1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALASKA DEPARTMENT OF :

4 ENVIRONMENTAL CONSERVATION, :

5 Petitioner :

6 v. : No. 02-658

7 ENVIRONMENTAL PROTECTION :

8 AGENCY, ET AL. :

9 - - - - - - - - - - - - - - - -X

10 Washington, D.C.

11 Wednesday, October 8, 2003

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:02 a.m.

15 APPEARANCES:

16 JONATHAN S. FRANKLIN, ESQ., Washington, D.C., on behalf of

17 the Petitioner.

18 THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,

19 Department of Justice, Washington, D.C., on behalf of

20 the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 now in No. 02-658, Alaska Department of Environmental

5 Conservation v. the Environmental Protection Agency.

6 Mr. Franklin.

7 ORAL ARGUMENT OF JONATHAN S. FRANKLIN

8 ON BEHALF OF THE PETITIONER

9 MR. FRANKLIN: Mr. Chief Justice, and may it

10 please the Court:

11 The question in this case is whether the Federal

12 Environmental Protection Agency has the legal authority to

13 override by fiat a discretionary determination that

14 Congress expressly directed be made instead by the State

15 of Alaska, which Congress trusted to exercise its own

16 independent judgment according to local priorities and

17 local conditions. We submit that the answer to that

18 question is no.

19 When Congress wanted to give EPA the authority

20 to -- under the Clean Air Act to review and approve the

21 substance of individual State determinations of the best

22 available control technology, or BACT, Congress said so

23 expressly. It gave EPA no such role in the circumstances

24 of this case.

25 QUESTION: Well, do you think that the statute

1 allows EPA to at least say, Alaska, you didn't go through
2 the proper analysis here, you didn't consider, as
3 contemplated by the statute, some of the costs and
4 concerns that would enable a State to say, fine, you go
5 ahead with less than the ultimate equipment? Now, can
6 EPA, under the statute, say, Alaska, you just didn't
7 follow the required procedures?
8 MR. FRANKLIN: EPA can say, yes, Alaska, you did
9 not consider the statutory factors, but that is not the
10 contention that's being made in this case, Your Honor.
11 QUESTION: Well, isn't that an element here in
12 fact? Wasn't that part of EPA's concern? Is it true that
13 the owner of the mine wouldn't even furnish certain
14 financial information to enable the State to make that
15 analysis?
16 MR. FRANKLIN: Two points, Your Honor. The
17 contention that's being made here is not that Alaska
18 failed to consider the factors that Congress set forth.
19 The contention is that they didn't do it in the way that
20 -- that EPA might have done it if EPA were the permitting
21 authority with regard --
22 QUESTION: Well, that's a -- that's a pretty
23 fine line. I mean, I'm -- I'm really surprised by -- by
24 your concession. I -- I would have thought a much more
25 rational interpretation of the statute is that, yes, the

1 State has certain obligations under the statute to
2 consider the factors, but if they were not considered, the
3 person who would bring them to account for not considering
4 them is initially the State courts and then, on
5 certiorari, to this Court. I thought your position was
6 that this is none of EPA's business --
7 MR. FRANKLIN: It is our --
8 QUESTION: -- that this -- that this
9 discretionary determination is given to the States, and
10 when the States are reviewed, they should be reviewed in
11 court.
12 MR. FRANKLIN: That is our -- our position, Your
13 Honor.
14 QUESTION: Well, why isn't it for -- for the --
15 for the hypothetical that Justice O'Connor gives as well
16 as for everything else?
17 MR. FRANKLIN: I think that the -- the line is
18 whether the requirements of the statute were followed or
19 not. In this case, Alaska has done precisely that which
20 it --
21 QUESTION: Well, assuming they weren't followed,
22 is your position that when they are not followed, EPA can
23 call them to account?
24 MR. FRANKLIN: EPA has the authority to enforce
25 the requirements and prohibitions of the act, but we

1 believe that authority should be narrowly circumscribed to
2 the bounds that Congress set for the EPA.
3 QUESTION: Well, let -- let me intervene and --
4 and suggest this. Could you have answered Justice
5 O'Connor's question this way? Oh, yes, the EPA can -- can
6 complain and make its case that the State did not exercise
7 its discretion the right way, but it can't do so by just
8 issuing an order. It has to go through the judicial
9 review process. Would -- would that -- would that answer
10 your case or --
11 MR. FRANKLIN: Yes.
12 QUESTION: -- or am I misstating the theory
13 here?
14 MR. FRANKLIN: No, you're not, Your Honor. The
15 -- the question in this case is not whether the claims
16 that EPA raises here will be subject to review. The
17 question is how, when, and in what manner, and --
18 QUESTION: Okay. Now, could -- could the EPA
19 have gone to Federal court and say, oh, well, this
20 discretion was exercised in good faith and so forth, but
21 it was -- it was wrong? It didn't comply with the
22 statute. Could it go to Federal court?
23 MR. FRANKLIN: if it's contention is it didn't
24 comply with the express terms of the statute --
25 QUESTION: In -- in this case -- in this case --

1 MR. FRANKLIN: In this case, no.

2 QUESTION: -- as Justice O'Connor said, it

3 didn't give -- oh, it cannot go to Federal court?

4 MR. FRANKLIN: Not in this case, Your Honor. It

5 could under the State review procedure, and I think

6 there's an open question as to whether --

7 QUESTION: Well, why couldn't it? Why couldn't

8 it? They simply proceed under 28 U.S.C. 1345.

9 MR. FRANKLIN: Exactly.

10 QUESTION: Now, what they do is they say, we're

11 now in Federal court. There's a State law here. The

12 State law happens to say that you cannot be arbitrary.

13 MR. FRANKLIN: Correct.

14 QUESTION: And so now they say, we're making the

15 same claim identically. They were arbitrary, capricious,

16 abuse of discretion. But it's under State law. And now,

17 my goodness, what is this case about?

18 MR. FRANKLIN: Exactly.

19 QUESTION: You say that they should have gone

20 into the Ninth Circuit under 1345 arguing it was

21 arbitrary, capricious under State law, and they say that

22 they should be in the Ninth Circuit arguing that it's

23 arbitrary and capricious under Federal law, where I've

24 never heard that there's any difference between arbitrary

25 and capricious under State law or under Federal law. It's

1 just whether it's arbitrary and capricious.

2 MR. FRANKLIN: There are two important

3 differences, Your Honor, and -- and I think they would

4 have -- 1345 is the statute I was just about to cite, and

5 I think they would have the authority to go into Federal

6 court under State law. Two important distinctions.

7 First, Your Honor, the -- the -- going through

8 the State process would require that they go through, in

9 addition to the State judicial review process, the State

10 administrative review process. In Alaska, that would have

11 allowed Alaska's Department of Environmental Conservation

12 a de novo administrative hearing at which they could have

13 presented a full administrative record, additional

14 witnesses, and they would have had the opportunity to

15 further clarify and defend their decision.

16 The second point, Your Honor, is that under the

17 fiat that they have exercised here by order, it does not

18 accord Alaska's determination the kind of deference that

19 it would have received under the State process.

20 The point that we're making, Your Honor, is that

21 the State review process is adequate to address all the

22 concerns --

23 QUESTION: They do go into Federal court, and I

24 do see your point.

25 What I am curious about is I think there are

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1 like maybe a handful of administrative law experts who
2 might have thought there was really some kind of
3 difference between whether you're in Federal court under
4 the State words or in Federal court under the Federal
5 words when the words are identical. And there may be
6 somebody who thinks there's a difference between what you
7 told Justice O'Connor and what you've told Justice Scalia,
8 but I'm not one of them. I don't understand how you
9 reconcile those things.
10 So if we assume Congress is not an expert, why
11 wouldn't they have just meant by this, well, EPA, you stay
12 out of it unless you think what they're doing is
13 unreasonable? If what you think they're doing is
14 unreasonable, you have the authority to come in and go to
15 Federal court if you want. That would be simple.
16 Everybody would understand it.
17 MR. FRANKLIN: If Congress had made that clear
18 in the statute, Your Honor, we would not be here. The
19 reason that Congress did not is that when Congress wanted
20 to give EPA the authority to review and approve the
21 substance of individual State BACT determinations, it said
22 so expressly in section 7475 --
23 QUESTION: Mr. Franklin --
24 MR. FRANKLIN: Yes.
25 QUESTION: -- perhaps I misunderstood your

1 brief, but I thought that you were making the distinction
2 in your brief between the substance of a decision and the
3 procedural motions. I thought you conceded that if the
4 Alaska agency simply said, well, the company wants Low
5 NOx, so they're going to get it, and we're not going to go
6 through any feasibility analysis. I thought your brief
7 conceded that if that were the case, there would be access
8 to the Federal court on the part of EPA.
9 MR. FRANKLIN: Yes, Your Honor, but that is not
10 what we are here about today. What we are here about
11 today is EPA --
12 QUESTION: Well, why isn't it, going back to
13 Justice O'Connor's question, when the EPA is saying, in
14 essence, you didn't really go through the feasibility
15 analysis because you didn't even ask for the relevant
16 information?
17 MR. FRANKLIN: To get back to that, Your Honor,
18 the -- what EPA is saying is that we did go through the
19 factors, but we didn't weigh them the way EPA would.
20 And with respect to the economic considerations,
21 Your Honor, Alaska has followed EPA's own guidance on this
22 which says quite clearly that the individual circumstances
23 and finances of a permit -- an applicant are not to be
24 considered in the analysis. So it was not relevant
25 whether the technology would have bankrupted this company

1 or not. What Alaska found to be relevant and what it was
2 its statutory prerogative to find relevant and as a matter
3 of its own local priorities was a comparison of the costs
4 between this applicant and other similarly situated
5 applicants in recent decisions.
6 QUESTION: So you want --
7 QUESTION: Mr. Franklin, it's not just a
8 question of coming into Federal court.
9 MR. FRANKLIN: No.
10 QUESTION: It's not just a question of the
11 agency coming into Federal court the way a private citizen
12 would and challenging the State action. It's a matter of
13 the agency issuing an order --
14 MR. FRANKLIN: Exactly.
15 QUESTION: -- which order is presumptively valid
16 and which would have to be deferred to by the Federal
17 court presumably unless the order was arbitrary or
18 capricious.
19 MR. FRANKLIN: And that is what I was --
20 QUESTION: So you'd be deciding in Federal court
21 whether it was arbitrary or capricious for EPA to find the
22 State to have been arbitrary or capricious, a very -- a
23 very refined determination, to put it mildly.
24 MR. FRANKLIN: Yes, Your Honor, and that is --
25 QUESTION: But isn't that the problem? It isn't

1 just a matter of getting into Federal court. It's a
2 matter of how you get into Federal court.
3 MR. FRANKLIN: Exactly. As I was saying before,
4 it's not a question of -- of whether these things will be
5 reviewed but how, and more specifically, whether these
6 issues which are --
7 QUESTION: But it is. There's a difference
8 because you're -- you said that the review -- the
9 reviewing authority would be the State court. So you
10 aren't talking about whether there would be Federal court
11 review, and I think in response to Justice Scalia, now you
12 are saying that the route is the State court. You're
13 agreeing with him when he said the route is the State
14 court and this Court on cert.
15 Do you see any role for the Federal courts?
16 MR. FRANKLIN: Well, as Justice Breyer pointed
17 out, it's an open question. We believe that the Federal
18 courts -- if EPA were instituting this, the State review
19 procedure, under section -- 28 U.S.C., section 1345, there
20 may be Federal jurisdiction because that confers original
21 Federal jurisdiction on any action brought by a Federal
22 agency. But that's a narrow, limited scope.
23 QUESTION: Well, but the action has to properly
24 lie in order for it to be successful, and when you have --
25 on what basis would the agency be suing?

1 MR. FRANKLIN: They would be suing under the
2 State review procedure, Your Honor. It would be their
3 option we think, and it's an open question. It's not one
4 that I think this Court --
5 QUESTION: I don't think they could do it.
6 Suppose that the -- a State agency decides the
7 best available control technology is a ceiling fan that
8 they brought up to New Orleans -- from New Orleans. They
9 bought it and brought it up to Alaska. Now, EPA looks at
10 that and says, no, no, this is going too far. Now, what
11 in your opinion is supposed to happen?
12 MR. FRANKLIN: Well, in -- in our opinion in
13 that situation, Your Honor, it would be subject to the
14 APA-type review and it would be struck down. Again, the
15 question is not whether that kind of review of --
16 QUESTION: What's the role of the Federal court?
17 MR. FRANKLIN: Well, if EPA is the one bringing
18 the action, I -- I would accept Your Honor's premise that
19 once it has proceeded through the comment process, once it
20 has proceeded through the administrative review process --
21 and frankly, we think that that particular matter would
22 end there. No State would do that because the States take
23 their responsibilities seriously to implement these
24 statutes.
25 If, however, there were any question that

1 remained at the end of that process, which EPA
2 circumvented in this case by fiat, then and only in that
3 event would EPA be able to seek judicial review, but it
4 would be an APA case. It would not be --
5 QUESTION: Well, I don't -- I don't understand
6 anyway because the statute that we're looking at, section
7 113(a)(5) says that if EPA finds a State is not acting in
8 compliance with any requirement or prohibition of the PSD
9 program --
10 MR. FRANKLIN: Yes.
11 QUESTION: -- EPA can stop construction and
12 issue orders. It can also bring a civil suit for
13 injunctive or monetary relief.
14 Suppose it just puts out an order and says,
15 look, Alaska, you did not determine what costs would mean
16 to the mine in terms of profitability, employment, or
17 global competitiveness, and therefore you didn't meet the
18 requirements of the PSD statute, and you stop any
19 construction now on the mine expansion. That would put
20 the onus on the mine owner or the State to go to court
21 somewhere, wouldn't it?
22 MR. FRANKLIN: It would and -- and that's
23 precisely the reversal of the kind of presumption of
24 regularity that the States are entitled to in these kinds
25 of cases.

1 QUESTION: Mr. Franklin --

2 QUESTION: So under 17 -- or what is it --

3 7413(a)(5)(C), which is 14a of your brief toward the

4 bottom, you say that in this case the agency cannot invoke

5 that section to issue an order or to go to court.

6 MR. FRANKLIN: That is correct, Your Honor.

7 QUESTION: All right. You have to say that to

8 be consistent.

9 MR. FRANKLIN: Yes.

10 QUESTION: Now, if you want us to write the

11 opinion your way, you would say under 17 -- 7413(a)(5),

12 the State -- the EPA cannot issue an order barring

13 construction unless. Now you fill in the blank.

14 MR. FRANKLIN: Unless a State has -- if there

15 was a demonstrated violation of an express statutory

16 requirement. For example, a State has not --

17 QUESTION: Well --

18 MR. FRANKLIN: -- issued a permit to begin with

19 or a State has not put a BACT limitation into a permit.

20 Those are the kind --

21 QUESTION: Unless there's a violation of an

22 express statutory requirement, but the Government is going

23 to come up and say, there was a -- there was a violation

24 of the statute defining BACT.

25 MR. FRANKLIN: But in this case, Your Honor,

1 that is not with respect to -- to the EPA, that's not what
2 they're saying. They're saying that we did go through the
3 various factors that the BACT statute requires us to go
4 through. In their opinion we didn't weigh them the proper
5 way and under the proper policies. We, in fact, disagree
6 strongly with that, but that is a contention that is
7 raised every day of the week under administrative
8 procedure law. It's not a contention that the express
9 requirements of the statute --
10 QUESTION: What your formulation is, is that
11 they did not follow a requirement of the statute. And I
12 just don't see how that gets you there.
13 QUESTION: You're making a distinction between
14 the express requirements of the statute and the obviously
15 implicit requirements of the statute? Certainly it -- it
16 is implicit in the statute that the State's decision must
17 be made rationally and not arbitrarily. Don't you think
18 that that's a requirement of law?
19 MR. FRANKLIN: It is certainly a requirement of
20 law, Your Honor, but it is a background principle that
21 derives ultimately, we think, from the Due Process Clause
22 not a unstated requirement of the Clean Air Act.
23 And the important thing is what did Congress
24 intend for EPA to be able to --
25 QUESTION: I mean, that isn't going to get --

1 the reason I think we're -- I'm having the same trouble
2 Justice Scalia is because the kind of -- in my mind
3 anyway, I tend to think of a classical definition of
4 arbitrary and capricious as sometimes involving they
5 didn't follow what the statute told them to do. Sometimes
6 they did what the statute told them not to do. Sometimes
7 they didn't get the weight right. And I put all those
8 things -- and I think a lot of people do -- in the same
9 box called arbitrary and unreasonable, capricious, and you
10 try to draw some kind of line between those things. I
11 don't know how to do it, and I don't think many judges
12 would.
13 MR. FRANKLIN: Well, I think that judges would,
14 Your Honor. It doesn't usually come up because a court,
15 reviewing such a procedure, could -- could find the -- the
16 order invalid under either basis, either it didn't comply
17 with the statute or it didn't comply with the APA.
18 Here, though, Congress specifically
19 circumscribed the EPA's authority and it did so for a good
20 reason.
21 QUESTION: Where is --
22 QUESTION: But the language of 113(a)(5) doesn't
23 really seem to be limiting -- I'm over here.
24 (Laughter.)
25 MR. FRANKLIN: Yes, Your Honor.

1 QUESTION: It doesn't seem to be limiting the
2 authority of EPA. And I'm just wondering just -- I'm not
3 sure I totally follow the argument, but I'm just looking
4 at the -- that statutory provision. And are you saying
5 that statutory provision does not apply even if the State
6 acted arbitrarily and capriciously?
7 MR. FRANKLIN: The statute governs how the
8 agency's -- gives the agency the discretion. How the --
9 the agency exercises that discretion is a separate
10 question and one that is traditionally reviewed on a full
11 administrative record by a court, not by EPA acting on its
12 own fiat.
13 QUESTION: Well, but this -- that provision
14 gives the -- the EPA the authority to issue certain
15 orders.
16 MR. FRANKLIN: Yes.
17 QUESTION: And is it your position that they did
18 not have the authority to issue the order here or that the
19 order was wrong?
20 MR. FRANKLIN: Our -- that they did not have the
21 authority because there was not a -- a violation of the
22 requirements of the act, which is the only basis --
23 QUESTION: Even if there were a violation of the
24 requirements of the act, would you say they -- if -- if
25 there were a violation of the act, would they have the

1 authority to issue it -- issue that order?

2 MR. FRANKLIN: If there -- if there were a

3 violation of the express requirements of the act, then --

4 then that's what the statute says. But it has to be read

5 in context. It has to be read in context. Particularly

6 when Congress wanted to give EPA the authority to review

7 and approve the substance of these determinations, it said

8 so expressly in one narrow instance that is not applicable

9 here. When a State has --

10 QUESTION: That's in advance of the permit. The

11 fact that -- that Congress specified that for certain

12 pollutions, you must, before you give any permit, go to

13 the EPA doesn't exclude that you could have the review

14 after. But I would -- after the permit issues.

15 But I would like to ask you. You seem to be

16 saying, well, this is just a determination. They applied

17 the statutory factors. EPA didn't like the way they did

18 it. There seems to be lurking in this a -- a difference

19 on what the statute means to this extent.

20 EPA seems to be taking a single source approach.

21 That is, you want a new generator? That generator has to

22 have BACT for that generator. Never mind if you tell us

23 voluntarily you're going to put Low NOx on all of them and

24 the result would be lowering the emissions. In other

25 words, EPA seems to be taking a no-bubble approach to

1 this. You go at it machine by machine --

2 MR. FRANKLIN: Right.

3 QUESTION: -- generator by generator, where

4 you're taking the position or Alaska is taking the

5 position that if you can reduce overall emissions by

6 putting the Low NOx on all six generators and in the end

7 have cleaner air, well, then do that and forget about the

8 SCR on one machine. That seems to be a substantive

9 difference about whether BACT applies to the whole setup

10 or machine -- generator by generator.

11 MR. FRANKLIN: Yes, it is, and we believe that

12 EPA is -- is wrong on that. But they're wrong as a matter

13 of policy, Your Honor. The BACT statute gives the States

14 the discretion to weigh, among other factors,

15 environmental factors. We think that is clearly broad

16 enough for the State to take into consideration the

17 overall environmental effect that this --

18 QUESTION: But that's -- it's either that you go

19 at it machine -- source by source, new source by new

20 source, modification by modification, or you can have the

21 bubble concept. In Chevron, EPA was -- was espousing the

22 bubble concept and the Court -- this Court said, EPA,

23 that's a reasonable construction of the statute.

24 Now EPA seems to be saying as to this program

25 there is no bubble. You have to look at that machine,

1 that generator in isolation.

2 MR. FRANKLIN: Right.

3 QUESTION: And that seems to be a basic

4 difference on what the statute means, not on -- mix it all

5 up and is it arbitrary and capricious.

6 MR. FRANKLIN: We think that it's -- in fact,

7 there is a difference on -- on how it's to be implemented.

8 Congress was very clear here. They understood that States

9 would have different policies, that one State could choose

10 the approach that EPA might choose, which says we are not

11 going to consider the environmental -- overall

12 environmental impact here. Another State might view it

13 differently, but that's what Congress wanted to have

14 happen. When EPA issued its orders in this case --

15 QUESTION: But on the facts here I thought --

16 now, tell me if I'm right about this. When I started

17 reading it, I was quite sympathetic to your view that it

18 makes no sense to have more emissions coming out as a

19 result of trying to control this one generator. Their job

20 is to get fewer emissions not more. But then when I read

21 into the record a little bit, it seemed to me that the

22 facts are that by the time this generator 17 came up, it

23 was perfectly apparent that the company had to put the --

24 whatever, some low technology, NOx technology or something

25 on four of the other generators anyway.

1 So that the bottom line is that this bubble has
2 nothing to do with this case because we're talking about
3 one generator coming in in circumstances where the other
4 generators have to be controlled regardless. Am I right?
5 MR. FRANKLIN: You're almost right, Your Honor,
6 but the -- the difference is that there -- there were four
7 other generators that were subject to the cap, but there
8 were six other generators total.
9 QUESTION: I know, but then we -- I had my law
10 clerk go through and do the extra emissions from those
11 other two, and it didn't really make any difference.
12 MR. FRANKLIN: It did -- it does make a
13 difference, Your Honor.
14 QUESTION: It does?
15 MR. FRANKLIN: Because of the assumption that
16 Alaska made, and that is that if you used SCR on MG-17 --
17 and this has never been challenged -- that -- that MG-17
18 would be the backup generator. It would not be used.
19 Therefore, any emissions savings that you can get off
20 those other two engines, 2 and 6, no matter how small they
21 might be -- and I think that they probably come in the
22 neighborhood of 100 tons or so. Any emissions savings
23 that you can get off 2 and 6 add to the bottom line
24 because the assumption that the State has made, which is a
25 -- a reasonable and in my view correct assumption, is that

1 MG-17 is not going to be used if it's SCR because SCR has
2 enormous operating costs associated with it.
3 Again, these were the -- the policy
4 determinations --
5 QUESTION: If I go --
6 QUESTION: I still don't -- I don't -- I don't
7 see where Justice Breyer's question fits with -- with the
8 issue, does the statute dictate BACT on an individual
9 generator? Never mind the rest. In other words, does the
10 act say, no bubble, and that's how EPA seems to be reading
11 the act, that it's not a matter of discretion, that this
12 calls for a new source, modified source, and you just look
13 at that new source and you don't look at the old
14 generators at all.
15 MR. FRANKLIN: You look at the new source, Your
16 Honor, but you're allowed to consider environmental impact
17 in looking at it. And there EPA is wrong, if that's their
18 contention. Their -- for example, they -- they do not
19 require States, nor could they, to use their top-down
20 methodology. EPA understands -- and that is the nub of
21 this case -- that the BACT determination is not supposed
22 to be a uniform Federal standard.
23 QUESTION: What -- what other method is there
24 besides the top-down? I know both briefs have said it's
25 -- it's the way it was done here. That's what EPA

1 recommends, but it isn't inevitable. What else would they
2 use other than top-down?
3 MR. FRANKLIN: It could -- it could be bottom-
4 up, Your Honor. They could look at each technology and
5 eliminate the ones going up. There's a number of
6 different ways that a State could do it.
7 The point that's being made here, when EPA
8 issued --
9 QUESTION: Is that in fact the situation, that
10 there are other ways, or is it just in theory, but they
11 all use top-down?
12 MR. FRANKLIN: Your Honor, I don't know what
13 every State uses, but I do know that Congress made clear
14 -- and the legislative history at page 31 of the Senate
15 report is crystal clear on this point -- that each State
16 was to have the discretion to weigh the factors in its own
17 judgment. And -- and Congress made clear that a State --
18 it would be permissible for a State to consider such
19 things as anticipated and desired economic development, as
20 well as the amount of the available increment that the
21 State wished a particular source to consume. When --
22 QUESTION: Mr. -- Mr. Franklin, the -- the
23 difficulty that I'm having with -- with your argument
24 about the meaning of the statute goes back to your answer
25 I think to Justice Kennedy's question awhile ago. He

1 asked you, in effect, what's the role of the statute on
2 your theory, and -- and you said, well, if they -- if they
3 simply ignore one of the stated statutory factors, they
4 say we're not going to consider this, or if there's a
5 technical defect in the order, if the order is incomplete,
6 that would be a -- a circumstance in which EPA could
7 exercise this authority.
8 But you also said -- and I -- I assume you said
9 correctly -- that later on that these kinds of obvious
10 violations are going to be rare.
11 MR. FRANKLIN: Yes.
12 QUESTION: And that leads me back to -- as I
13 said, I guess, to Justice Kennedy's question, and that is
14 this. It seems to me that on your view of the -- the two
15 statutory sections, there really isn't very much role for
16 them to play, and I can't imagine why Congress would have
17 enacted separate order sections if all they were meant to
18 do is what you say.
19 So my question is, why -- why doesn't your
20 explanation trivialize these two statutes to a point that
21 is implausible?
22 MR. FRANKLIN: They don't trivialize it, Your
23 Honor. There are numerous Federal requirements that if a
24 State does not meet those express statutory requirements,
25 then EPA can step in. There are ambient air quality

1 standards --

2 QUESTION: And -- and EPA could do the same

3 thing by following the State review process, couldn't it?

4 MR. FRANKLIN: It --

5 QUESTION: It could go in and say, look, they

6 forgot X. They refused to apply Y.

7 MR. FRANKLIN: But if its contention is one that

8 the statute gives the discretion but it was simply not

9 exercised in the proper way that we would have exercised

10 it, that is not a contention that Congress wanted EPA to

11 be able to resolve by fiat.

12 QUESTION: Well, but I mean, that's -- that's

13 the question. I mean, the -- the difficulty I'm having is

14 that if -- if it is unlikely that Congress would have

15 provided this entire separate track simply to deal with

16 the problems that you say the track is meant to deal with,

17 then it is not so implausible at all that Congress would

18 have intended the statute to be applied as it has been

19 applied here.

20 MR. FRANKLIN: I think it is implausible because

21 Congress made clear that EPA's authority was circumscribed

22 to enforcing the -- the statutory requirements, and those

23 requirements were met in this case.

24 If I might reserve the balance of my time.

25 QUESTION: Very well, Mr. Franklin.

1 Mr. Hungar, we'll hear from you.

2 ORAL ARGUMENT OF THOMAS G. HUNGAR

3 ON BEHALF OF THE RESPONDENTS

4 MR. HUNGAR: Mr. Chief Justice, and may it

5 please the Court:

6 Petitioner's fundamental contention is that once

7 a State issues a determination of best available control

8 technology so labeled, no matter how arbitrary, factually

9 unsupported, or unreasoned it may be, the Federal

10 Government has no enforcement authority under the act to

11 take actions to stop the invalid permit from taking

12 effect. Nothing in the text, structure, or history of the

13 act supports the implausible contention that Congress

14 intended to immunize arbitrary, unreasoned State decision

15 making from Federal enforcement review.

16 QUESTION: Well, I don't think he is -- I mean,

17 my impression of their argument was, yes, you can review

18 that. What you have go is through the State procedure and

19 then after you go through the State procedures, in fact,

20 you can go into a Federal court and have them apply the

21 State review procedure if you want.

22 MR. HUNGAR: Yes, but --

23 QUESTION: I think that's what their argument

24 was, or at least one of their arguments.

25 MR. HUNGAR: But, Your Honor, Congress enacted a

1 Federal regulatory scheme and a Federal enforcement
2 scheme.
3 QUESTION: That's a different thing. Maybe
4 yours is better, but you can't say they're leaving it
5 without review. So I just wanted to --
6 MR. HUNGAR: Review only under State law, Your
7 Honor, and -- and our point is that Congress has enacted a
8 comprehensive Federal regulatory scheme and authorized EPA
9 to serve as a backstop to ensure compliance with all of
10 the requirements of the act, or this -- this portion of
11 the act.
12 QUESTION: That's begging -- I mean, that --
13 that is exactly the point at issue, it seems to me. Why
14 is -- why is it irrational to envision a scheme such as --
15 such as the petitioners here propose, which is, look it,
16 Congress set certain, absolute requirements? Ambient air
17 quality, you know, shall be this. But as long as those
18 requirements are met, below that we also want each State
19 -- each emission source in a State to be examined to see
20 whether it is using the best available technology.
21 But what constitutes the best available
22 technology under the circumstances is a very difficult
23 question. It involves issues of -- of the State economy,
24 as well as scientific issues. We are content so long as
25 each State meets the absolute standards that the statute

1 sets forth. Below that standard, we're going to let each
2 State decide whether the best available technology under
3 all the circumstances is being used. That seems to me a
4 perfectly sensible and rational system.
5 MR. HUNGAR: Your Honor, the definition of best
6 available control technology does not simply leave it to
7 the discretion of the decision maker, the unbridled
8 discretion, to -- to select whatever it wants --
9 QUESTION: Well, let's see what it says.
10 MR. HUNGAR: It imposes meaningful constraints,
11 Your Honor. Maximum emissions reduction that is
12 achievable taking into account specified factors. A
13 failure, for example --
14 QUESTION: But you're -- you're missing the --
15 the first part of it. It doesn't say which is the best
16 available. It says the best of means and emission
17 limitation, best on the maximum degree of production of
18 each pollutant subject to regulation under this chapter,
19 blah, blah, blah, blah, which the permitting authority on
20 a case-by-case basis, taking into account these various
21 methods, determines to be the BACT. I mean, there it is.
22 Which the permitting authority determines.
23 MR. HUNGAR: Yes, Your Honor. Two responses.
24 Number one, the -- the United States Code is
25 filled with examples of instances in which Congress

1 defines that it's the initial decision maker for a
2 particular question, but that is not generally taken to
3 mean that delegation of absolute, unreviewable discretion.
4 Number two -- particularly when, as here, the statute
5 imposes --
6 QUESTION: But they're -- they're not saying --
7 MR. HUNGAR: -- these constraints on the
8 decision maker.
9 QUESTION: They're not saying that the
10 discretion is unreviewable. They're just saying it's
11 reviewable in a different manner than you think it is.
12 MR. HUNGAR: They're saying that it's not
13 reviewable as a matter of Federal law, Your Honor, and
14 that is what we're talking about here.
15 QUESTION: Well, Federal -- are you aware of any
16 State in the United States that does not have in its law
17 the requirement that its own agencies have to act
18 rationally, that they can't act arbitrarily, abuse of
19 discretion?
20 MR. HUNGAR: I don't know, Your Honor, but --
21 QUESTION: Well, I don't know of any either.
22 MR. HUNGAR: But I know there are --
23 QUESTION: And so that seems to be the same
24 standard that you argue that applies, and since there is
25 no State that doesn't have that standard and no Federal

1 Government that doesn't have it, we all have the same
2 standard. And that's why I think the argument does boil
3 down to which courts will apply it: the Federal court as
4 a matter of Federal law, or the Federal court as a matter
5 of State law.
6 MR. HUNGAR: Well, number one, I believe various
7 States have standing requirements that may be more
8 restrictive than those applicable under -- under Federal
9 law.
10 Number two, the question is not merely which
11 court will apply it but whether the -- the comprehensive
12 administrative authority confirmed on EPA to issue orders
13 and not just the administrative orders at issue here, but
14 also the possibility of the -- of the administrative
15 sanctions proceeding, which is separately provided by
16 Congress in subsection (d) of 7413. Under petitioner's
17 interpretation, none of that would apply as long as
18 there's some element of discretion in the State's
19 decision. And it's simply not correct to say that BACT is
20 the only area in which the States enjoy some range of
21 judgment or -- or in which there may be factual
22 disputes --
23 QUESTION: It's some range of judgment. This is
24 the only provision that reads this categorically. I -- I
25 -- which the permitting authority on a case-by-case basis

1 determines.

2 MR. HUNGAR: With respect, Your Honor, that's

3 not correct. Under -- under 7475(a)(3), which is the

4 --the subparagraph prior to (a)(4) which imposes the BACT

5 requirement -- 7475(a)(3) is on -- I believe it's on 13a

6 of the appendix to the gray brief. (a)(3) is -- is where

7 the -- is where the requirement that permittees meet other

8 provisions of the act such as the national ambient air

9 quality standards and the increments.

10 QUESTION: Tell me again where -- where --

11 MR. HUNGAR: 7475(a)(3) on -- on 13a of the gray

12 brief appendix.

13 QUESTION: On 13a.

14 MR. HUNGAR: Yes.

15 QUESTION: (4). Right?

16 MR. HUNGAR: (4) is the BACT requirement. (3)

17 is the national ambient air quality standards, other

18 standards of performance, the increments, and so forth.

19 All of the other requirements that -- that petitioner

20 concedes EPA should be able to enforce.

21 But if you turn -- and that (a)(3), in turn,

22 references 7410 --

23 QUESTION: (j).

24 MR. HUNGAR: (j). 7410(j), which is on page 5a

25 of the appendix, says that the permittee must -- the

1 permit applicant must demonstrate to the satisfaction of
2 the permitting agency that all of these requirements have
3 been met.
4 So under petitioner's interpretation, EPA's
5 authority to enforce all of -- all of the requirements of
6 the prevention of significant deterioration program would
7 be eviscerated to the extent there is discretion in those
8 determinations and there is necessarily discretion. All
9 of those other determinations require modeling, and to do
10 modeling, you have to determine what the inputs to the
11 model are and you have to determine what the boundaries of
12 the ambient air area are, and if EPA cannot review any of
13 those discretionary decisions, it has essentially no
14 authority to do anything under this act except to require
15 that permitting authorities mouth the words of the
16 statutory definition. And that's it. And if that's
17 all --
18 QUESTION: Well, could -- could we get specific
19 in this case? Looking at the Clean Air Act provision,
20 169(3), which the permitting authority on a case-by-case
21 basis determines is achievable, after considering economic
22 impacts and other costs. Now, EPA says what's wrong.
23 Alaska did make a determination, did it not?
24 MR. HUNGAR: Alaska made a determination, but it
25 did not determine best available control technology within

1 the constraints of the statute, and the -- and the
2 easiest --
3 QUESTION: Well, how so? Let -- looking at the
4 statute, what provision did they fail to comply with?
5 MR. HUNGAR: Well, they -- they didn't determine
6 the maximum degree that is achievable, taking into account
7 these factors, because the only basis for their rejection
8 of the best technology selective control -- I mean,
9 selective catalytic reduction was their reliance on
10 economic impacts, and specifically what they said was the
11 foremost consideration -- the foremost consideration --
12 for their rejection of SCR, according to the State -- this
13 is at page 208 of the joint appendix -- was impact of the
14 cost of SCR on the competitiveness of the mine. And
15 yet --
16 QUESTION: What's wrong -- what's wrong with
17 that?
18 QUESTION: And --
19 MR. HUNGAR: What's wrong with that, Your Honor,
20 is that on the previous page, on page 207 of the joint
21 appendix, the State admits that because Cominco refused to
22 provide the financial information, they had no basis for
23 making a judgment. That's a -- they quote judgment.
24 QUESTION: Well, let me just ask you --
25 MR. HUNGAR: They couldn't make a judgment about

1 that very issue.

2 QUESTION: -- a technical point. Suppose at the

3 end of the day -- and I'm not sure this is what we would

4 do or that I would favor, but suppose at the end of the

5 day we agree EPA had authority to issue a stop order and

6 that it was proper. Could Alaska then go back and say,

7 well, okay, we're going to run through this drill once

8 more and do consideration of costs, and they're now going

9 to allow Low NOx's instead based on that? Now, can they

10 do that? Is that all right?

11 MR. HUNGAR: On -- on an appropriate record,

12 absolutely they could do that. And -- and EPA made it

13 clear --

14 QUESTION: So this wouldn't be the end of the

15 day.

16 MR. HUNGAR: That's correct. The State has the

17 -- has discretion, but that discretion is not unlimited,

18 and that is the point that --

19 QUESTION: Can you tell me, Mr. Hungar --

20 QUESTION: Speaking of it's appropriate --

21 QUESTION: Can you tell me, Mr. Hungar, whether

22 or not as -- as a matter of past practice, the EPA has

23 intervened in any State administrative review proceedings

24 in State courts?

25 MR. HUNGAR: In State court, no, I don't believe

1 so, Your Honor.

2 QUESTION: All right. Has -- has it gone to

3 Federal court under -- was it -- 1345, the United States

4 District?

5 MR. HUNGAR: I don't believe so. It's an

6 unsettled question I think whether 1345 would authorize

7 EPA to --

8 QUESTION: So the EPA has been consistent in

9 saying that it -- it is not in any case like this or with

10 parallels to this gone through an administrative review

11 process. It's simply issued a stop order?

12 MR. HUNGAR: That's correct. The EPA has

13 consistently maintained and -- and has -- has announced

14 this interpretation in a variety of administrative

15 documents, including through notice -- in the course of

16 notice and comment rulemakings and in the very orders in

17 this case. EPA has consistently taken the position for 20

18 years, at least, that it has authority under these

19 statutes, 7477 and 7413(a)(5) to do exactly what it did in

20 this case --

21 QUESTION: That doesn't surprise me. You -- you

22 mention on an appropriate record. That is one of the

23 things that makes me uneasy about the -- the resolution

24 that you propose.

25 When this thing comes to a Federal court of

1 appeals, which is not a fact-finding court, it comes on
2 the basis of nothing except EPA's order. We -- we do not
3 know the record before the administrative agency on the
4 basis of which the EPA acted. Now, if you had gone
5 through the State administrative procedure, that record
6 would have been examined. That would -- the action in
7 question would have been the action of the State agency
8 and -- and you would examine the record before the State
9 agency.
10 But -- but the administrative action we're
11 reviewing here is not the State administrative action.
12 It's your administrative action, and the only relevant
13 record is the record before the EPA. And -- and as I said
14 before, the court of appeals ends up determining whether
15 it was arbitrary and capricious for the EPA to determine
16 that the State agency was arbitrary or capricious.
17 You combine those two weird factors and -- and
18 I'm just dubious that this is the kind of review that
19 Congress intended.
20 MR. HUNGAR: Taking the last part of your
21 question first, Your Honor, there's nothing particularly
22 strange about an appellate court reviewing a prior
23 determination of whether an agency decision was arbitrary
24 and capricious. Courts do that all the time --
25 QUESTION: Square.

1 MR. HUNGAR: -- under the APA when a district
2 court -- no. If a -- a district court determines whether
3 a -- whether the -- an agency decision was arbitrary and
4 capricious, the court of appeals, to the extent there are
5 discretionary issues, they would review deferentially, but
6 really as a general matter, it's going to boil down to a
7 question of law, which is I think the case here, which is
8 was it -- was it or was it not arbitrary and capricious
9 for the State of Alaska to do what it did here.
10 Fundamentally that is a question of law upon review of the
11 EPA's determination.
12 QUESTION: All right. It's a question of
13 judgment and whose judgment gets some weight.
14 In respect to that, what I'd really suddenly
15 stirred up again here -- suppose we reach the second
16 question. Suppose we reach the question of whether Alaska
17 did, in fact, do something that was pretty unreasonable,
18 and suppose I accept your argument that this was totally
19 unreasonable to say that they didn't have to put in this
20 special technology because of cost when Alaska didn't even
21 know what the cost was. That's about like the fan.
22 That's close to the ceiling fan. That's what you're
23 arguing.
24 But then they've made another argument, and the
25 other argument is bothering me a lot more. And that is

1 that the EPA has taken the position that you have to put
2 this extra special converter or whatever on number 17,
3 even if the consequence of that, because of the
4 interaction of the regs and their desires with number 2
5 and number 6, is more pollution. Now, that does bother me
6 because it seems to me a State agency that's trying to get
7 a result that is less polluting is not acting arbitrarily
8 and capriciously except in rather unusual circumstances.
9 Now, what do I do with that argument? Does that
10 mean if I accept everything you say -- but that worries me
11 -- I should send it back for another determination of
12 whether this really is arbitrary and capricious? What
13 should I do with that argument?
14 MR. HUNGAR: Your Honor, the State agency did
15 not justify its final permit decision on that rationale.
16 The State is now arguing in its brief in this Court --
17 QUESTION: That's a -- that's one point. I've
18 got that point. That's a kind of technical point in my
19 mind. In other words, Alaska might really be polluting
20 more, but because of this sort of which paper they wrote
21 which in, we should just accept it. Now, I got that
22 argument. But is there any other?
23 MR. HUNGAR: But it's more than that, Your
24 Honor. The State agency expressly rejected that analysis,
25 refused to conduct that analysis, refused to base its

1 permit decision on that approach because it agreed it was
2 contrary to the requirements of the act. That's at page
3 199 of the joint appendix. The State agency said we are
4 -- we agree that's not an appropriate way in which to
5 analyze the BACT question. That's consistent with EPA's
6 regulations, in answer to Justice Ginsburg --
7 QUESTION: Yes. I asked that question before.
8 MR. HUNGAR: Yes.
9 QUESTION: And -- and it is a question of
10 interpretation of the text of this statute. I thought
11 that EPA was taking an anti-bubble approach, that it said,
12 you want to have generator 17. We look at generator 17
13 and that's what the statute means by new source. I
14 thought you were taking that view, but maybe you're not.
15 MR. HUNGAR: Your Honor, and -- and Chevron
16 itself actually discusses this, as you -- as you
17 suggested, but Chevron recognizes that EPA has -- has
18 construed the -- has applied the bubble concept or not
19 differently. It -- the bubble concept applies at the
20 initial stage in determining whether a modification has to
21 go through prevention of significant deterioration
22 analysis.
23 But once -- once that -- once it is determined
24 that the total emissions are going to increase so that the
25 -- the modification does have to go through that analysis,

1 it is then -- the bubble concept no longer applies and the
2 analysis is done on an individual basis. That's set forth
3 in EPA regulations promulgated through a notice and
4 comment rulemaking --
5 QUESTION: That's what I thought. So it isn't a
6 question of just loose, arbitrary, and capricious. EPA is
7 taking the position that you look at generator 17 because
8 you've already made the determination that adding a
9 generator, modifying another one, is going to add to the
10 pollution.
11 MR. HUNGAR: As a matter of law, what EPA has
12 determined in -- in exercising in -- its rulemaking
13 authority is that the statute requires that once it's
14 determined that the BACT analysis must be made, it must be
15 made on an individual unit basis, which is exactly what
16 the State ultimately did here. The State conceded that is
17 correct as EPA's regulations state. Only in its recent --
18 in this Court is the State now trying to back away from
19 that.
20 QUESTION: Mr. Hungar, can I ask you, going back
21 to Justice Scalia's question earlier, is there a
22 significant difference in the record before us in this
23 proceeding than what the record would contain if they had
24 followed the route of applying a review of the Alaska
25 order through the State system?

1 MR. HUNGAR: We don't believe so, Your Honor.
2 The EPA gave the State ample authority and Cominco ample
3 -- I mean, ample opportunity to place in the record
4 whatever materials they wanted --
5 QUESTION: That was my impression, the record
6 really was the same no matter which way you went.
7 MR. HUNGAR: The Ninth Circuit, when this case
8 was in -- in the court of appeals, issued an order
9 directing the preparation of a record and asking the
10 parties what -- to -- to address whether the record was
11 complete or not. Cominco and the State said the record
12 was sufficiently complete. The only things that -- that
13 the State identified --
14 QUESTION: Well, did they -- did they put in the
15 whole State record --
16 MR. HUNGAR: I don't know that the whole --
17 QUESTION: -- before the State agency?
18 MR. HUNGAR: The -- the administrative fills a
19 box. It contains internal ADEC communications, memoranda,
20 analysis, the Cominco application. It's quite detailed.
21 QUESTION: But in any -- I take your answer is
22 they can put in the entire State record to go before the
23 court of appeals. Is that the answer?
24 MR. HUNGAR: Absolutely. And -- and again,
25 under Overton Park and under this case's precedents, if

1 the EPA record is incomplete for some reason, the Court
2 can remand it to the agency for -- for further -- to
3 complete the record. But that doesn't -- that doesn't
4 suggest that EPA doesn't have the authority to act. It
5 merely suggests that EPA needs to exercise that authority
6 in a procedurally correct manner.
7 QUESTION: It goes back to a question that has
8 now dropped out of the case entirely it seems. In the
9 Ninth Circuit, I think EPA was arguing this is not a final
10 order. You have to wait until we go into court and the
11 court that we would go into is a district court where a
12 full record could be developed.
13 I take it you have now abandoned that argument
14 and seen the error of your ways, and now you accept that
15 this is final. What led you to change?
16 MR. HUNGAR: Upon further consideration of this
17 Court's more recent precedents in the -- in the area of
18 finality, the -- the Whitman case and Bennett against
19 Spear and given the particular circumstances of this case
20 where the agency -- where EPA was not simply issuing an
21 order to someone saying you're violating preexisting
22 requirements of the act, but was in fact changing the
23 status quo and stating that a -- a permit that had been
24 issued by the State that allowed construction could not
25 take effect, in those circumstances we -- we concluded

1 that this Court's precedents regarding final orders are
2 satisfied and that this is indeed a final order because it
3 imposes legal obligations, new legal obligations, on
4 Cominco.
5 QUESTION: Mr. Hungar, you -- you've just told
6 us that the reviewing court can have the full State record
7 before it when it makes its determination. What about EPA
8 when it makes its determination, when it issues its order?
9 What -- what does it have in front of it? It doesn't have
10 to have anything, does it?
11 MR. HUNGAR: Well, it has to have evidence
12 sufficient to make a finding that the State is not
13 complying with the requirements of the act, Your Honor.
14 QUESTION: Well, but it doesn't -- it doesn't
15 have to do that on the basis of the record presented to
16 the agency, does it?
17 MR. HUNGAR: Well, it's difficult --
18 QUESTION: Did it in this case? Is that -- is
19 that what it did? Did it review the agency record here?
20 MR. HUNGAR: Well, in this case it's -- although
21 they had extensive record materials before them, the --
22 the flaw in the State's decision making is apparent on the
23 face of the State's own decision. As I said before, pages
24 207 and 208 of the joint appendix revealed that the State
25 admits it doesn't have factual support for what it views

1 as the foremost consideration justifying its decision.
2 But -- but if EPA issued -- issued an order
3 under this act without -- without the record materials in
4 front of it, and -- and had -- therefore, had no basis for
5 issuing an order, a court of appeals could set it aside.
6 QUESTION: Can you tell me? I want to be very
7 clear on what I didn't hear in answer to my question.
8 What I was concerned about -- and I understand your legal
9 arguments, but I was concerned about their claim. If you
10 win this case, what it means is more expensive technology
11 goes onto number 17. They run number 17 less. They run 2
12 and 6 more, and the net result in Alaska is more
13 pollution. Now, you haven't said -- I haven't heard you
14 say, no, that's wrong. What you have said is we shouldn't
15 reach it. There -- there -- they didn't make the claim in
16 the right place with the right words. And I want to give
17 you a chance to say, no, that's wrong, if it is wrong.
18 MR. HUNGAR: I think it is wrong, Your Honor.
19 It is -- it is theoretically possible that if they
20 installed this expensive generator and spent millions of
21 dollars on it and never once turned it on and they ran all
22 of their other -- other generators 100 percent of the time
23 without ever stopping them, it is theoretically possible
24 that there could be slightly more pollution. However,
25 that is highly implausible, number one, and number two,

1 there is no finding by the State that that is in fact what
2 would happen. This is merely argument in their appellate
3 briefs.
4 And what is clear on the record is that under --
5 if the State had adopted SCR as BACT, the total cap on
6 emissions allowable by this facility would be hundreds of
7 tons lower than the cap that was imposed by the State.
8 That's undisputed and perfectly clear that SCR would
9 result in a total emissions cap far lower than the one
10 that the State wanted to impose. And so the State's
11 argument, unsupported by any findings, is that -- is the
12 sheer speculation that Cominco would spend millions of
13 dollars to install a generator that it would never use.
14 We submit that's highly improbable.
15 QUESTION: So, do I -- I understand you to say
16 that they would be forced -- I take it you're --
17 implicitly you're saying they'd be forced to use this
18 generator because the use of this generator would be the
19 only way that they, in fact, could comply with the cap?
20 MR. HUNGAR: No, Your Honor. If -- if they
21 installed this generator and if -- if selective catalytic
22 reduction were deemed to be required, the total -- there's
23 a total emissions cap of 3,878 tons in the State's permit.
24 QUESTION: For --
25 MR. HUNGAR: For all seven generators.

1 QUESTION: -- for this -- all seven. Okay.

2 MR. HUNGAR: And if -- and that includes MG-17

3 under -- using the Low NOx. Under Low NOx, MG-17 -- its

4 output is 531 tons if it's used throughout the year, 531

5 tons. Under SCR it would output -- put out only a tenth

6 of that at full capacity. So the total cap under BACT

7 would be hundreds of tons lower, slightly less than 3,500

8 tons.

9 QUESTION: The cap -- the cap wouldn't be lower.

10 The total emissions would be lower. The cap would --

11 MR. HUNGAR: The -- the total emissions cap

12 would be lower. The -- the company is free to -- to

13 choose how to -- how to meet the cap, how to -- which

14 machines to operate at what times, as long as it doesn't

15 exceed that cap. But the cap is determined by adding to

16 the preexisting cap total for the other six generators the

17 additional amount that is deemed permissible to --

18 QUESTION: So -- so the answer is it would

19 probably -- most probably use the new generator.

20 MR. HUNGAR: Absolutely.

21 QUESTION: Theoretically it wouldn't have to.

22 MR. HUNGAR: Correct.

23 Your Honor, we -- Your Honors, we submit that

24 Congress clearly intended EPA to exercise meaningful

25 enforcement authority in the prevention of significant

1 deterioration program. Indeed, it specifically authorized
2 in that very context EPA to issue the types of orders at
3 issue here. We, therefore, ask that the judgment of the
4 court of appeals be affirmed.
5 QUESTION: Thank you, Mr. Hungar.
6 Mr. Franklin, you have 3 minutes remaining.
7 REBUTTAL ARGUMENT OF JONATHAN S. FRANKLIN
8 ON BEHALF OF THE PETITIONER
9 MR. FRANKLIN: Thank you, Your Honor.
10 Responding to Justice O'Connor's colloquy with
11 counsel as to whether EPA could simply remand the case and
12 then there might be a back and forth that could take --
13 QUESTION: I didn't ask if it was -- could
14 remand it. I asked whether it would be open to the State
15 to go through the drill that EPA said it didn't do before
16 and that the State said it didn't have the information to
17 enable it to do.
18 MR. FRANKLIN: And -- and that is precisely the
19 problem in our view because EPA, if the Court upholds its
20 authority in this case, can act by fiat at any time it
21 wants on the basis of any information that it deems
22 relevant, even after a permit has gone through the entire
23 State process, even after it has become final under State
24 law, and even after the source may have invested millions
25 of dollars in the technology. Then EPA could step in.

1 What we are saying here -- and, Justice Breyer,
2 we don't care which court --
3 QUESTION: Well, there are courts -- there are
4 courts with doctrines that would not allow such
5 inequitable conduct. I mean, you brought up it could be
6 years and years later; anytime, 17 years later, EPA could
7 wake up. The answer to that was that no court would give
8 an ear to EPA having just slept on --
9 MR. FRANKLIN: With respect --
10 QUESTION: -- on the situation.
11 MR. FRANKLIN: With respect, Your Honor, EPA's
12 enforcement authority in this case is mandatory. Under
13 section 167, they shall take appropriate measures to stop
14 construction. Therefore, if the Court upholds their
15 authority in this case, they have to exercise it at any
16 point.
17 And, Justice Breyer, we don't care which court
18 conducts the review. We care that a court does and not
19 EPA acting at any time by fiat according to any
20 information that it may have at -- at -- on the basis of
21 what it thinks may or may not be reasonable or
22 unreasonable.
23 The point of the matter is, is that the State
24 procedures are fully adequate to address any concerns that
25 EPA has raised here, and its injecting itself into the

1 process, disrupting the orderly process -- and, Justice
2 Stevens, the record would be different and it would be
3 different because Alaska law allows, when a party has
4 properly objected, for a de novo administrative hearing,
5 at which the agency is allowed to present additional
6 evidence, witnesses, and further refine and clarify its
7 decision.
8 If there was any legitimate concern as to
9 whether the State's decision wasn't clear, as it should
10 have been, that is the manner in which it should have been
11 resolved, through the administrative process. And we are
12 confident that it would have been resolved there, Justice
13 O'Connor. That's where the back and forth would have
14 occurred, not in the manner of here where we're now 4
15 years later and we still don't have a decision as to what
16 technology this company can use.
17 And finally, Your Honors, the -- the point of
18 the matter is there's no legitimate dispute here that the
19 result of Alaska's decision is cleaner air and that cannot
20 be unreasonable.
21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Franklin.
23 The case is submitted.
24 (Whereupon, at 10:56 a.m., the case in the
25 above-entitled matter was submitted.)