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**

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

EPA cannot dispute that Congress expressly intended that the State make the discretionary determination of BACT in this case. Instead, EPA argues that its general enforcement powers trump Congress's carefully-crafted scheme of cooperative federalism, and require EPA to veto a State's BACT determination whenever EPA believes the State has acted unreasonably. Its argument, however, rests on a straw-man: its incorrect assertion that EPA must be able to intervene because Alaska desires to make unreasoned or arbitrary decisions. As a government agency charged with protecting the public, Alaska's Department of Environmental Conservation ("ADEC") does not argue that it can behave unreasonably or arbitrarily in carrying out any of its responsibilities, and it is confident it did not do so here. But ADEC's inherent duty to act reasonably is not a separate requirement of the CAA to be enforced by EPA any more than it is a separate, unstated requirement of any other law ADEC implements.

As set forth in the plain language of the CAA, once EPA has approved a State's implementation plan Congress trusted the State to make certain discretionary determinations—including BACT—and trusted EPA to make other determinations, subject in both cases to appropriate *judicial* review to ensure that discretion is exercised properly. EPA's argument that it may decide by fiat whether a sovereign state agency has behaved arbitrarily or unreasonably, subject only to limited judicial review of EPA's decision, cannot be squared with the statutory language or its underlying purposes.[1]

## I. EPA HAS NO AUTHORITY TO VETO A STATE BACT DETERMINATION THAT WEIGHS THE STATUTORY FACTORS.

### A. Claims Of Arbitrary Or Unreasoned Decision-making Are Addressed Through Normal Administrative And Judicial Review, Not By EPA Fiat.

The plain language of the statute provides that BACT is to be determined by "the permitting authority"—here, 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). EPA identifies *no* statutory language that Alaska allegedly violated. Instead, EPA argues that its general enforcement authority allows it to veto any state BACT determination it believes is "arbitrary" or "unreasoned." But the statute does not say that. Although ADEC has never argued that it can act arbitrarily or unreasonably in anything

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[1] Alaska agrees with EPA that the orders at issue here were "final action" within the meaning of 42 U.S.C. § 7607(b)(1), and that the Court has jurisdiction. *See* EPA Br. 16-17. The constitutional issue decided in *TVA* v. *Whitman*, 2003 WL 21452521, at *18 (11th Cir. 2003), has not been raised in this case. But EPA's lack of an adjudicative process as highlighted by the Eleventh Circuit in that case underscores why review of state BACT determinations should be made through the usual state review process rather than by EPA fiat. *See* Alaska Br. 37-38.

it does, that inherent duty is not an unstated "requirement" of the CAA that Congress gave EPA the power to enforce. Determinations of whether agencies have acted arbitrarily in carrying out discretion afforded by statutes are made by *courts* exercising their traditional function of judicial review.

Alaska has never suggested that, because BACT is "strictly a State and local decision," S. Rep. No. 95-127, at 31 (1977), a State may "impose whatever emissions limitations it wants under the BACT label." EPA Br. 24. EPA confuses the State's "sole" discretion, Alaska Br. 27, with "absolute," "unreviewable" or "unfettered" discretion. EPA Br. 14, 35. When any interested party (including EPA) believes that a State's BACT determination is unreasoned or arbitrary, it may challenge that determination through a state administrative and judicial review process. *See* Alaska Br. 19, 34. State courts routinely review BACT and other determinations made by States under the CAA.[2] EPA does not dispute that it can pursue this remedy. *See United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994) (noting that EPA could have challenged CAA permit through state review process); *cf.* 40 C.F.R. § 72.72(b)(5)(iv) (EPA may intervene in state Acid Rain permit appeals).[3] Nor does it dispute that

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[2] *See*, *e.g.*, *Plumbers & Steamfitters Local 52* v. *Alabama Dep't of Envtl. Mgmt.*, 647 So. 2d 793, 795-796 (Ala. Civ. App. 1994) (BACT determination); *Bowers* v. *Pollution Control Hearings Bd.*, 13 P.3d 1076, 1098 (Wash. Ct. App. 2000) (RACT determination); *Color Comm., Inc.* v. *Illinois Pollution Control Bd.*, 680 N.E.2d 516, 519-520 (Ill. App. Ct. 1997) (determination of "source"); *In re Crown/Vista Energy Project*, 652 A.2d 212, 218-219 (N.J. Super. Ct. App. Div. 1995) (emissions rate determination).

[3] Here, the state review process would have been available to EPA had it participated in the public comment process on Cominco's application. *See* Alaska Br. 34-35. Although ADEC did consider EPA's belated input, it is difficult to understand how EPA can characterize its actions as "prompt," EPA Br. 31 n.11, when it failed to submit comments during the comment period.

the remedy adequately protects the interests it would vindicate. Indeed, EPA will not even approve a state PSD permit program unless the program provides "an opportunity for state judicial review." 61 Fed. Reg. 1800, 1882 (1996).

EPA has authority to enforce certain "requirements" of the CAA, *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 determined by the State after considering the applicable factors. It is not a specific requirement *of the CAA* that the State make what EPA would believe to be a non-arbitrary BACT determination, any more than it is a specific requirement of any other substantive statute that an agency act non-arbitrarily in exercising discretion. As it does whenever it affords discretion to a state or federal agency, Congress rightly assumed that States—just like EPA when it exercises discretionary authority—could be trusted to make reasoned BACT determinations. Like their federal counterparts, state agencies must engage in reasoned decisionmaking. *See*, *e.g.*, *Bering Straits Coastal Mgmt. Program* v. *Noah*, 952 P.2d 737, 741 (Alaska 1998). That duty, however, is a basic principle of administrative law with constitutional underpinnings.[4] To the extent such principles are codified, they are most commonly set forth in procedural statutes such as the Administrative Procedure Act ("APA"). *See*, *e.g.*, 5 U.S.C. § 706(2)(A); Alaska Stat. § 44.62.570(b)(3).

A judicial finding that an agency acted arbitrarily or capriciously is not a finding that the governing statute itself has

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[4] *See ICC* v. *Union Pac. R.R.*, 222 U.S. 541, 547 (1912) (order set aside if agency exercised its authority in "an unreasonable manner"); Senate Comm. on the Judiciary, S. Doc. No. 79-248, at 39 (Comm. Print 1945) (categories of judicial review of agency action "were first established by the Supreme Court as the minimum requisite under the Constitution and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the [Constitution]") (citations omitted).

been violated. Those are two different inquiries. *See*, *e.g.*, *NRDC* v. *Thomas*, 838 F.2d 1224, 1253 (D.C. Cir. 1988) ("While we do not by any means find that the EPA's conclusion is in violation of statutory authority, we are unable to conclude that it rests upon 'reasoned decisionmaking.' "); *compare* 5 U.S.C. § 706(2)(A) (proscribing "arbitrary or capricious" action) *with id*. § 706(2)(C) (proscribing action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). Although the governing statute may afford an agency discretion, the judiciary may still determine that the discretion was not exercised consistently with inherent principles of administrative procedure. Thus, the recognition that a state review process is available is not "at war" with the notion that there is no objectively "correct" BACT determination. *See* EPA Br. 34-36.

It is traditionally the role of courts, not federal agencies, to determine whether state agencies have acted arbitrarily or capriciously. *See Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276 (1997) (Kennedy, J.) ("[T]he elaboration of administrative law * * * is one of the primary responsibilities of the state judiciary."). When Congress intends to upset that traditional balance, it says so expressly, as it has done elsewhere in the CAA. *See* 42 U.S.C. § 7543(b)(1)(A) (EPA may deny waiver from certain standards if EPA finds that State's waiver determinations are "arbitrary or capricious").

Moreover, if EPA were correct here, it would be able to veto not only state agencies but also state courts, which could well reach different conclusions from EPA on the reasonableness of an agency action upon judicial review. Such extraordinary federal agency authority over state judicial and executive branches should not be inferred without express direction from Congress. *Cf. Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (quotations omitted).

Indeed, when Congress wanted to give EPA *any* role in the PSD permitting process—and specifically in the determination of BACT—Congress did so explicitly. *See* Alaska Br. 25-26 & n.6. EPA argues that Section 165(a)(8)—which requires EPA approval of state BACT determinations in one specified instance not applicable here, *see* 42 U.S.C. § 7475(a)(8)—is merely a requirement of "prior approval" in "special circumstances" that does not prevent EPA from exercising "general oversight" authority for other BACT determinations. EPA Br. 37. The CAA, however, provides that EPA "*shall*" take measures "to prevent the construction or modification of a major facility which does not conform to the requirements" of the Act's PSD provisions. 42 U.S.C. § 7477 (emphasis added). Thus, if it were in fact a "requirement" of the Act that each BACT determination conform to what EPA would consider reasonable, prior EPA approval of *each* determination would be required. There is no reason Congress would specify approval of certain state BACT determinations in Section 165(a)(8) if EPA already had the mandatory duty to approve every such determination.

### B. There Is No "Correct" BACT Determination.

Because BACT in any given case will depend on how the permitting authority weighs the pertinent factors in view of the comments of the public and other agencies, it cannot be said that a particular BACT determination is "correct" or "incorrect." Different decisionmakers may weigh the factors differently under different policies and thus yield different results, but one result is not more "correct" than another. If the State sets a limitation based on consideration of the applicable factors, it has complied with the BACT "requirement."[5]

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[5] EPA erroneously asserts that the BACT "requirement" is no different in nature than the requirement that a facility's emissions may not exceed the increments. EPA Br. 37 n.14. Although the latter may involve the "sometimes complex judgment" of permitting authorities, *id*., the CAA does not give permitting authorities

EPA misses this fundamental point. It argues that a State violates the BACT requirement when it is "clear" that the State "has not actually determined the 'maximum degree of reduction * * * achievable' by a facility." EPA Br. 26. BACT, however, is not simply the "maximum degree of reduction * * * achievable" as a purely technological matter, but rather what the State determines is the maximum achievable after specifically "taking into account" non-technological "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). EPA says a State would necessarily violate the statute if it found as BACT a technology that offers "a degree of reduction that requires no new equipment installation," or "the least expensive reduction in emissions." EPA Br. 26. But because "[t]he weight assigned to such factors is to be determined *by the State*," S. Rep. No. 95-127, at 31 (emphasis added), it may well be that economic or other cost considerations would lead a State validly to make such determinations. Indeed, sometimes BACT is no control technology whatsoever. *See*, *e.g.*, Cert. Rec. 71-100.[6]

This fact, among others, distinguishes this case from *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), which EPA cites as "analogous." EPA Br. 27. *Wilder*, of course, had nothing to do with the CAA. But EPA's analogy is off-base in any event. *Wilder* involved a statute that directed States to determine, and "make[] assurances satisfactory to" the Secretary of Health and Human Services, that certain

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broad discretion to determine whether the increments would be violated. In fact, EPA requires all air quality modeling to be conducted under an EPA-approved model. *See* 40 C.F.R. § 51.166(*l*). By contrast, the CAA on its face gives the States "broad flexibility" to determine BACT. S. Rep. No. 95-127, at 31.

[6] If a State were to establish a blanket rule that BACT is *always* the least expensive technology, such a rule would arguably contravene the statutory requirement that BACT determinations be made on "a case-by-case basis." 42 U.S.C. § 7479(3). No such issue, however, is presented in this case.

rates were "reasonable." 496 U.S. at 501-502 (quotation omitted). The holding in *Wilder* was based in part on the idea that there was an objectively "correct" determination of "reasonable" rates. *Id*. at 513-514. As the Court later observed, "the word 'reasonable' occupied a prominent place in the critical language of the statute" in *Wilder*. *Suter* v. *Artist M.*, 503 U.S. 347, 357 (1992). By contrast, the CAA does not require such an objectively correct determination of BACT, but rather directs a highly discretionary weighing of factors in selecting the "best" available control technology.

The BACT determination is thus much closer to the statutory scheme in *Suter*, *supra*, which the Court held created no enforceable rights, than that in *Wilder*. *Suter* held that a statute did not create an enforceable right under Section 1983 to ensure that States made "reasonable efforts" to keep children in their homes, because the directive was one "whose meaning will obviously vary with the circumstances of each individual case." 503 U.S. at 360. "How the State was to comply with this directive * * * was, within broad limits, left up to the State." *Id*. *See also id*. at 362 (legislative history "indicated that the Act left a great deal of discretion to [the States]"). The CAA directs the States to weigh "energy, environmental, and economic impacts and other costs" in determining BACT, 42 U.S.C. § 7479(3), but similarly provides no detailed, enforceable guidance as to the specific impacts and costs the States should weigh, or how to weigh them.[7]

To the extent *Wilder* has any marginal relevance here, it supports Alaska's position, not EPA's. *Wilder* relied on the fact that the statute at issue required States to "make[] assurances satisfactory to the Secretary" that the rates they

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[7] By contrast, *Wilder* "relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates." *Suter*, 503 U.S. at 359 (citing *Wilder*, 496 U.S. at 519 n.17).

found were "reasonable and adequate." *Wilder*, 496 U.S. at 501-502 (citation omitted). The Court held that "there would be no reason to require a State to submit assurances to the Secretary if the statute did not require the State's findings to be reviewable in some manner by the Secretary." *Id*. at 514. That federal enforcement scheme stands in marked contrast to the one at issue here. Here, as with the law in *Suter*, 503 U.S. at 360, the CAA does *not* require the States to submit individual BACT determinations to EPA for approval, except in one specified instance not applicable here.

### C. EPA's Position Is Contrary To The Statute's Legislative History And Purpose.

1. Like the Ninth Circuit, EPA steers clear of the CAA's legislative history making plain that Congress intended BACT to be "strictly a State and local decision." S. Rep. No. 95-127, at 31. Instead, EPA cites excerpts stating, for instance, that " '[t]he Administrator thus could go to court to stop a permit * * * which * * * did not comply with the requirements of [the PSD provisions], including the use of [BACT].' " EPA Br. 30-31 (citation omitted). But such statements do nothing to advance EPA's interpretation. As we have already explained (Br. 33-34), the mere fact that Congress intended EPA to enforce "requirements" of the Act says nothing about what those requirements are.

EPA also ignores the history that makes clear that Congress not only intended to allow continued economic growth in clean air areas, but specifically intended the States—"not Federal agencies"—to determine how much growth to allow. *See* Alaska Br. 30-32. As we have explained, BACT is "key" to "manag[ing] * * * allowed internal growth" under the Act. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 364 (D.C. Cir. 1980); S. Rep. No. 95-127, at 31. For this reason, Congress "place[d] [the] responsibility [to determine BACT] *with the State*." *Id*. (emphasis added).

Contrary to EPA's assertion, we do not suggest that "a State may determine BACT simply by dividing up the allowable increments among facilities as it sees fit," or that "compliance with the overall increment limitations * * * establish[es] that the State has satisfied the separate BACT requirement for each facility." EPA Br. 36-37. Rather, we have noted that, in weighing "energy, environmental, and economic impacts and other costs," a State has "broad flexibility" to consider how much economic growth it desires in a particular area and thus how much of the available increment a State wants a particular facility to consume. *See* Alaska Br. 24. EPA does not dispute that States may take the increments into account in determining BACT. Nor could it, as Congress expressly intended the States to consider "the increment of air quality which will be absorbed by any particular major emitting facility." S. Rep. No. 95-127, at 31. *See also id*. ("flexible approach" in determining BACT "allows the States * * * to judge how much of the defined increment * * * will be devoted to any major emitting facility").

2. EPA (and its amici States) contend that the CAA's legislative history shows that Congress intended EPA to have "ultimate authority" over state BACT determinations to protect other States from cross-border pollution. *See* EPA Br. 32-33. Of course, there are no other States anywhere near Alaska. But in any event, Congress provided a detailed remedy for this general problem that does *not* grant EPA veto authority over BACT determinations. Section 126 of the CAA requires sources subject to PSD permits to provide written notice to all nearby States whose pollution levels might be affected. 42 U.S.C. § 7426(a)(1)(A). Upon the petition of any such State, EPA is granted the authority to block construction or operation of the source, but *only* if EPA finds, after a public hearing, that the source would harm the ability of the *neighboring* State to meet the NAAQS, or the PSD measures in its SIP. *See id*. §§ 7426(b), (c)(1),

7410(a)(2)(D)(i).[8] Congress expressly recognized that some States may have "more stringent control requirements" that place plants in those States at a "competitive disadvantage," and it therefore enacted Section 126 as its carefully-crafted solution. S. Rep. No. 95-127, at 42. Once again, Congress's express specification of an EPA enforcement remedy that does not include the authority to veto BACT determinations is further confirmation that such a veto power does not exist.

3. EPA also contends that the legislative history shows that EPA must have veto power over state BACT determinations to prevent States from competing for industry through lax enforcement of environmental laws. *See* EPA Br. 33-34. Of course, such concerns were never an issue here, as the Red Dog Mine is not going anywhere.[9] But any concerns that EPA, other States, or anyone else may have about a permit may be addressed through the public comment and state review process. Some States may face competing applications for consumption of allowable increments, and may therefore choose as BACT only the most stringent controls. Such States may feel disadvantaged compared to cleaner or less-developed States. But Congress intended each State to consider "*anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis

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[8] Section 7426 gives EPA authority to enforce violations of the SIP provisions of Section 7410 relating to cross-border pollution. Although the amended text of Section 7426 refers to Section 7410(a)(2)(D)*(ii)*, it has been held definitively that this was a scrivener's error that in fact refers to Section 7410(a)(2)(D)*(i)*. *See Appalachian Power Co.* v. *EPA*, 249 F.3d 1032 (D.C. Cir. 2001).

[9] EPA's statement that Alaska "provided just under half of the funding" for Cominco's PRI project is misleading. EPA Br. 5. The State owns the port used by the Red Dog Mine as well as the road connecting the two. Although the State issued bonds to fund the expansion and improvement of its facilities in connection with Cominco's PRI project, the State spent no funds on the mine itself. *See* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf.

added). A State concerned with the impact of increased costs on an economically disadvantaged population in an area experiencing little growth or emissions may lawfully issue a BACT determination reflecting those priorities.

Congress *could* have adopted a national standard for BACT for particular sources. Indeed, Congress took precisely such an approach under the New Source Performance Standards ("NSPS") program, enacted to further the attainment of the NAAQS. There, Congress directed EPA to publish a list of categories of sources and establish "Federal standards of performance [*i.e.*, emissions limitations] for new sources within such category." 42 U.S.C. § 7411(b). Thus, for example, all fossil fuel-fired steam generators built after August 17, 1971 must have controls that prevent NOx emissions in excess of specified levels. *See* 40 C.F.R. § 60.44.

But in the PSD program, Congress "purposely chose not to dictate what State and local decisions on air quality deterioration must be," H.R. Rep. No. 95-294, at 146 (1977), provided those decisions meet the NSPS and other baseline federal standards. In particular, Congress chose not to adopt a "uniform Federal standard" for BACT. S. Rep. No. 95-127, at 31. Rather than ensure "national consistency" for BACT by adopting a "control technology of choice" for particular sources—as EPA asserted below, J.A. 129, 148, 303—Congress left it to the States to "weigh[] * * * environmental and economic goals and needs," and "balance sometimes conflicting goals" H.R. Rep. No. 95-294, at 146, "on a case-by-case basis." 42 U.S.C. § 7479(3).

4. EPA has no answer for the incongruous results that follow from its position. For instance, if a party had challenged the State's decision through the state review process, the challenger would have had to show that the State's decision was arbitrary or capricious. But because EPA vetoed ADEC's decision here by fiat, the State had to show that *EPA's* action was arbitrary or capricious, thereby resulting in

a diluted form of deference to ADEC's decision. EPA's circular response—that such an anomalous result supports its interpretation of the CAA because it "naturally follows" from its interpretation, EPA Br. 39, is no response at all. Nor does EPA have a response for the other procedural anomalies engendered by its interpretation. *See* Alaska Br. 36-37.[10]

EPA's interpretation effectively eliminates Congress's distinction between States exercising authority under approved SIPs and States merely exercising federal power delegated by EPA. *See* Alaska Br. 5-6. For in either case, EPA asserts authority to override the State's determination. In fact, EPA provides *greater* rights to States that are merely exercising delegated federal power. When EPA believes a "delegated" State has made an unreasoned BACT determination, EPA's preferred approach is not to overturn it by fiat, as it did here, but rather to challenge the determination through EPA's own review process. *See* Cert. Rec. 70-004 to -006. EPA's assertion that it can unilaterally veto an *approved* State's BACT determination turns the statutory scheme on its head.

### D. *Chevron* Deference Does Not Apply.

As a last resort, EPA argues that its interpretation is owed deference under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). But no deference is due here, because Congress's intent that the States be the sole arbiters of BACT is manifest from the plain language of the CAA and its legislative history. *See id*. at 842-843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed in-

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[10] In the Ninth Circuit, Alaska specifically noted that the record in this case might not include all the materials on which the State relied in making its BACT determination, and that additional evidence in support of the State's BACT determination would be produced if EPA were required, like everyone else, to use the *de novo* administrative state review process to challenge the State's decision. *See* Response to Hardesty Decl. at 3 (Aug. 17, 2001).

tent of Congress."). Even if the CAA were ambiguous, however, EPA's interpretation would still deserve no deference.

First, EPA seeks deference for its interpretation as "embodied" in the orders in this case, EPA Br. 41, but those orders *nowhere* state EPA's current position that ADEC failed to provide a "reasoned" BACT determination. Instead, the orders simply assert that ADEC failed to comply with the PSD requirements of the CAA because, as a *factual* matter, "SCR is BACT." Pet. App. 34a, 46a, 59a. Regardless of whether deference can be given to an interpretation "embodied" in a unilateral administrative compliance order, no deference is due here given that the orders do not even embody the particular interpretation for which deference is sought.

Second, this Court has "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or *adjudication* that produces *regulations* or *rulings* for which deference is claimed." *United States* v. *Mead Corporation*, 533 U.S. 218, 229 (2001) (emphasis added). No such delegation is at issue here. While the orders at issue do carry "the force of law" (EPA Br. 41) in that they subject Cominco to severe penalties for their violation, they were not in any sense issued "in the process of * * * *adjudication*." EPA did not conduct any sort of adjudicative proceeding, but simply overturned Alaska's BACT determination by fiat.[11]

Third, although EPA argues for deference because its interpretation is reflected in certain EPA guidance documents, EPA Br. 41-42, "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of

[11] EPA's observation that "formal" adjudication is not required for *Chevron* deference is immaterial, because EPA's orders were not the result of *any* sort of "adjudication." *See* EPA Br. 43 n.16. In a similar vein, EPA's reliance on *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991), is misplaced. That case involved deference to an agency's interpretation of its own regulation.

which lack the force of law[,] do not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). The same is true for statements made in a rulemaking that are not reproduced in the rules themselves, EPA Br. 42-43, since such statements, too, "lack the force of law."

Finally, EPA's interpretation is not entitled to any weight under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), where the focus is on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228 (footnotes omitted). EPA's interpretation is not the product of any formal process. Nor does the straightforward question of statutory interpretation implicate EPA's technical expertise. And EPA's interpretation is contrary to Congress's intent, so it plainly lacks the "power to persuade." *Skidmore*, 323 U.S. at 140. Furthermore, such deference is singularly inappropriate where, as here, the agency's interpretation involves the scope of its own authority. *See*, *e.g.*, *Northern Illinois Steel Supply Co.* v. *Secretary of Labor*, 294 F.3d 844, 846-847 (7th Cir. 2002). That principle applies with even greater force in this case, where the issue is the allocation of authority between the States and the Federal government—an area where this Court has traditionally required a clear statement by Congress. *See supra* at 5.

## II. EVEN IF EPA COULD OVERTURN UNREASONED BACT DETERMINATIONS, IT HAD NO AUTHORITY TO OVERTURN ALASKA'S REASONED DETERMINATION HERE.

Even if EPA were correct that it can unilaterally overturn state BACT determinations that are "unreasoned" or "arbitrary," EPA still had no authority to overturn Alaska's action here, because the State provided a reasoned explanation for its decision.[12] In accordance with EPA's *own* guidance,

[12] This issue is embraced by the question presented, which asks "[w]hether the Ninth Circuit erred in upholding EPA's assertion of

ADEC determined that the cost of SCR for the MG-17 generator was "excessive" because it was well "outside the range of costs being borne by similar sources under recent BACT determinations"—in fact, more than *twic*e as much on a cost-per-ton removal basis as the most expensive controls previously imposed by ADEC as BACT to control NOx emissions from a similar type of generator. J.A. 204. *See* Alaska Br. 40, 44-45. ADEC also concluded that the costs of SCR would be "disproportionate" for a rural electric utility and therefore, by analogy, for a mine required to supply its own power. J.A. 206. Thus, even though Cominco had not provided detailed financial information concerning the impact of SCR on its operations, J.A. 207, ADEC could still reasonably conclude that the excessive and disproportionate costs of SCR warranted its rejection as BACT.[13]

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authority to second-guess a permitting decision made by the State of Alaska." Pet. i. EPA asserts authority to overturn only "arbitrary or unreasoned" state BACT determinations. EPA Br. 21. Thus, whether the State issued a reasoned justification is "fairly included" within the question presented, S. Ct. R. 14.1(a), given EPA's view of the limits of its authority. *See* Cert. Reply 9 n.4.

[13] EPA notes that ADEC had concluded in its *preliminary* TAR that SCR was economically feasible. EPA Br. 47. As we have explained (Br. 43 n.13), ADEC did not conduct a cost-effectiveness analysis at that time because it had accepted Cominco's emissions-netting proposal. The final decision prompted ADEC to conduct a more informed weighing of economic impacts. There, ADEC examined "four recent BACT determinations for diesel-electric generators used for primary power production." J.A. 205-206. *See also* Cert. Rec. 22-032 to -033. Although these determinations may not have been as recent as ADEC would have preferred, they were still ADEC's most recent determinations and in the end ADEC chose to rely on them. *See* J.A. 243. Like the Ninth Circuit below, EPA fails to recognize that the type of heater involved in the Yukon-Pacific permit, which imposed NOx controls at $7,000 per ton of NOx removed, is not a "similar source." *See* EPA Br. 48; Pet. App. 14a; Alaska Br. 46; Cert. Rec. 22-033.

EPA claims that ADEC had no "reasoned basis" for rejecting SCR based on "economic impacts and other costs" because SCR's "world-wide pervasiveness" demonstrates its "economic feasibility." EPA Br. 47. Yet EPA has *never* pointed to a single instance where SCR had previously been imposed as BACT to reduce NOx emissions from a similar source—and EPA does not do so now. *See* Cert. Rec. 71-116 (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*") (emphasis added).[14]

Moreover, EPA's *own* BACT guidance provides that "[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.*" Cert. Rec. 71-115 (emphasis added). Following that guidance, ADEC determined that SCR was far more costly than technologies that had been found as BACT for similar sources, and would have a "disproportionate" impact on a mine required to act as its own primary power source. J.A. 206. ADEC reasoned that if a rural utility would not be required to incur the costs that SCR would impose on the local community, then a rural facility that must act as its own utility should not be required to bear them either. Given that SCR would not be BACT if a

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[14] EPA contends that a "fair reading" of its guidance is that once a control technology has been " 'effectively employed in the same source category,' " that technology generally should be considered BACT for the source category. EPA Br. 47 n.17 (quoting Cert. Rec. 71-115). Congress, however, plainly did not intend to establish a national BACT standard for particular sources. In any event, EPA's post hoc explanation does it no good here. As just explained, EPA has never been able to cite an example where SCR had previously been imposed as BACT to reduce NOx emissions from "diesel-electric generators used for primary power production"—the source category at issue here. J.A. 205-206.

rural utility supplied power to the Red Dog Mine, *cf*. *infra* n.15, the outcome should be no different where the power is generated on site. Although EPA may disagree with this explanation, there is nothing arbitrary or unreasoned about it.

Ultimately, EPA's disagreement with ADEC rests on a dispute about policy—which even EPA must admit is not an appropriate ground for it to overturn a state BACT determination. Disregarding its own guidance, EPA insisted during the permitting process that "economic infeasibility" could be justified only by a showing of "adverse economic impacts upon Cominco *specifically*." J.A. 127 (emphasis added). And it now responds that Cominco "is not a rural utility and it does not compete with rural utilities," EPA Br. 48-49, echoing the Ninth Circuit's cavalier rejoinder that "Cominco does not, in fact, buy power from an electric utility." Pet. App. 14a. According to EPA, the economic impact of SCR on a large commercial venture would not be "anything like" its impact on "a rural, non-profit utility that must pass costs on to a small base of individual consumers." EPA Br. 49. EPA's view, therefore, is that BACT is the most stringent control technology a particular source can afford. Indeed, at the same time that EPA was insisting that SCR was BACT for the MG-17 generator, EPA was assuring an Alaska rural electric cooperative association that EPA would not "make the same demands for PSD permits for rural utilities which install similar generators." Cert. Rec. 62-001.[15]

Nothing in the CAA—or even EPA's own guidance—suggests that BACT must be the most stringent control that does not bankrupt a company. Indeed, it is EPA's decision, not ADEC's, that is the arbitrary one. EPA's assurance that it would not "make the same demands for PSD permits for

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[15] Thus, EPA raised no objection when ADEC later determined that a technology less stringent than either SCR or Low NOx was BACT for a rural utility 90 miles from the Red Dog Mine. *See* http://www.state.ak.us/dec/dawq/aqm/132ac004fin.pdf.

rural utilities" demonstrates that EPA itself believes that "economic impacts and other costs" *can* include costs that may have to be passed on to the regional community. That is no different from considering the impact of the excessive costs of a control on an undeveloped region's largest and most important private employer and the regional community it benefits. That determination is exactly the kind of case-by-case, discretionary balancing of economic factors that Congress intended to leave to States, which have much greater understanding of local conditions than EPA.

Finally, in judging the reasonableness of ADEC's action, it cannot be ignored that the *result* of the State's approach was *lower* NOx emissions than if ADEC had selected SCR as BACT for the MG-17 generator, because Cominco had agreed to install—and indeed has installed—Low NOx on all its generators. *See FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942) ("If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.").[16] In the final

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[16] EPA never disputed this point during the permitting process, in the proceedings below, or at the certiorari stage in this Court. Now—for the first time—EPA contends that ADEC's decision would *not* result in lower emissions. *See* EPA Br. 46. That contention is mistaken. The pre-existing limit for NOx emissions that was retained in the final permit applies *only* to the MG-1, MG-3, MG-4, and MG-5 generators, not MG-2 and MG-6. *See* J.A. 156-157, 214-215. The installation of Low NOx on those two otherwise exempt generators results in emissions savings because, as ADEC reasonably found, a generator equipped with the more costly SCR would remain on stand-by throughout the year. *See* J.A. 86-87. EPA has never challenged the reasonableness of that real-world and site-specific assumption. To protect the applicable increment, the final permit imposes a *new* cap equal to the amount of emissions from seven generators installed with Low NOx in continuous operation. *See* J.A. 86, 155, 230. As a practical matter, however, all seven generators will never be in continuous

analysis, ADEC decided not to rely on emissions savings from the installation of Low NOx on all Cominco's generators after EPA reversed course and objected to that approach. *See* Alaska Br. 42 n.12. Nevertheless, EPA's contention that the CAA does not allow BACT determinations to be justified by emissions savings is simply wrong. EPA Br. 45-46. The Act requires consideration of "environmental" impacts "on a case-by-case basis." 42 U.S.C. § 7479(3). Given that cleaner air is the ultimate goal of the CAA, a BACT decision whose overall "environmental" impact is lower emissions as compared to another technology cannot be deemed so inherently arbitrary or unreasonable as to justify an EPA veto.

Ultimately, ADEC's careful and conscientious weighing of factors in light of local conditions and priorities further demonstrates why the authority to render—and, if necessary, to review—discretionary BACT determinations should be left where Congress expressly put it: with the State.

## CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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operation. Thus, Cominco's agreement to install Low NOx on MG-2 and MG-6 will still result in lower emissions.