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant

to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

* * *

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

* * *

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the

Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval,

disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

* * *

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * *

§ 7413. Federal enforcement

(a) In general

* * *

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such

failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

* * *

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;[1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

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[1] So in original. The semicolon probably should be a comma.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

* * *

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(l) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

* * *

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator

has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

* * *

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

* * *

§ 7477. Enforcement

The 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 this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

* * *

§ 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal

production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

* * *

(2)(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means 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 through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

Selected Provision of Title 40 of the Code of Federal Regulations, Part 52:

PART 52—PROTECTION OF THE ENVIRONMENT

Subpart C—Alaska

§ 52.96. Significant deterioration of air quality.

(a) The State of Alaska Department of Environmental Conservation Air Quality Control Regulations as in effect on June 2, 1988 (specifically 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900) and the State air quality control plan as in effect on June 2, 1988 (specifically, Section I.B. AIR QUALITY CONTROL REGIONS, Section I.C. ATTAINMENT/NONATTAINMENT DESIGNATIONS, Section I.D. PREVENTION OF SIGNIFICANT DETERIORATION DESIGNATIONS, Section IV.F. FACILITY REVIEW PROCEDURES, Section IV.G APPLICATION REVIEW AND PERMIT DEVELOPMENT, Section IV.H PERMIT ISSUANCE REQUIREMENTS, Appendix IV.1. PSD area Classification and Reclassification, and Appendix V ADEC Ambient Analysis Procedures), are approved as meeting the requirements of part C for preventing significant deterioration of air quality.

* * *

Selected Provisions of Chapter 50
of the Alaska Administrative Code
(1997)

CHAPTER 50—AIR QUALITY CONTROL

18 AAC 50.310. Construction permits: application.

* * *

(d) Prevention of Significant Deterioration Information. For a new facility classified under 18 AAC 50.300(c) or a modification classified under 18 AAC 50.300(h)(3) or (4), a construction permit application must include the following additional information for each air contaminant with an expected actual emissions increase greater than or equal to a quantity listed in 18 AAC 50.300(h)(3):

* * *

(3) a demonstration that the proposed limitation represents the best available control technology for each air contaminant and for each new or modified source;

* * *

18 AAC 50.990. Definitions.

* * *

(13) "best available control technology" means the emission limitation that represents the maximum reduction achievable for each regulated air contaminant, taking into account energy, environmental and economic impacts, and other costs; the resulting emissions must comply with applicable state and federal emission standards; best available control technology includes, for example, design features, equipment specifications, and work practices;