SUPREME COURT OF THE UNITED STATES

No. 02–658

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 21, 2004]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority of the Environmental Protection Agency (EPA or Agency) to enforce the provisions of the Clean Air Act's (CAA or Act) Prevention of Significant Deterioration (PSD) program. Under that program, no major air pollutant emitting facility may be constructed unless the facility is equipped with "the best available control technology" (BACT). As added by §165, 91 Stat. 735, and amended, 42 U. S. C. §7475(a)(4). BACT, as defined in the CAA, means, for any major air pollutant emitting facility, "an emission limitation based on the maximum degree of [pollutant] reduction . . . 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 [the] facility. . . ." §7479(3).

Regarding EPA oversight, the Act includes a general instruction and one geared specifically to the PSD program. The general prescription, §113(a)(5) of the Act, authorizes EPA, when it finds that a State is not complying with a CAA requirement governing construction of a

pollutant source, to issue an order prohibiting construction, to prescribe an administrative penalty, or to commence a civil action for injunctive relief. 42 U. S. C. §7413(a). Directed specifically to the PSD program, CAA §167 instructs EPA to "take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction" of a major pollutant emitting facility that does not conform to the PSD requirements of the Act. 42 U. S. C. §7477.

In the case before us, "the permitting authority" under §7479(3) is the State of Alaska, acting through Alaska's Department of Environmental Conservation (ADEC). The question presented is what role EPA has with respect to ADEC's BACT determinations. Specifically, may EPA act to block construction of a new major pollutant emitting facility permitted by ADEC when EPA finds ADEC's BACT determination unreasonable in light of the guides §7479(3) prescribes? We hold that the Act confers that checking authority on EPA.

I

A

Congress enacted the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U. S. C. §7401 *et seq.*, in response to "dissatisfaction with the progress of existing air pollution programs." *Union Elec. Co.* v. *EPA,* 427 U. S. 246, 249 (1976). The amendments aimed "to guarantee the prompt attainment and maintenance of specified air quality standards." *Ibid.;* D. Currie, Air Pollution §1.13, p. 1–16 (1981) (summary of 1970 amendments). Added by the 1970 amendments, §§108(a) and 109(a) of the Act require EPA to publish lists of emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and to promulgate primary and secondary national ambient air quality standards (NAAQS) for such pollutants. 42 U. S. C. §§7408(a)

and 7409(a); *Whitman* v. *American Trucking Assns., Inc.,* 531 U. S. 457, 462–463 (2001). NAAQS "define [the] levels of air quality that must be achieved to protect public health and welfare." R. Belden, Clean Air Act 6 (2001). The Agency published initial NAAQS in 1971, *Union Elec.,* 427 U. S., at 251 (citing 40 CFR pt. 50 (1975)), and in 1985, NAAQS for the pollutant at issue in this case, nitrogen dioxide. 40 CFR §50.11 (2002).[1]

Under §110 of the Act, also added in 1970, each State must submit for EPA approval "a plan which provides for implementation, maintenance, and enforcement of [NAAQS]." 42 U. S. C. §7410(a)(1); cf. §7410(c)(1) (EPA shall promulgate an implementation plan if the State's plan is inadequate). Relevant to this case, EPA has approved Alaska's implementation plan. 48 Fed. Reg. 30626 (1983), as amended, 56 Fed. Reg. 19288 (1991); 40 CFR §52.96(a) (2002). To gain EPA approval, a "state implementation plan" (SIP) must "include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable [CAA] requirements." 42 U. S. C. §7410(a)(2)(A). While States have "wide discretion" in formulating their plans, *Union Elec.*, 427 U. S., at 250, SIPs must include certain measures Congress specified "to assure that national ambient air quality standards are achieved," 42 U. S. C. §7410(a)(2)(C). Among those meas-

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[1] Emissions levels for nitrogen dioxide, a regulated pollutant under the Act, are defined in terms of quantities of all oxides of nitrogen. R. Belden, Clean Air Act 47, n. 11 (2001). "The term nitrogen oxides refers to a family of compounds of nitrogen and oxygen. The principal nitrogen oxides component present in the atmosphere at any time is nitrogen dioxides. Combustion sources emit mostly nitric oxide, with some nitrogen dioxide. Upon entering the atmosphere, the nitric oxide changes rapidly, mostly to nitrogen dioxide." EPA, Prevention of Significant Deterioration for Nitrogen Oxides, 53 Fed. Reg. 40656 (1988). Nitrogen oxides are also termed "NOx."

ures are permit provisions, §7475, basic to the administration of the program involved in this case, CAA's "Prevention of Significant Deterioration of Air Quality" (PSD) program.

The PSD requirements, enacted as part of 1977 amendments to the Act, Title I, §160 *et seq.*, 91 Stat. 731, "are designed to ensure that the air quality in attainment areas or areas that are already 'clean' will not degrade," Belden, *supra*, p. 43. See 42 U. S. C. §7470(1) (purpose of PSD program is to "protect public health and welfare from any actual or potential adverse effect which in [EPA's] judgment may reasonably be anticipate[d] to occur from air pollution . . . notwithstanding attainment and maintenance of all national ambient air quality standards"). Before 1977, no CAA provision specifically addressed potential air quality deterioration in areas where pollutant levels were lower than the NAAQS. *Alabama Power Co.* v. *Costle*, 636 F. 2d 323, 346–347 (CADC 1979). Responding to litigation initiated by an environmental group,[2] however, EPA issued regulations in 1974 requiring that SIPs include a PSD program. *Id.*, at 347, and n. 18 (citing 39 Fed. Reg. 42510 (1974)). Three years later, Congress adopted the current PSD program. See S. Rep. No. 95–127, p. 11 (1977) (Congress itself has "a responsibility to delineate a policy for protecting clean air").

The PSD program imposes on States a regime governing areas "designated pursuant to [42 U. S. C. §7407] as attainment or unclassifiable." §7471.[3] An attainment area is one in which the air "meets the national primary or secondary ambient air quality standard for [a regulated

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[2] *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (DC 1972), aff'd *per curiam*, 4 E. R. C. 1815, 2 Env. L. Rep. 20656 (CADC 1972), aff'd by an equally divided court *sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

[3] The PSD program also requires visibility control measures, 42 U. S. C. §§7491–7492, not at issue in this case.

pollutant]." §7407(d)(1)(A)(ii). Air in an unclassifiable area "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." §7407(d)(1)(A)(iii). Northwest Alaska, the region this case concerns, is classified as an attainment or unclassifiable area for nitrogen dioxide, 40 CFR §81.302 (2002), therefore, the PSD program applies to emissions of that pollutant in the region. In 2002, the Agency reported that "[a]ll areas of the country that once violated the NAAQS for [nitrogen dioxide] now meet that standard." EPA, Latest Findings on National Air Quality 7 (Aug. 2003).

Section 165 of the Act, 42 U. S. C. §7475, installs a permitting requirement for any "major emitting facility," defined to include any source emitting more than 250 tons of nitrogen oxides per year, §7479(1). No such facility may be constructed or modified unless a permit prescribing emission limitations has been issued for the facility. §7475(a)(1); see §7479(2)(C) (defining "construction" to include "modification"). Alaska's SIP imposes an analogous requirement. 18 Alaska Admin. Code §50.300(c)(1) (2003). Modifications to major emitting facilities that increase nitrogen oxide emissions in excess of 40 tons per year require a PSD permit. 40 CFR §51.166(b)(23)(i) (2002); 18 Alaska Admin. Code §50.300(h)(3)(B)(ii) (2003).

The Act sets out preconditions for the issuance of PSD permits. *Inter alia*, no PSD permit may issue unless "the proposed facility is subject to the best available control technology for each pollutant subject to [CAA] regulation . . . emitted from . . . [the] facility." 42 U. S. C. §7475(a)(4). As described in the Act's definitional provisions, "best available control technology" (BACT) means:

> "[A]n 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 . . . . 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 [emission standards for new and existing stationary sources]." §7479(3).

40 CFR §51.166(b)(12) (2002) (repeating statutory definition). Alaska's SIP contains provisions that track the statutory BACT requirement and definition. 18 Alaska Admin. Code §§50.310(d)(3) and 50.990(13) (2003). The State, with slightly variant terminology, defines BACT 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." *Ibid.* Under the federal Act, a limited class of sources must gain advance EPA approval for the BACT prescribed in the permit. 42 U. S. C. §7475(a)(8).

CAA also provides that a PSD permit may issue only if a source "will not cause, or contribute to, air pollution in excess of any . . . maximum allowable increase or maximum allowable concentration for any pollutant" or any NAAQS. §7475(a)(3). Congress left to the Agency the determination of most maximum allowable increases, or "increments," in pollutants. EPA regulations have defined increments for nitrogen oxides. 40 CFR §51.166(c) (2002). Typically, to demonstrate that increments will not be exceeded, applicants use mathematical models of pollutant plumes, their behavior, and their dispersion. Westbrook,

Air Dispersion Models: Tools to Assess Impacts from Pollution Sources, 13 Natural Resources & Env. 546, 547–548 (1999).

Among measures EPA may take to ensure compliance with the PSD program, two have special relevance here. The first prescription, §113(a)(5) of the Act, provides that "[w]henever, on the basis of any available information, [EPA] 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," EPA 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)(A).[4] The second measure, §167 of the Act, trains on enforcement of the PSD program; it requires EPA to "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 [PSD] requirements." §7477.

B

Teck Cominco Alaska, Inc. (Cominco), operates a zinc concentrate mine, the Red Dog Mine, in northwest Alaska approximately 100 miles north of the Arctic Circle and close to the native Alaskan villages of Kivalina and Noatak. App. to Pet. for Cert. 3a; Brief for Petitioner 8; Brief for Respondents 4. The mine is the region's largest private employer. Brief for Petitioner 9. It supplies a quarter of the area's wage base. *Ibid.* Cominco leases the

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[4] As enacted in 1977, §113(a)(5) extended only to solid waste combustion and sources in nonattainment areas. See Title I, §111(a), 91 Stat. 685. Congress extended §113(a)(5) in 1990 amendments to the Act to cover attainment areas, and thus to encompass enforcement of PSD permitting requirements. Title VII, 104 Stat. 2672.

land from the NANA Regional Corporation, an Alaskan corporation formed pursuant to the Alaska Native Claims Settlement Act, 85 Stat. 688, as amended, 43 U. S. C. §1601 *et seq.* Brief for NANA Regional Corporation, Inc., as *Amicus Curiae* 1–2, 4.

In 1988, Cominco obtained authorization to operate the mine, a "major emitting facility" under the Act and Alaska's SIP. App. 106. The mine's PSD permit authorized five 5,000 kilowatt Wartsila diesel electric generators, MG–1 through MG–5, subject to operating restrictions; two of the five generators were permitted to operate only in standby status. *Ibid.* Petitioner Alaska Department of Environmental Conservation (ADEC) issued a second PSD permit in 1994 allowing addition of a sixth full-time generator (MG–6), removing standby status from MG–2, and imposing a new operational cap that allowed all but one generator to run full time. *Ibid.*

In 1996, Cominco initiated a project, with funding from the State, to expand zinc production by 40%. Brief for Petitioner 5; Reply Brief for Petitioner 11, n. 9. Anticipating that the project would increase nitrogen oxide emissions by more than 40 tons per year, see *supra*, at 5, Cominco applied to ADEC for a PSD permit to allow, *inter alia*, increased electricity generation by its standby generator, MG–5. App. 107–108; App. to Pet. for Cert. 33a. On March 3, 1999, ADEC preliminarily proposed as BACT for MG–5 the emission control technology known as selective catalytic reduction (SCR),[5] which reduces nitrogen oxide emissions by 90%. App. 72, 108. In response, Cominco amended its application to add a seventh genera-

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[5] SCR requires injections of "ammonia or urea into the exhaust before the exhaust enters a catalyst bed made with vanadium, titanium, or platinum. The reduction reaction occurs when the flue gas passes over the catalyst bed where the NOx and ammonia combine to become nitrogen, oxygen, and water . . . ." App. 71.

tor, MG–17, and to propose as BACT an alternative control technology—Low NOx[6]—that achieves a 30% reduction in nitrogen oxide pollutants. Brief for Respondents 5, and n. 1; App. 84.

On May 4, 1999, ADEC, in conjunction with Cominco's representative, issued a first draft PSD permit and preliminary technical analysis report that concluded Low NOx was BACT for MG–5 and MG–17. *Id.,* at 55–95. To determine BACT, ADEC employed EPA's recommended top-down methodology, *id.*, at 61:

> "In brief, the top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent—or 'top'—alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not 'achievable' in that case. If the most stringent technology is eliminated in this fashion, then the next most stringent alternative is considered, and so on." EPA, New Source Review Workshop Manual B2 (Draft Oct. 1990) (hereinafter New Source Review Manual); App. 61–62.[7]

Applying top-down methodology, ADEC first homed in on SCR as BACT for MG–5, and the new generator, MG–

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[6] In Low NOx, changes are made to a generator to improve fuel atomization and modify the combustion space to enhance the mixing of air and fuel. *Id.,* at 75.

[7] Nothing in the Act or its implementing regulations mandates top-down analysis. See 42 U. S. C. §7479(3); 40 CFR §52.21(j) (2002). EPA represents that permitting authorities "commonly" use top-down methodology. Brief for Respondents 3.

17. "[W]ith an estimated reduction of 90%," ADEC stated, SCR "is the most stringent" technology. *Id.,* at 79. Finding SCR "technically and economically feasible," *id.*, at 65, ADEC characterized as "overstated" Cominco's cost estimate of $5,643 per ton of nitrogen oxide removed by SCR. *Id.*, at 113. Using Cominco's data, ADEC reached a cost estimate running between $1,586 and $2,279 per ton. *Id.*, at 83. Costs in that range, ADEC observed, "are well within what ADEC and EPA conside[r] economically feasible." *Id.*, at 84. Responding to Cominco's comments on the preliminary permit, engineering staff in ADEC's Air Permits Program pointed out that, according to information Cominco provided to ADEC, "SCR has been installed on similar diesel-fired engines throughout the world." *Id.*, at 102.

Despite its staff's clear view "that SCR (the most effective individual technology) [was] technologically, environmentally, and economically feasible for the Red Dog power plant engines," *id.*, at 103–104, ADEC endorsed the alternative proffered by Cominco. To achieve nitrogen oxide emission reductions commensurate with SCR's 90% impact, Cominco proposed fitting the new generator MG–17 and the six existing generators with Low NOx. *Ibid.*[8] Cominco asserted that it could lower net emissions by 396 tons per year if it fitted all seven generators with Low NOx rather than fitting two (MG–5 and MG–17) with SCR and choosing one of them as the standby unit. *Id.,* at 87. Cominco's proposal hinged on the "assumption . . . that under typical operating conditions one or more engines will not be running due to maintenance of standby-generation capacity." *Ibid.* If all seven generators ran

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[8]Two generators already were fitted with a technology called Fuel Injection Timing Retard that results in a 20% to 30% reduction in nitrogen oxide emissions. App. 75–76, 86.

continuously, however, Cominco's alternative would increase emissions by 79 tons per year. *Ibid.* Accepting Cominco's submission, ADEC stated that Cominco's Low NOx solution "achieve[d] a similar maximum NOx reduction as the most stringent controls; [could] potentially result in a greater NOx reduction; and is logistically and economically less onerous to Cominco." *Id.*, at 87–88.

On the final day of the public comment period, July 2, 1999, the United States Department of the Interior, National Parks Service (NPS), submitted comments to ADEC. App. to Pet. for Cert. 33a; App. 97, 108. NPS objected to the projected offset of new emissions from MG–5 and MG–17 against emissions from other existing generators that were not subject to BACT. Letter from John Notar, NPS Air Resources Division, to Jim Baumgartner, ADEC (June 2, 1999). Such an offset, NPS commented, "is neither allowed by BACT, nor achieves the degree of reduction that would result if all the generators that are subject to BACT were equipped with SCR." *Id.*, at 3. NPS further observed that the proposed production-increase project would remove operating restrictions that the 1994 PSD permit had placed on four of the existing generators—MG–1, MG–3, MG–4, and MG–5. App. to Pet. for Cert. 34a. Due to that alteration, NPS urged, those generators, too, became part of the production-expansion project and would be subject to the BACT requirement. *Ibid.*

Following NPS' lead, EPA wrote to ADEC on July 29, 1999, commenting: "Although ADEC states in its analysis that [SCR], the most stringent level of control, is economically and technologically feasible, ADEC did not propose to require SCR. . . . [O]nce it is determined that an emission unit is subject to BACT, the PSD program does not allow the imposition of a limit that is less stringent than BACT." App. 96–97. A permitting authority, EPA agreed with NPS, could not offset new emissions "by imposing new

controls on other emission units" that were not subject to BACT. *Id.*, at 97. New emissions could be offset only against reduced emissions from sources covered by the same BACT authorization. *Id.*, at 285–286. EPA further agreed with NPS that, based on the existing information, BACT would be required for MG–1, MG–3, MG–4, and MG–5. *Id.*, at 97.

After receiving EPA comments, ADEC issued a second draft PSD permit and technical analysis report on September 1, 1999, again finding Low NOx to be BACT for MG–17. *Id.,* at 105–117. Abandoning the emissions-offsetting justification advanced in the May 4 draft permit, ADEC agreed with NPS and EPA that "emission reductions from sources that were not part of the permit action," here MG–1, MG–2, MG–3, MG–4, MG–5, and MG–6, could not be considered in determining BACT for MG–17. *Id.*, at 111; *id.*, at 199 (same).[9]

ADEC conceded that, lacking data from Cominco, it had made "no judgment . . . as to the impact of . . . [SCR] on the operation, profitability, and competitiveness of the Red Dog Mine." *Id.*, at 116. Contradicting its May 1999 conclusion that SCR was "technically and economically feasible," see *supra,* at 10, ADEC found in September 1999 that SCR imposed "a disproportionate cost" on the mine. App. 116. ADEC concluded, on a "cursory review," that requiring SCR for a rural Alaska utility would lead to a 20% price increase, and that in comparison with other BACT

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[9]Rather than subject MG–1, MG–3, MG–4, and MG–5 to BACT, ADEC and Cominco "agreed to permit conditions that would require low NOx controls on MG–1, MG–3, MG–4, and MG–5, and emission limits that reflect the previous 'bubbled' limits. Under this approach, the permit would result in no increase in actual or allowable emissions from any of these engines and the installation of BACT would not be necessary for these four units." *Id.,* at 149. EPA found no cause to question this ADEC-Cominco agreement. *Ibid.*

technologies, SCR came at a "significantly higher" cost. *Ibid.* No economic basis for a comparison between the mine and a rural utility appeared in ADEC's technical analysis.

EPA protested the revised permit. In a September 15, 1999, letter, the Agency stated: "Cominco has not adequately demonstrated any site-specific factors to support their claim that the installation of [SCR] is economically infeasible at the Red Dog Mine. Therefore, elimination of SCR as BACT based on cost-effectiveness grounds is not supported by the record and is clearly erroneous." *Id.*, at 127; see *id.*, at 138 (ADEC's record does not support the departure from ADEC's initial view that the costs for SCR were economically feasible).

To justify the September 1, 1999, permit, EPA suggested, ADEC could "include an analysis of whether requiring Cominco to install and operate [SCR] would have any adverse economic impacts upon Cominco specifically." *Id.*, at 127. Stating that such an inquiry was unnecessary and expressing "concerns related to confidentiality," Cominco declined to submit financial data. *Id.*, at 134. In this regard, Cominco simply asserted, without detail, that the company's "overall debt remains quite high" despite continuing profits. *Id.*, at 134–135. Cominco also invoked the need for "[i]ndustrial development in rural Alaska." *Id.*, at 135.

On December 10, 1999, ADEC issued the final permit and technical analysis report. Once again, ADEC approved Low NOx as BACT for MG–17 "[t]o support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region." *Id.*, at 208. ADEC did not include the economic analysis EPA had suggested. *Id.*, at 152–246. Indeed, ADEC conceded again that it had made "no judgment . . . as to the impact of . . . [SCR's] cost on the operation, profitability, and competitiveness of the Red Dog Mine." *Id.*, at 207. Nonetheless,

ADEC advanced, as cause for its decision, SCR's adverse effect on the mine's "unique and continuing impact on the economic diversity of th[e] region" and on the venture's "world competitiveness." *Id.*, at 208. ADEC did not explain how its inferences of adverse effects on the region's economy or the mine's "world competitiveness" could be made without financial information showing SCR's impact on the "operation, profitability, and competitiveness" of the mine. *Id.*, at 207, 299. Instead, ADEC reiterated its rural Alaska utility analogy, and again compared SCR's cost to the costs of other, less stringent, control technologies. *Id.*, at 205–207.

The same day, December 10, 1999, EPA issued an order to ADEC, under §§113(a)(5) and 167 of the Act, 42 U. S. C. §§7413(a)(5) and 7477, prohibiting ADEC from issuing a PSD permit to Cominco "unless ADEC satisfactorily documents why SCR is not BACT for the Wartsila diesel generator [MG–17]." App. to Pet. for Cert. 36a. In the letter accompanying the order, the Agency stated that "ADEC's own analysis supports the determination that BACT is [SCR], and that ADEC's decision in the proposed permit therefore is both arbitrary and erroneous." App. 149.

On February 8, 2000, EPA, again invoking its authority under §§113(a)(5) and 167 of the Act, issued a second order, this time prohibiting Cominco from beginning "construction or modification activities at the Red Dog mine." App. to Pet. for Cert. 49a. A third order, issued on March 7, 2000, superseding and vacating the February 8 order, generally prohibited Cominco from acting on ADEC's December 10 PSD permit but allowed limited summer construction. *Id.*, at 62a–64a. On April 25, 2000, EPA withdrew its December 10 order. App. 300; App. to Pet. for Cert. 6a. Once ADEC issued the permit, EPA explained, that order lacked utility. On July 16, 2003, ADEC granted Cominco a PSD permit to construct MG–17

with SCR as BACT. Letter from Theodore B. Olson, Solicitor General, to William K. Suter, Clerk of the Court (Aug. 21, 2003). Under the July 16, 2003, permit, SCR ceases to be BACT "if and when the case currently pending before the Supreme Court of the United States of America is decided in favor of the State of Alaska." ADEC, Air Quality Construction Permit, Final Technical Analysis Report, Permit No. 9932–AC005, Revision 2, p. 7.

The day EPA issued its first order against Cominco, February 8, 2000, ADEC and Cominco petitioned the Court of Appeals for the Ninth Circuit for review of EPA's orders. App. 11. The Agency initially moved to dismiss, urging that the Court of Appeals lacked subject-matter jurisdiction. In an order released March 27, 2001, the Ninth Circuit concluded that it had adjudicatory authority pursuant to 42 U. S. C. §7607(b)(1), which lodges jurisdiction over challenges to "any . . . final [EPA] action" in the Courts of Appeals. *Alaska* v. *United States EPA*, 244 F. 3d 748, 750–751.[10]

The Court of Appeals resolved the merits in a judgment released July 30, 2002. 298 F. 3d 814 (CA9). It held that EPA had authority under §§113(a)(5) and 167 to issue the contested orders, and that the Agency had properly exercised its discretion in doing so. *Id.,* at 820–823. Concerning EPA's authority under §§113(a)(5) and 167, the Court of Appeals observed first that "the question presented is what requirements the *state* must meet" under the Act to issue a PSD permit, not what the correct BACT might be. *Id.*, at 821 (emphasis in original). Concluding that EPA had "authority to determine the reasonableness or ade-

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[10] At oral argument, counsel for EPA confirmed that the Agency no longer questions the Court of Appeals' adjudicatory authority, satisfied that the finality requirement was met because the stop-construction order imposed "new legal obligations on Cominco." Tr. of Oral Arg. 43–44 (punctuation omitted).

quacy of the state's justification for its decision," the Court of Appeals emphasized that the "provision of a reasoned justification" by a permitting authority is undeniably a "requirement" of the Act. *Ibid.* EPA had properly exercised its discretion in issuing the three orders, the Ninth Circuit ultimately determined, because (1) Cominco failed to "demonstrat[e] that SCR was economically infeasible," and (2) "ADEC failed to provide a reasoned justification for its elimination of SCR as a control option." *Id.*, at 823. We granted certiorari, 537 U. S. 1186 (2003), to resolve an important question of federal law, *i.e.*, the scope of EPA's authority under §§113(a)(5) and 167, and now affirm the Ninth Circuit's judgment.

II

ADEC contested EPA's orders under 42 U. S. C. §7607(b)(1), which renders reviewable in the appropriate federal court of appeals any EPA "final action." Before the Ninth Circuit, EPA unsuccessfully urged that its orders were "interlocutory," and therefore unreviewable in court unless and until EPA chose to commence an enforcement action.[11] A pre-enforcement contest could be maintained in the Court of Appeals under §7607(b)(1), the Ninth Circuit held, for in the circumstances presented, EPA's actions had the requisite finality.

It was undisputed, the Court of Appeals observed, that EPA had spoken its "'last word'" on whether ADEC had adequately justified its conclusion that Low NOx was the best available control technology for the MG–17 generator. 244 F. 3d, at 750. Further, EPA's orders effectively halted construction of the MG–17 generator, for Cominco would risk civil and criminal penalties if it defied a valid EPA directive.

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[11] Such an action would lie in district court, under 42 U. S. C. §7413(b).

In this Court, EPA agrees with the Ninth Circuit's finality determination. See Brief for Respondents 16–20; Tr. of Oral Arg. 43–44. We are satisfied that the Court of Appeals correctly applied the guides we set out in *Bennett* v. *Spear*, 520 U. S. 154, 177–178 (1997) (to be "final," agency action must "mark the 'consummation' of the agency's decisionmaking process," and must either determine "rights or obligations" or occasion "legal consequences" (internal quotation marks omitted)). As the Court of Appeals stated, EPA had "asserted its final position on the factual circumstances" underpinning the Agency's orders, 244 F. 3d, at 750, and if EPA's orders survived judicial review, Cominco could not escape the practical and legal consequences (lost costs and vulnerability to penalties) of any ADEC-permitted construction Cominco endeavored, *ibid.*

No question has been raised here, we note, about the adequacy of EPA's preorder procedures under the Due Process Clause or the Administrative Procedure Act. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U. S. 519, 544 (1978) (agencies have authority to "fashion their own rules of procedure," even when a statute does not specify what process to use). Furthermore, in response to ADEC's initial contention that the record was incomplete, the Ninth Circuit gave EPA an opportunity to supplement the record, and thereafter obtained from all parties agreement "that the record as it stood was adequate to resolve [ADEC's review petition]." 298 F. 3d, at 818.

III

A

Centrally at issue in this case is the question whether EPA's oversight role, described by Congress in CAA §§113(a)(5) and 167, see *supra*, at 7, extends to ensuring that a state permitting authority's BACT determination is

reasonable in light of the statutory guides. Sections 113(a)(5) and 167 lodge in the Agency encompassing supervisory responsibility over the construction and modification of pollutant emitting facilities in areas covered by the PSD program. 42 U. S. C. §§7413(a)(5) and 7477. In notably capacious terms, Congress armed EPA with authority to issue orders stopping construction when "a State is not acting in compliance with any [CAA] requirement or prohibition . . . relating to the construction of new sources or the modification of existing sources," §7413(a)(5), or when "construction or modification of a major emitting facility . . . does not conform to the requirements of [the PSD program]," §7477.

The federal Act enumerates several "[p]reconstruction requirements" for the PSD program. §7475. Absent these, "[n]o major emitting facility . . . may be constructed." *Ibid.* One express preconstruction requirement is inclusion of a BACT determination in a facility's PSD permit. §§7475(a)(1) and (4). As earlier set out, see *supra*, at 5–6, the Act defines BACT as "an emission limitation based on the maximum degree of reduction of [a] 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 [a] facility." §7479(3). Under this formulation, the permitting authority, ADEC here, exercises primary or initial responsibility for identifying BACT in line with the Act's definition of that term.

All parties agree that one of the "many requirements in the PSD provisions that the EPA may enforce" is "that a [PSD] permit contain a BACT limitation." Brief for Petitioner 34; see *id.*, at 22, 25 (same). See also Brief for Respondents 23. It is therefore undisputed that the Agency may issue an order to stop a facility's construction if a PSD permit contains no BACT designation.

EPA reads the Act's definition of BACT, together with

CAA's explicit listing of BACT as a "[p]reconstruction requiremen[t]," to mandate not simply *a* BACT designation, but a determination of BACT faithful to the statute's definition. In keeping with the broad oversight role §§113(a)(5) and 167 vest in EPA, the Agency maintains, it may review permits to ensure that a State's BACT determination is reasonably moored to the Act's provisions. See *id.,* at 24. We hold, as elaborated below, that the Agency has rationally construed the Act's text and that EPA's construction warrants our respect and approbation.

BACT's statutory definition requires selection of an emission control technology that results in the "maximum" reduction of a pollutant "achievable for [a] facility" in view of "energy, environmental, and economic impacts, and other costs." 42 U. S. C. §7479(3). This instruction, EPA submits, cabins state permitting authorities' discretion by granting only "authority to make *reasonable* BACT determinations," Brief for Respondents 27 (emphasis in original), *i.e.*, decisions made with fidelity to the Act's purpose "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources," 42 U. S. C. §7470(3). Noting that state permitting authorities' statutory discretion is constrained by CAA's strong, normative terms "maximum" and "achievable," §7479(3),[12] EPA reads §§113(a)(5) and 167 to empower the federal Agency to check a state agency's unreasonably lax BACT designation. See Brief for Respondents 27.

EPA stresses Congress' reason for enacting the PSD

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[12] Formulations similar to the BACT definition's "maximum degree of [pollutant] reduction . . . achievable" appear in the Act's standards for new sources in nonattainment areas, 42 U. S. C. §§7501(3) and 7503(a)(2) ("lowest achievable emission rate") (internal quotation marks omitted), and its technology-based standard for hazardous emissions, §7412(d)(2) ("maximum degree of reduction . . . achievable").

program—to prevent significant deterioration of air quality in clean-air areas within a State and in neighboring States. §§7470(3), (4); see *id.,* at 33. That aim, EPA urges, is unlikely to be realized absent an EPA surveillance role that extends to BACT determinations. The Agency notes in this regard a House Report observation:

> "Without national guidelines for the prevention of significant deterioration a State deciding to protect its clean air resources will face a double threat. The prospect is very real that such a State would lose existing industrial plants to more permissive States. But additionally the State will likely become the target of "economic-environmental blackmail" from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls." H. R. Rep. No. 95–294, p. 134 (1977).

The House Report further observed that "a community that sets and enforces strict standards may still find its air polluted from sources in another community or another State." *Id.*, at 135 (quoting 116 Cong. Rec. 32909 (1970)). Federal agency surveillance of a State's BACT designation is needed, EPA asserts, to restrain the interjurisdictional pressures to which Congress was alert. See Brief for Respondents 33–34, 43; Brief for Vermont et al. as *Amici Curiae* 12 ("If EPA has authority to ensure a reasonable level of consistency among BACT determinations nationwide, then every State can feel more confident about maintaining stringent standards without fear of losing its current industry or alienating prospective industry.").

The CAA construction EPA advances in this litigation is reflected in interpretive guides the Agency has several times published. See App. 268–269 (1983 EPA PSD guidance memorandum noting the Agency's "oversight function"); *id.*, at 274 (1988 EPA guidance memorandum stat-

ing EPA may find a BACT determination deficient if it is "not based on a reasoned analysis"); *id.*, at 281–282 (1993 guidance memorandum stating that "EPA acts to ensure that the state exercises its discretion within the bounds of the law" (internal quotation marks omitted); as to BACT, EPA will not intervene if the state agency has given "a reasoned justification for the basis of its decision" (internal quotation marks omitted)). See also Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 63 Fed. Reg. 13797 (1998) (EPA will "review whether any determination by the permitting authority was made on reasonable grounds properly supported on the record, described in enforceable terms, and consistent with all applicable requirements"). We "normally accord particular deference to an agency interpretation of 'long-standing' duration," *Barnhart* v. *Walton,* 535 U. S. 212, 220 (2002) (quoting *North Haven Bd. of Ed.* v. *Bell,* 456 U. S. 512, 522, n. 12 (1982)), recognizing that "well-reasoned views" of an expert administrator rest on "'a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *Bragdon* v. *Abbott,* 524 U. S. 624, 642 (1998) (quoting *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 139–140 (1944)).

We have previously accorded dispositive effect to EPA's interpretation of an ambiguous CAA provision. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 865–866 (1984); *Union Elec.,* 427 U. S., at 256. The Agency's interpretation in this case, presented in internal guidance memoranda, however, does not qualify for the dispositive force described in *Chevron*. See *Christensen* v. *Harris County,* 529 U. S. 576, 587 (2000) ("Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); accord, *United States* v. *Mead Corp.,* 533 U. S. 218,

234 (2001). Cogent "administrative interpretations . . . not [the] products of formal rulemaking . . . nevertheless warrant respect." *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler,* 537 U. S. 371, 385 (2003). We accord EPA's reading of the relevant statutory provisions, §§7413(a)(5), 7470(3), 7470(4), 7475(a)(4), 7477, and 7479(3), that measure of respect.

B

ADEC assails the Agency's construction of the Act on several grounds. Its arguments do not persuade us to reject as impermissible EPA's longstanding, consistently maintained interpretation.

ADEC argues that the statutory definition of BACT, §7479(3), unambiguously assigns to "the permitting authority" alone determination of the control technology qualifying as "best available." Brief for Petitioner 21–26. Because the Act places responsibility for determining BACT with "the permitting authority," ADEC urges, CAA excludes federal Agency surveillance reaching the substance of the BACT decision. *Id.*, at 22–25. EPA's enforcement role, ADEC maintains, is restricted to the requirement "that the permit contain a BACT limitation." *Id.*, at 34.

Understandably, Congress entrusted state permitting authorities with initial responsibility to make BACT determinations "case-by-case." §7479(3). A state agency, no doubt, is best positioned to adjust for local differences in raw materials or plant configurations, differences that might make a technology "unavailable" in a particular area. But the fact that the relevant statutory guides—"maximum" pollution reduction, considerations of energy, environmental, and economic impacts—may not yield a "single, objectively 'correct' BACT determination," *id.,* at 23, surely does not signify that there can be no *unreasonable* determinations. Nor does Congress' sensitivity to

site-specific factors necessarily imply a design to preclude in this context meaningful EPA oversight under §§113(a)(5) and 167. EPA claims no prerogative to designate the correct BACT; the Agency asserts only the authority to guard against unreasonable designations. See 298 F. 3d, at 821 ("the question presented is what requirements the *state* must meet," not what final substantive decision the State must make (emphasis in original)).[13]

Under ADEC's interpretation, EPA properly inquires whether a BACT determination appears in a PSD permit,

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[13] The dissent admonishes that "a statute is to be read as a whole." *Post*, at 3 (quoting *King* v. *St. Vincent's Hospital,* 502 U. S. 215, 221 (1991)). We give that unexceptional principle effect by attending both to the unequivocal grant of supervisory authority to EPA in §§113(a)(5) and 167, and to the statutory control on permitting authorities' discretion contained in the BACT definition, 42 U. S. C. §7479(3). It is, moreover, "a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews,* 534 U. S. 19, 31 (2001) (quoting *Duncan* v. *Walker,* 533 U. S. 167, 174 (2001)). The Act instructs permitting authorities to identify the "best," "maximum" emission reduction technique, taking account of costs. 42 U. S. C. §7479(3). The dissent does not explain how that instruction can be construed as something other than a constraint on permitting authorities' discretion. Ultimately, the dissent recognizes the essential statutory requirement: selection of "the technology that can *best* reduce pollution within practical constraints." *Post*, at 4 (emphasis added).

Nor do we find enlightening Congress' inclusion of the word "determines" in the BACT definition. *Post,* at 2. Even under the dissent's view of the Act, state permitting authorities' BACT determinations are not "conclusiv[e] and authoritativ[e]." *Ibid.* (internal quotation marks and citation omitted). As the dissent develops at length, review of such BACT determinations may be sought in state court. *Post,* at 7–11; Alaska Stat. §44.62.560 (2002). And EPA actions, of course, are subject to "the process of judicial review," see *post*, at 1, Congress empowered federal courts to provide, here in 42 U. S. C. §7607(b)(1). See *supra*, at 16–17.

Brief for Petitioner 34, but not whether that BACT determination "was made on reasonable grounds properly supported on the record," 63 Fed. Reg., at 13797. Congress, however, vested EPA with explicit and sweeping authority to enforce CAA "requirements" relating to the construction and modification of sources under the PSD program, including BACT. We fail to see why Congress, having expressly endorsed an expansive surveillance role for EPA in two independent CAA provisions, would then implicitly preclude the Agency from verifying substantive compliance with the BACT provisions and, instead, limit EPA's superintendence to the insubstantial question whether the state permitting authority had uttered the key words "BACT."

We emphasize, however, that EPA's rendition of the Act's less than crystalline text leaves the "permitting authority" considerable leeway. The Agency acknowledges "the need to accord appropriate deference" to States' BACT designations, Brief for Respondents 43, and disclaims any intention to "'second guess' state decisions," 63 Fed. Reg., at 13797. Only when a state agency's BACT determination is "not based on a reasoned analysis," App. 274, may EPA step in to ensure that the statutory requirements are honored.[14] EPA adhered to that limited role here, ex-

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[14] According to the Agency, "[i]t has proven to be relatively rare that a state agency has put EPA in the position of having to exercise [its] authority," noting that only two other reported judicial decisions concern EPA orders occasioned by States' faulty BACT determinations. Brief for Respondents 30, and n. 9 (citing *Allsteel, Inc.* v. *EPA*, 25 F. 3d 312 (CA6 1994), and *Solar Turbines Inc.* v. *Seif*, 879 F. 2d 1073 (CA3 1989)). EPA's restrained and moderate use of its authority hardly supports the dissent's speculation that the federal Agency will "displac[e]" or "degrad[e]" state agencies or relegate them to the performance of "ministerial" functions. *Post*, at 14, 16–17. Nor has EPA ever asserted authority to override a state-court judgment. Cf. *post*, at 10. Preclusion principles, we note in this regard, unquestionably do apply

plaining why ADEC's BACT determination was "arbitrary" and contrary to ADEC's own findings. *Id.,* at 149–150. EPA's limited but vital role in enforcing BACT is consistent with a scheme that "places primary responsibilities and authority with the States, backed by the Federal Government." S. Rep. No. 95–127, p. 29.

ADEC also points to 42 U. S. C. §7475(a)(8), a provision of the Act expressly requiring, in a limited category of cases, EPA approval of a state permitting authority's BACT determination before a facility may be constructed. See Brief for Petitioner 25; Reply Brief for Petitioner 6. Had Congress intended EPA superintendence of BACT determinations, ADEC urges, Congress would have said so expressly by mandating Agency approval of all, not merely some, BACT determinations. Brief for Petitioner 25–26. ADEC's argument overlooks the obvious difference between a statutory *requirement*, *e.g.*, §7475(a)(8), and a statutory *authorization*. Sections 113(a)(5) and 167 sensibly do not require EPA approval of all state BACT determinations, they simply authorize EPA to act in the unusual case in which a state permitting authority has determined BACT arbitrarily. EPA recognizes that its authorization to issue a stop order may be exercised only when a state permitting authority's decision is unreasonable; in contrast, a required approval may be withheld if EPA would come to a different determination on the merits. See, *e.g.*, 57 Fed. Reg. 28095 (1992) ("EPA acknowledges that states have the primary role in administering and enforcing the various components of the PSD program. States have been largely successful in this effort, and EPA's involvement in interpretative and enforcement issues is limited to only a small number of cases.").

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against the United States, its agencies and officers. See, *e.g.*, *Montana* v. *United States,* 440 U. S. 147 (1979).

Even if the Act imposes a requirement of reasoned justification for a BACT determination, ADEC ultimately argues, such a requirement may be enforced only through state administrative and judicial processes. Brief for Petitioner 34–38.[15] State review of BACT decisions, according to ADEC, allows development of an adequate factual record, properly imposes the burden of persuasion on EPA when it challenges a State's BACT determination, and promotes certainty. *Id.*, at 36–37. Unless EPA review of BACT determinations is channeled into state administrative and judicial forums, ADEC suggests, "there is nothing to prevent the EPA from invalidating a BACT determination at any time—months, even years, after a permit has been issued." *Id.*, at 35.

It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court. We decline to read such an uncommon regime into the Act's silence. EPA, the expert federal agency charged

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[15] From the availability of state-court judicial review, the dissent concludes, it necessarily "follows that EPA . . . must take the same procedural steps," of filing suit in state court, as any other person or entity seeking to challenge the issuance of a PSD permit. *Post*, at 8. Interpreted otherwise, the dissent asserts, the Act contains a "loophole" that allows an EPA "end run around the State's process." *Post,* at 10. In designing the Act, however, Congress often gave EPA a choice of enforcement measures. For example, EPA has three options to address a failure to comply with new source requirements. Compare 42 U. S. C. §7413(a)(5)(A) (EPA may "issue an order prohibiting the construction or modification of any major stationary source"), with §7413(a)(5)(B) (EPA may "issue an administrative penalty order"), and §7413(a)(5)(C) (EPA may "bring a civil action"). Other sections of the Act provide EPA with similar options. See, *e.g.*, §§7413(a)(1)–(a)(3). Following the dissent's logic, EPA's authority to bring a civil action would rule out, as a "loophole," its authority to issue a stop-construction order.

Moreover, the existence of concurrent authority is hardly at odds with the Act. As ADEC itself concedes, EPA can issue a checking order if a PSD permit lacks a BACT determination, Brief for Petitioner 34, even if state-court jurisdiction could be invoked instead.

with enforcing the Act, has interpreted the BACT provisions and its own §§113(a)(5) and 167 enforcement powers not to require recourse to state processes before stopping a facility's construction. See *supra*, at 17–21. That rational interpretation, we agree, is surely permissible.[16]

Nor are we persuaded by ADEC's practical concerns. We see no reason to conclude that an appropriate record generally cannot be developed to allow informed federal-court review when EPA disputes a BACT decision's reasonableness. ADEC contends that, in this very case, "the State's BACT determination was reviewed by the Ninth Circuit on an incomplete record." Brief for Petitioner 37. ADEC, however, offers no particulars to back up its assertion that the Court of Appeals proceeded on an inadequate evidentiary record. We note again that the Ninth Circuit ordered EPA to submit a complete administrative record. 298 F. 3d, at 818. After the Agency declared that the record was complete, "all the parties effectively agreed that the record as it stood was adequate to resolve the issues on appeal." *Ibid.*

As to the burdens of production and persuasion, nothing in the Act suggests that EPA gains a proof-related tactical advantage by issuing a stop-construction order instead of seeking relief through a civil action. But cf. *post*, at 9 (EPA authority to issue stop-construction orders creates "the anomaly of shifting the burden of pleading and of initiating litigation from EPA to the State"). Correspondingly, nothing in our decision today invites or permits EPA to achieve an unfair advantage through its choice of litigation forum. In granting EPA a choice between initiating a

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[16] Experience, we have already noted, see *supra*, at 24–25, n. 14, affords no grounding for the dissent's predictions that EPA oversight, which is undeniably subject to federal-court review, will "rewor[k] . . . the balance between State and Federal Governments" and threaten state courts' independence. *Post*, at 10–12.

civil action and exercising its stop-construction-order authority, see *supra*, at 7, 26, n. 15, Congress nowhere suggested that the allocation of proof burdens would differ depending upon which enforcement route EPA selected. The point ought not to be left in doubt. Accordingly, we hold that in either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with EPA and the underlying question a reviewing court resolves remains the same: Whether the state agency's BACT determination was reasonable, in light of the statutory guides and the state administrative record. See *supra*, at 18–19, 24.[17]

The Ninth Circuit's review of EPA's order is in keeping with our holding that EPA may not reduce the burden it must carry by electing to invoke its stop-construction-order authority. Specifically, the Court of Appeals rested its judgment on what EPA showed from ADEC's own report: "(1) Cominco failed to meet its burden of demonstrating [to ADEC] that SCR was economically infeasible; and (2) ADEC failed to provide a reasoned justification for its elimination of SCR as a control option." 298 F. 3d, at

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[17] "[L]ooking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof. The latter burdens do not invariably follow the pleadings." 2 J. Strong, McCormick on Evidence §337, pp. 411–412 (5th ed. 1999). No "single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence" of proof burdens. 9 J. Wigmore, Evidence §2486, p. 288 (J. Chadbourn rev. ed. 1981) (emphasis deleted). "[I]n a case of first impression," which we address today, "reference to which party has pleaded a fact is no help at all." McCormick, *supra*, at 412. Among other considerations, allocations of burdens of production and persuasion may depend on which party—plaintiff or defendant, petitioner or respondent—has made the "affirmative allegation" or "presumably has peculiar means of knowledge." Wigmore, *supra*, at 288, 290 (emphases deleted); accord, *Campbell* v. *United States,* 365 U. S. 85, 96 (1961).

823. EPA's conclusions, and the basis for them, support the Court of Appeals' determination that the federal Agency's grounds for issuing the orders under review were not "arbitrar[y] and capriciou[s]." *Ibid.* Our own analysis, *infra* at 30–35, similarly hinges on the question whether ADEC's BACT determination was a reasonable one. Our analysis would have taken the same path had EPA initiated a civil action pursuant to §113(a)(5)(C), or if the suit under consideration had been filed initially in state court.

Nor do we find compelling ADEC's suggestion, reiterated by the dissent, that, if state courts are not the exclusive judicial arbiters, EPA would be free to invalidate a BACT determination "months, even years, after a permit has been issued." Brief for Petitioner 35; *post*, at 11–13. This case threatens no such development. It involves preconstruction orders issued by EPA, see *supra*, at 14, not postconstruction federal Agency directives. EPA itself regards it as "imperative" to act on a timely basis, recognizing that courts are "less likely to require new sources to accept more stringent permit conditions the farther planning and construction have progressed." App. 273 (July 15, 1988, EPA guidance memorandum). In the one instance of untimely EPA action ADEC identifies, the federal courts declined to permit enforcement to proceed. See *United States* v. *AM General Corp.*, 34 F. 3d 472, 475 (CA7 1994) (affirming District Court's dismissal of an EPA-initiated enforcement action where EPA did not act until well after the facility received a PSD permit and completed plant modifications). EPA, we are confident, could not indulge in the inequitable conduct ADEC and the dissent hypothesize while the federal courts sit to review EPA's actions. Cf. *Walz* v. *Tax Comm'n of City of New York,* 397 U. S. 664, 678–679 (1970); *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting), overruled in part by *Alabama* v. *King & Boozer,* 314 U. S. 1, 8–9 (1941)).

In sum, EPA interprets the Act to allow substantive federal Agency surveillance of state permitting authorities' BACT determinations subject to federal court review. We credit EPA's longstanding construction of the Act and confirm EPA's authority, pursuant to §§113(a)(5) and 167, to rule on the reasonableness of BACT decisions by state permitting authorities.

IV

A

We turn finally, and more particularly, to the reasons why we conclude that EPA properly exercised its statutory authority in this case. ADEC urges that, even if the Act allows the Agency to issue stop-construction orders when a state permitting authority unreasonably determines BACT, EPA acted impermissibly in this instance. See Brief for Petitioner 39–48. We note, first, EPA's threshold objection. ADEC's petition to this Court questioned whether the Act accorded EPA oversight authority with respect to a State's BACT determination. Pet. for Cert. 13–22. ADEC did not present, as a discrete issue, the question whether EPA, assuming it had authority to review the substance of a state BACT determination, nevertheless abused its authority by countermanding ADEC's permit for the Red Dog Mine expansion. See Brief for Respondents 44–45; cf. Reply Brief for Petitioner 15–16, n. 12 ("EPA asserts authority to overturn only 'arbitrary or unreasoned' state BACT determinations. . . . Thus, whether the State issued a reasoned justification is 'fairly included' within the question presented[.]"). Treating the case-specific issue as embraced within the sole question presented, we are satisfied that EPA did not act arbitrarily in finding that ADEC furnished no tenable accounting for its determination that Low NOx was BACT for MG–17.

Because the Act itself does not specify a standard for

judicial review in this instance,[18] we apply the familiar default standard of the Administrative Procedure Act, 5 U. S. C. §706(2)(A), and ask whether the Agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Even when an agency explains its decision with "less than ideal clarity," a reviewing court will not upset the decision on that account "if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U. S. 281, 286 (1974). EPA's three skeletal orders to ADEC and Cominco surely are not composed with ideal clarity. These orders, however, are properly read together with accompanying explanatory correspondence from EPA; so read, the Agency's comments and orders adequately ground the determination that ADEC's acceptance of Low NOx for MG–17 was unreasonable given the facts ADEC found.

In the two draft permits and the final permit, ADEC formally followed the EPA-recommended top-down methodology to determine BACT, as Cominco had done in its application. App. 61, 109, 175; see *supra*, at 9–10. Employing that methodology in the May 1999 draft permit, ADEC first concluded that SCR was the most stringent emission-control technology that was both "technically and economically feasible." App. 65; see *supra*, at 9–10. That technology should have been designated BACT absent "technical considerations, or energy, environmental, or economic impacts justif[ying] a conclusion that [SCR was] not 'achievable' in [this] case." New Source Review Manual, p. B2; App. 61–62. ADEC nevertheless selected Low NOx as BACT; ADEC did so in May 1999 based on

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[18] The Court of Appeals referred to 42 U. S. C. §7607(d)(9)(A) when it considered whether EPA's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 298 F. 3d 814, 822 (CA9 2002). Section 7607(d)(9), however, applies only to the "subsection" concerning rulemaking in which it is embedded.

Cominco's suggestion that fitting all Red Dog Mine generators with Low NOx would reduce aggregate emissions. *Id.,* at 87, 111–112; see *supra*, at 10–11.

In September and December 1999, ADEC again rejected SCR as BACT but no longer relied on Cominco's suggestion that it could reduce aggregate emissions by equipping all generators with Low NOx. See *supra*, at 12–14. ADEC candidly stated that it aimed "[t]o support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region." App. 208. In these second and third rounds, ADEC rested its selection of Low NOx squarely and solely on SCR's "disproportionate cost." *Id.*, at 116; *id.*, at 112–117, 203–208; *supra*, at 12–14.

EPA concluded that ADEC's switch from finding SCR economically feasible in May 1999 to finding SCR economically infeasible in September 1999 had no factual basis in the record. See App. 138. In the September and December 1999 technical analyses, ADEC acknowledged that "no judgment [could then] be made as to the impact of [SCR's] cost on the operation, profitability, and competitiveness of the Red Dog Mine." *Id.*, at 116, 207. ADEC nevertheless concluded that SCR would threaten both the Red Dog Mine's "unique and continuing impact on the economic diversity" of northwest Alaska and the mine's "world competitiveness." *Id.*, at 208. ADEC also stressed the mine's role as employer in an area with "historical high unemployment and limited permanent year-round job opportunities." *Id.*, at 207.

We do not see how ADEC, having acknowledged that no determination "[could] be made as to the impact of [SCR's] cost on the operation . . . and competitiveness of the [mine]," *ibid.*, could simultaneously proffer threats to the mine's operation or competitiveness as reasons for declaring SCR economically infeasible. ADEC, indeed, forthrightly explained why it was disarmed from reaching any judgment on whether, or to what extent, implementation

of SCR would adversely affect the mine's operation or profitability: Cominco had declined to provide the relevant financial data, disputing the need for such information and citing "confidentiality" concerns, *id.*, at 134; see *supra*, at 13; 298 F. 3d, at 823 ("Cominco failed to meet its burden of demonstrating that SCR was economically infeasible."). No record evidence suggests that the mine, were it to use SCR for its new generator, would be obliged to cut personnel, or raise zinc prices. Absent evidence of that order, ADEC lacked cause for selecting Low NOx as BACT based on the more stringent control's impact on the mine's operation or competitiveness.

Nor has ADEC otherwise justified its choice of Low NOx. To bolster its assertion that SCR was too expensive, ADEC invoked four BACT determinations made in regard to diesel generators used for primary power production; BACT's cost, in those instances, ranged from $0 to $936 per ton of nitrogen oxide removed. App. 205–206; *supra*, at 14. ADEC itself, however, had previously found SCR's per-ton cost, then estimated as $2,279, to be "well within what ADEC and EPA considers economically feasible." App. 84; cf. *id.*, at 204 (estimating SCR's per ton cost to be $2,100). No reasoned explanation for ADEC's retreat from this position appears in the final permit. See *id.*, at 138 ("[SCR's cost falls] well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control except where there are compelling site specific factors that indicate otherwise."). Tellingly, as to examples of low-cost BACT urged by Cominco, ADEC acknowledged: "The cited examples of engines permitted in Alaska without requiring SCR are not valid examples as they either took place over 18 months ago or were not used for similar purposes." *Id.*, at 233–234 (footnote omitted). ADEC added that it has indeed "permitted [Alaska] projects requiring SCR." *Id.*, at 234. Further, EPA rejected ADEC's comparison be-

tween the mine and a rural utility, see *supra*, at 12–13, because "no facts exist to suggest that the 'economic impact' of the incrementally higher cost of SCR on the world's largest producer of zinc concentrates would be anything like its impact on a rural, non-profit utility that must pass costs on to a small base of individual consumers." Brief for Respondents 49; App. 138–139 (similar observation in Nov. 10, 1999, EPA letter).

ADEC's basis for selecting Low NOx thus reduces to a readiness "[t]o support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region." *Id.,* at 208. This justification, however, hardly meets ADEC's own standard of a "source-specific . . . economic impac[t] which demonstrate[s] [SCR] to be inappropriate as BACT." *Id.*, at 177. In short, as the Ninth Circuit determined, EPA validly issued stop orders because ADEC's BACT designation simply did not qualify as reasonable in light of the statutory guides.

In its briefs to this Court, ADEC nonetheless justifies its selection of Low NOx as BACT for MG–17 on the ground that lower aggregate emissions would result from Cominco's "agree[ment] to install Low NOx on *all* its generators." Brief for Petitioner 42, and n. 12 (emphasis added); *id.*, at 29; Reply Brief for Petitioner 19, n. 16. We need not dwell on ADEC's attempt to resurrect Cominco's emissions-offsetting suggestion, see *supra,* at 10–11, adopted in the initial May 1999 draft permit, but thereafter dropped. As ADEC acknowledges, the final PSD permit did not offset MG–17's emissions against those of the mine's six existing generators, installations that were not subject to BACT. Brief for Petitioner 42, n. 12; App. 149. ADEC recognized in September and December 1999 that a State may treat emissions from several pollutant sources

as falling under one "bubble"[19] for PSD permit purposes only if every pollutant source so aggregated is "part of the permit action." *Id.,* at 111, 199. Offsetting new emissions against those from any of the mine's other generators, ADEC agreed, "[was] not a consideration of the BACT review provided for by the applicable law or guidelines," for those generators remained outside the permit's compass. *Id.,* at 112, 199. ADEC plainly did not, and could not, base its December 10, 1999 permit and technical analysis on an emissions-offsetting rationale drawing in generators not subject to BACT. *Id.,* at 111–112.[20] By that time, only MG–17 was "part of the permit action." *Id.*, at 111, 199.

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We emphasize that today's disposition does not impede ADEC from revisiting the BACT determination in question. In letters and orders throughout the permitting process, EPA repeatedly commented that it was open to ADEC to prepare "an appropriate record" supporting its

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[19] Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 853–859 (1984) (upholding EPA regulations allowing States to treat all pollutant-emitting devices within the same stationary source in a nonattainment area as though encased in a single "bubble").

[20] The May 4, 1999, draft permit considered whether adding Low NOx to seven generators would result in lower emissions than adding SCR to only two and choosing one of the latter as a standby unit. App. 86–87. Before December 10, 1999, however, Cominco agreed to install Low NOx controls on four of the mine's six existing generators—MG–1, MG–3, MG–4, and MG5—in order to increase use of those generators without exceeding the 1994 PSD permit's operating restriction. *Id.,* at 149. Having agreed to use Low NOx on four generators, Cominco could propose in the December 10, 1999, permit only the addition of Low NOx to two generators—MG–2 and MG–6—to offset increases in emissions from MG–17. No facts in the record support any suggestion that addition of Low NOx to three generators, MG–2, MG–6, and MG–17, would result in lower aggregate emissions than the addition of SCR to MG–17 alone.

selection of Low NOx as BACT. Tr. of Oral Arg. 35; see App. 127 (attachment to Sept. 28, 1999, EPA letter to ADEC, stating "an analysis of whether requiring Cominco to install and operate [SCR] would have any adverse economic impacts upon Cominco specifically" might demonstrate SCR's economic infeasibility); *id.*, at 150 (letter accompanying EPA's Dec. 10, 1999, finding of noncompliance and order reiterating the Agency's willingness to "review and consider any additional information or analyses provided by ADEC or Cominco" on Low NOx as BACT); App. to Pet. for Cert. 36a (EPA Dec. 10, 1999, order inviting ADEC to justify its choice of Low NOx by "document[ing] why SCR is not BACT [for MG–17]"); *id.*, at 49a (similar statement in Feb. 8, 2000, order). At oral argument, counsel for EPA reaffirmed that, "absolutely," ADEC could reconsider the matter and, on an "appropriate record," endeavor to support Low NOx as BACT. Tr. of Oral Arg. 35.[21] We see no reason not to take EPA at its word.

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In sum, we conclude that EPA has supervisory authority over the reasonableness of state permitting authorities' BACT determinations and may issue a stop construction order, under §§113(a)(5) and 167, if a BACT selection is not reasonable. We further conclude that, in exercising that authority, the Agency did not act arbitrarily or capriciously in finding that ADEC's BACT decision in this instance lacked evidentiary support. EPA's orders, there-

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[21] The dissent is daunted by the hypothesis that "[b]ecause there can always be an additional procedure to ensure that the preceding process was followed," the State "may never reach" the goal of issuing a permit. *Post*, at 14 ("The majority creates a sort of Zeno's paradox for state agencies."). Again, the dissent can point to no instance in which EPA has indulged in any piling of process upon process. See *supra*, at 27, n. 16.

fore, were neither arbitrary nor capricious. The judgment of the Court of Appeals is accordingly

Affirmed.