

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

**ALASKA DEPARTMENT OF ENVIRONMENTAL
CONSERVATION *v.* ENVIRONMENTAL
PROTECTION AGENCY ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

No. 02–658. Argued October 8, 2003—Decided January 21, 2004

The Clean Air Act’s (CAA or Act) Prevention of Significant Deterioration (PSD) program, 42 U. S. C. §7477, was designed to ensure that the air quality in “attainment areas,” *i.e.*, areas that are already “clean,” will not degrade, see §7470(1). The program bars construction of any major air pollutant emitting facility not equipped with “the best available control technology” (BACT). §7475(a)(4). The Act defines BACT as “an emission limitation based on the maximum degree of [pollutant] reduction . . . which the [state] 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). Two provisions of the Act vest enforcement authority in the Environmental Protection Agency (EPA). Section §113(a)(5) generally authorizes the EPA, when it finds that a State is not complying with a CAA “requirement” governing construction of a pollutant source, to pursue remedial action, including issuance of “an order prohibiting construction.” 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, . . . as necessary to prevent the construction” of a major pollutant emitting facility that does not conform to the “requirements” of the program. Because EPA has classified northwest Alaska, the region here at issue, as an attainment area for nitrogen dioxide, the PSD program applies to emissions of that pollutant in the region. No “major emitting facility,” including any source emitting more than 250 tons of nitrogen oxides per year, §7479(1), may be constructed or modified unless a PSD permit has been issued for the facility,

ALASKA DEPT. OF ENVIRONMENTAL
CONSERVATION *v.* EPA

Syllabus

§7475(a)(1). A PSD permit may not issue unless the proposed facility is subject to BACT for each CAA-regulated pollutant emitted from the facility. §7475(a)(4).

In this case, “the permitting authority” under §7479(3) is Alaska, acting through petitioner, the Alaska Department of Environmental Conservation (ADEC). In 1988, Teck Cominco Alaska, Inc. (Cominco), obtained authorization to operate a zinc concentrate mine in northwest Alaska. The mine is a “major emitting facility” under §7475. Its initial PSD permit authorized five diesel electric generators, MG–1 through MG–5, subject to operating restrictions. Under a second PSD permit issued in 1994, Cominco added a sixth generator, MG–6. In 1996, Cominco initiated a project to expand zinc production by 40% and applied to ADEC for a PSD permit to allow, *inter alia*, increased electricity generation by MG–5. ADEC preliminarily proposed as BACT for MG–5 an emission control technology known as selective catalytic reduction (SCR), which reduces nitrogen oxide emissions by 90%. Amending its application, Cominco added a seventh generator, MG–17, and proposed, as BACT, an alternative control technology—Low NOx—that achieves a 30% reduction in nitrogen oxide pollutants. In May 1999, ADEC issued a first draft PSD permit and preliminary technical analysis report, concluding that Low NOx was BACT for MG–5 and MG–17. ADEC identified SCR as the most stringent technology then technically and economically feasible. ADEC nevertheless endorsed Cominco’s proffered emissions-offsetting alternative of fitting MG–17 and all six existing generators with Low NOx, rather than fitting MG–5 and MG–17 with SCR. This proposal, ADEC submitted, would achieve a maximum NOx reduction similar to the reduction SCR could achieve, and was logistically and economically less onerous for Cominco. In July 1999, EPA objected that ADEC had identified SCR as the best control technology, but failed to require it as BACT. ADEC responded with a second draft PSD permit and technical analysis report in September 1999, again finding Low NOx to be BACT for MG–17. ADEC’s second draft abandoned that agency’s May 1999 emissions-offsetting justification. ADEC further conceded that, lacking data from Cominco, it could make no judgment as to SCR’s impact on the mine’s operation, profitability, and competitiveness. It nonetheless concluded, contradicting its earlier finding that SCR was technically and economically feasible, that SCR imposed “a disproportionate cost” on the mine. In support of this conclusion, ADEC analogized the mine to a rural utility that would have to increase prices were it required to use SCR. Protesting that Cominco had not adequately demonstrated site-specific factors supporting the assertion of SCR’s economical infeasibility, EPA suggested that ADEC include an analysis of SCR’s ad-

Syllabus

verse economic impacts on Cominco. Expressing confidentiality concerns, Cominco declined to submit financial data. In December 1999, ADEC issued a final permit and technical analysis report approving Low NO_x as BACT for MG–17. Again conceding that it made no judgment as to SCR’s impact on the mine’s operation, profitability, and competitiveness, ADEC advanced, as cause for its decision, SCR’s adverse effect on the mine’s unique and continuing impact on the region’s economic diversity and the venture’s “world competitiveness.” ADEC reiterated its rural Alaska utility analogy, and compared SCR’s cost to the costs of other, less stringent, control technologies.

EPA then issued three orders to ADEC under §§113(a)(5) and 167 of the Act. Those orders prohibited ADEC from issuing a PSD permit to Cominco without satisfactorily documenting why SCR was not BACT for MG–17. In addition, EPA prohibited Cominco from beginning construction or modification activities at the mine, with limited exceptions. Ruling on ADEC’s and Cominco’s challenges to these orders, the Ninth Circuit held that EPA had authority under §§113(a)(5) and 167 to determine the reasonableness or adequacy of the State’s justification for its BACT decision. The Court of Appeals emphasized that provision of a reasoned justification for a BACT determination by a permitting authority is undeniably a CAA “requirement.” EPA had properly exercised its discretion in issuing the three orders, the Ninth Circuit held, because (1) Cominco failed to demonstrate SCR’s economical infeasibility, and (2) ADEC failed to provide a reasoned justification for its elimination of SCR as a control option.

Held: CAA authorizes EPA to stop construction of a major pollutant emitting facility permitted by a state authority when EPA finds that an authority’s BACT determination is unreasonable in light of 42 U. S. C. §7479(3)’s prescribed guides. Pp. 16–37.

(a) In holding that the EPA orders constituted reviewable “final action” under §7607(b)(1), the Ninth Circuit correctly applied *Bennett v. Spear*, 520 U. S. 154: 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,” *id.*, at 177–178. As the Ninth Circuit noted, EPA had asserted its final position on the factual circumstances underpinning the orders. If the orders survived judicial review, Cominco could not escape the practical and legal consequences of any ADEC-permitted construction Cominco endeavored. Pp. 16–17.

(b) EPA may issue a stop construction order, under CAA §§113(a)(5) and 167, if a state permitting authority’s BACT selection is not reasonable. Pp. 17–30.

(1) EPA has rationally construed CAA’s BACT definition, 42

ALASKA DEPT. OF ENVIRONMENTAL
CONSERVATION *v.* EPA

Syllabus

U. S. C. §7479(3), and the statute’s listing of BACT as a “[p]reconstruction requiremen[t]” for the PSD program, §§7475(a)(1) and (4), to mandate a determination of BACT faithful to the statute’s definition. EPA urges that state permitting authorities’ statutory discretion is constrained by §7479(3)’s strong, normative terms “maximum” and “achievable.” EPA accordingly reads §§113(a)(5) and 167 to empower the federal Agency to check a state agency’s unreasonably lax BACT designation. In support of this reading, EPA notes that Congress intended the PSD program to prevent significant deterioration of air quality in clean-air areas. Without a federal Agency surveillance role that extends to BACT determinations, EPA maintains, this goal is unlikely to be realized. The Act’s legislative history suggests that, absent national guidelines, a State deciding to set and enforce strict clean-air standards may lose existing industrial plants to more permissive States. The legislative history further suggests that without a federal check, new plants will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls. The Court agrees with EPA’s reading of the statutory provisions. EPA’s CAA construction is reflected in interpretive guides EPA has several times published. Although an interpretation presented in internal guidance memoranda does not qualify for dispositive force under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865–866, a cogent administrative interpretation nevertheless warrants respect, *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U. S. 371, 385. Pp. 17–22.

(2) ADEC’s several arguments do not persuade the Court to reject as impermissible EPA’s longstanding, consistently maintained interpretation. ADEC argues that CAA’s BACT definition, §7479(3), unambiguously assigns to “the permitting authority” alone the decision of the control technology qualifying as “best available.” In ADEC’s view, EPA’s enforcement role is restricted to assuring that the permit contain a BACT limitation. CAA entrusts state authorities with initial responsibility to make BACT determinations because they are best positioned to adjust for local circumstances that might make a technology “unavailable” in a particular area. According state authorities initial responsibility, however, does not signify that there can be no *unreasonable* state agency BACT determinations. Congress 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. Having expressly endorsed an expansive surveillance role for EPA in two independent CAA provisions, Congress would not have implicitly precluded EPA from verifying a state authority’s substantive compliance with the

Syllabus

BACT requirement. Nor would Congress have limited EPA to determining whether the state permitting authority had uttered the key words “BACT.” The fact that §7475(a)(8) expressly requires EPA approval of a State’s BACT determination in a limited category of cases does not mean EPA lacks supervisory authority in all other cases. Sections 113(a)(5) and 167 sensibly do not *require* EPA approval of all state BACT determinations. Those provisions simply authorize EPA to act in the unusual case in which a state permitting authority has determined BACT arbitrarily. Also unavailing is ADEC’s argument that any reasoned justification requirement for a BACT determination may be enforced only through state administrative and judicial processes in order to allow development of an adequate factual record, to ensure EPA carries the burdens of proof, and to promote certainty. The Court declines to read into CAA’s silence the unusual requirement that a federal agency’s decisions enforcing federal law must be remitted solely to state court. EPA has rationally 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. Nor is the Court persuaded by ADEC’s practical concerns. There is no reason to conclude that an appropriate record cannot be developed to allow informed federal-court review when EPA disputes a BACT decision’s reasonableness. In this very case, the Ninth Circuit ordered EPA to submit a complete administrative record. After EPA did so, all the parties agreed to the record’s adequacy. As to the burdens of production and persuasion, the Court holds that EPA bears both burdens in a challenge to an EPA stop-construction order as well as in an EPA-initiated civil action. The underlying question a reviewing court must answer is the same in either case: Was the BACT determination unreasonable given the statutory guides and the state administrative record. Nor does the Court find compelling the suggestion that, if state courts are not the exclusive judicial arbiters, EPA will be free to invalidate a BACT determination months or years after a permit issues. This case involves preconstruction orders issued by EPA, not postconstruction federal directives. EPA itself regards it as imperative to act on a timely basis. Courts are also less likely to require new sources to accept more stringent permit conditions the further planning and construction have progressed. Pp. 22–30.

(c) In this case, EPA properly exercised its statutory authority under §§113(a)(5) and 167 in finding that ADEC’s acceptance of Low NOx as BACT for MG–17 lacked evidentiary support. EPA’s orders, therefore, were neither arbitrary nor capricious. Pp. 30–36.

(1) The Court considers whether EPA’s finding was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

Syllabus

law” under the applicable review standard set forth in the APA, 5 U. S. C. §706(2)(A). While EPA’s three skeletal orders were not composed with ideal clarity, they properly ground EPA’s BACT determination when read together with EPA’s accompanying explanatory correspondence. See *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286. As the Ninth Circuit determined, EPA validly issued stop orders because ADEC’s BACT designation did not qualify as reasonable in light of statutory guides. 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. That technology should have been designated BACT absent considerations justifying a conclusion that SCR was not achievable in this case. ADEC, however, selected Low NOx as BACT based on Cominco’s emissions-offsetting suggestion. In September and December 1999, ADEC again rejected SCR as BACT but no longer relied on that suggestion. Rather, ADEC candidly stated that it aimed to support Cominco’s project and its contributions to the region. ADEC’s selection of Low NOx thus rested squarely and solely on SCR’s “disproportionate cost.” EPA rightly 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. ADEC forthrightly conceded it was disarmed from reaching a judgment on SCR’s economic impact on the mine by Cominco’s refusal to provide relevant financial data. No record evidence suggests that the mine, were it to use SCR, would be obliged to cut personnel or raise zinc prices. Having acknowledged that it lacked information needed to judge SCR’s impact on the mine’s operation, profitability, or competitiveness, ADEC could not simultaneously proffer threats to the mine’s operation and competitiveness as reasons for declaring SCR economically infeasible. Nor has ADEC otherwise justified its choice. To bolster its assertion that SCR was too expensive, ADEC invoked cost figures discussed in four BACT determinations made in regard to diesel generators used for primary power production. ADEC itself, however, had previously found SCR’s per-ton cost to be well within what ADEC and EPA consider economically feasible. No reasoned explanation for ADEC’s retreat from this position appears in the permit ADEC issued. ADEC’s basis for selecting Low NOx thus reduces to a readiness to support Cominco’s project and its contributions to the region. This justification, however, hardly meets ADEC’s own standard of a source-specific economic impact that demonstrates SCR to be inappropriate as BACT. ADEC’s justification that lower aggregate emissions would result from Cominco’s agreement to install Low NOx on *all* its generators is also unpersuasive. The final PSD permit did not offset MG-17’s emissions against those of the mine’s six existing generators. As ADEC recognized in September and

Syllabus

December 1999, a State may treat emissions from several pollutant sources as falling under one “bubble” for PSD permit purposes only if every pollutant source so aggregated is part of the permit action. In December 1999, however, only MG–17 figured in the permit action. Pp. 30–35.

(2) This decision does not impede ADEC from revisiting its BACT determination. In letters and orders throughout the permitting process and at oral argument, EPA repeatedly acknowledged that ADEC may yet prepare an appropriate record supporting its selection of Low NO_x as BACT. There is no reason not to take EPA at its word. Pp. 35–36.

298 F. 3d 814, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O’CONNOR, SOUTER, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined.