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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Respondents.

POWDER RIVER BASIN RESOURCE COUNCIL; NATIONAL PARKS CONSERVATION ASSOCIATION; SIERRA CLUB; WYOMING OUTDOOR COUNCIL; BASIN ELECTRIC POWER COOPERATIVE; PACIFICORP; ARCH COAL, INC.,

Intervenors.

WYOMING COUNTY COMMISSIONERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; PETROLEUM ASSOCIATION OF WYOMING,

Amici Curiae.

No. 14-9529

POWDER RIVER BASIN RESOURCE COUNCIL; NATIONAL PARKS CONSERVATION ASSOCIATION; SIERRA CLUB,

Petitioners,

v. No. 14-9530

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, Administrator, United States Environmental Protection Agency,

Respondents.

STATE OF WYOMING; BASIN ELECTRIC POWER COOPERATIVE; PACIFICORP; ARCH COAL, INC.; IDAHO POWER COMPANY,

Intervenors.

WYOMING COUNTY COMMISSIONERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; PETROLEUM ASSOCIATION OF WYOMING,

Amici Curiae.

PACIFICORP,

Petitioner,

v. No. 14-9534

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S.

REGAN, Administrator, United States Environmental Protection Agency,

Respondents.

POWDER RIVER BASIN RESOURCE COUNCIL; NATIOINAL PARKS CONSERVATION ALLIANCE; SIERRA CLUB; WYOMING OUTDOOR COUNCIL, BASIN ELECTRIC POWER COOPERATIVE,

Intervenors.

WYOMING COUNTY COMMISSIONERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE, PETROLEUM ASSOCIATION OF WYOMING,

Amici Curiae.

Petition for Review of an Order from the Environmental Protection Agency (EPA No. EPA-RO8-OAR-2012-0026)

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Megan Berge, Baker Botts L.L.P., San Francisco, California, and Sarah Douglas, Baker Botts L.L.P., Washington, D.C., for Idaho Power Company.

Before **TYMKOVICH**, **BACHARACH**, and **CARSON**, Circuit Judges.

TYMKOVICH, Circuit Judge.

The Clean Air Act requires states to address powerplant emissions that affect air quality. This case involves Wyoming's plan to regulate emissions from powerplants within its borders that produce nitrogen oxides—NO_X—pollutants that contribute to regional haze, reducing visibility in and the aesthetics to our national parks and wilderness areas. For many years, Wyoming worked with power companies to produce a plan to reduce emissions and improve visibility. Wyoming finally produced a plan, a so-called state implementation plan, or SIP, in 2011. The plan addressed emissions at several units operated by PacifiCorp, three of which are at issue here—Wyodak and Naughton 1 and 2.

The plan was submitted to the Environmental Protection Agency for approval. In a 2014 final rule, the EPA approved the SIP in part (as to Naughton) and disapproved it in part (as to Wyodak). Through a federal implementation plan, or FIP, the EPA also substituted its determination of the proper technology to install at

Wyodak, replacing Wyoming's SIP. Wyoming and PacifiCorp petitioned for review, arguing the SIP should be entirely approved and claiming the EPA failed to grant Wyoming the deference required by federal law when it disapproved the Wyodak portion. Several conservation groups also challenged the rule, arguing the Naughton 1 and 2 portion should be disapproved because the EPA failed to require the best available technology to reduce regional haze in a timely manner.

We grant the petition as to Wyodak and vacate that portion of the final rule. The EPA erred in evaluating the Wyodak portion of the SIP because it treated non-binding agency guidelines as mandatory in violation of the Clean Air Act. We remand that part of the final rule to the agency for further review. But because the EPA properly approved Wyoming's determination of the best technology for Naughton, we deny the petition as to those units and uphold that portion of the final rule.

I. Background

A. Legal framework

Through the Clean Air Act, Congress set a "national goal" of preventing any future, and remedying "any existing, impairment of visibility" from "manmade air pollution" in Class I areas, 42 U.S.C. § 7491(a)(1), which include certain national wilderness areas exceeding 5,000 acres and certain national parks exceeding 6,000 acres, § 7472(a). Accordingly, the EPA "must create and review national ambient air quality standards for certain pollutants," *Oklahoma v. U.S. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013) (citing §§ 7408–09), and implement regulations assuring "reasonable

progress toward meeting" the national goal, § 7491(a)(4); *see also* § 7491(b)(2) (mandating that these regulations contain certain requirements for SIPs); *Heal Utah v. U.S. EPA*, __ F.4th __, 2023 WL 5185608 (10th Cir. Aug. 14, 2023) (analyzing SIP requirements for states that propose alternative methods of meeting environmental goals). And each state must promulgate a SIP that "provides for implementation, maintenance, and enforcement" of these standards. § 7410(a)(1). States must submit their SIPs to the EPA, which "shall approve" any SIP that "meets all of the applicable requirements" of the relevant chapter of the United States Code. § 7410(k)(3). These "applicable requirements" include determining the best available technology to address emissions and formulating "a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal." § 7491(b)(2). If the EPA disapproves the SIP "in whole or in part," the EPA will promulgate a FIP unless the state successfully submits a corrected SIP. § 7410(c)(1).

To achieve the national goal, certain major power sources must generally "procure, install, and operate" the "best available retrofit technology," or BART, to address haze-causing pollutants. § 7491(b)(2)(A); *Yazzie v. U.S. EPA*, 851 F.3d 960, 966 (9th Cir. 2017). Congress mandated that the EPA "provide guidelines to the States . . . on appropriate techniques and methods" for determining BART. § 7491(b)(1); *see also* 40 C.F.R. pt. 51, App. Y (BART guidelines). And "[i]n the case of a fossil-fuel fired generating powerplant having a total generating capacity *in excess of 750 megawatts*, the emission limitations required . . . *shall* be determined

pursuant to [these] guidelines." § 7491(b) (emphases added). In other words, Congress decided that the EPA's BART guidelines are mandatory for larger powerplants generating over 750 megawatts. *Oklahoma*, 723 F.3d at 1208; *see also Jewell v. United States*, 749 F.3d 1295, 1298 (10th Cir. 2014) (recognizing that "shall" "indicates a mandatory intent"). But the guidelines are *not mandatory* for smaller powerplants (like those here) whose total generating capacity does not exceed 750 megawatts. *Cf. Oklahoma*, 723 F.3d at 1208.

Under the regional haze framework, Congress requires states (or the EPA promulgating a FIP) to determine BART by weighing five factors:

> [1] the costs of compliance, [2] the energy and nonair quality environmental impacts of compliance, [3] any existing pollution control technology in use at the source, [4] the remaining useful life of the source, and [5] the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

§ 7491(g)(2). This balancing means that although the "B" stands for "best," BART is not necessarily the most stringent or effective technology. That is because the statutory balancing is aimed at allowing a state to generate a SIP that addresses each source's site-specific characteristics. *See Arizona ex rel. Darwin v. U.S. EPA*, 852 F.3d 1148, 1152 (9th Cir. 2017).

B. Wyoming's SIP

In January 2011, Wyoming submitted its SIP to the EPA. In particular, the SIP was aimed at reducing NO_X (nitrogen oxides) and PM (particulate matter).

Only those portions that address NO_X are at issue here.[1] There are numerous technologies to control NO_X, including combustion controls—like low NO_X burners and overfire air—and post-combustion controls—like selective non-catalytic reduction and selective catalytic reduction. The controls can be combined. Combustion controls limit NO_X by controlling how air mixes with fuel, while post-combustion controls use a reductant like ammonia to convert NOx into nitrogen and water vapor. As the names suggest, selective catalytic reduction uses a catalyst to increase the rate of the chemical reaction, while selective *non*-catalytic reduction does not.

Wyoming determined BART for numerous units, including those at PacifiCorp's Wyodak and Naughton powerplants. Wyodak has one unit; Naughton has three, the first two of which are at issue here. The primary Class I areas impacted by Wyodak are Badlands and Wind Cave national parks, while the primary areas impacted by Naughton are Bridger, Fitzpatrick, North Absaroka, Washakie, and Teton wilderness areas, and Grand Teton and Yellowstone national parks.

Under Wyoming's state clean air program, it implemented a set of procedures to determine BART for powerplants. *See* Wyo. Admin. Code 020.0002.6 § 9. Those regulations required PacifiCorp to submit BART permit

[1] Compared to other pollutants such as sulfate, NO_X plays a relatively small role in causing visibility impairment in the impacted areas. *See* First Proposed Rule, 77 Fed. Reg. 33022, 33039 (proposed June 4, 2012) (to be codified at 40 C.F.R. pt. 52); App. Vol. II 333–36, 435.

applications. Wyoming then solicited public comment and held public hearings. When analyzing PacifiCorp's applications, Wyoming generated a 43-page analysis for Wyodak and a 59-page analysis for Naughton.

Wyoming determined BART to address NO_X at Wyodak to be new low NO_X burners with advanced overfire air (LNB + OFA) and an emission limit of 0.23 lb/MMBtu (pounds per million British Thermal Units). In doing so, the state rejected LNB + OFA with selective catalytic reduction. Wyoming observed that LNB + OFA standing alone was significantly cheaper over the plant's operational life than combining it with selective catalytic reduction—$13.1 million in capital costs versus $171.9 million—LNB + OFA did not use potentially harmful chemicals, and it had a minimal energy impact on plant efficiency. Wyoming also considered PacifiCorp's existing pollution controls (low NO_X burners) and visibility improvements. In other words, the state hit the CAA's statutory requirements. For similar reasons when evaluating Naughton 1 and 2, Wyoming rejected selective catalytic reduction and determined BART to be LNB + OFA and an emission limit of 0.26 lb/MMBtu.

After Wyoming submitted its SIP, the EPA's review resulted in three rules—two proposed and one final. In the first proposed rule, the EPA stated it would disapprove the BART determination for Wyodak and instead require LNB + OFA with selective non-catalytic reduction and an emission limit of 0.18 lb/MMBtu. 77 Fed. Reg. 33022, 33055 (proposed June 4, 2012) (to be codified at 40 C.F.R. pt. 52). Its disapproval was based on Wyoming's allegedly

unreasonable cost and visibility analyses. *Id.* The EPA, however, proposed to approve the Naughton 1 and 2 BART determination of LNB + OFA. *Id.* at 33036–38.

After receiving comments, in a second proposed rule in 2013, the EPA again stated it would disapprove the Wyodak BART determination and mandate selective non-catalytic reduction. 78 Fed. Reg. 34738, 34783–85 (proposed June 10, 2013) (to be codified at 40 C.F.R. pt. 52). But this time it proposed to *disapprove* Wyoming's Naughton 1 and 2 BART determination and require selective catalytic reduction with an emission limit of 0.07 lb/MMBtu. *Id.* at 34781–83.

Then, after further comments, in the final rule in 2014, the EPA disapproved Wyoming's BART determination for Wyodak and mandated, as part of a FIP, selective catalytic reduction with an emission limit 0.07 lb/MMBtu. 79 Fed. Reg. 5032, 5050–51 (Jan. 30, 2014) (to be codified at 40 C.F.R. pt. 52). It based its decision on its disagreement with the state's cost and visibility analyses. *Id.* at 5050. As for Naughton 1 and 2, it reversed course and approved Wyoming's BART determination of LNB + OFA. *Id.* at 5045, 5049–50.

Wyoming and PacifiCorp petitioned this court for review of the portion of the final rule disapproving the Wyodak BART determination. Several

Conservation Organizations[2] petitioned for review of the portion of the final rule approving the BART determination for Naughton units 1 and 2. Idaho Power Company intervened, supporting Wyoming and the EPA in the Naughton dispute. We consolidated the petitions for review.[3]

II. Analysis

These challenges ultimately turn on how much discretion Wyoming had—and how much deference the EPA owed to it—when determining BART for smaller powerplants. Because we conclude that the EPA misapplied the BART guidelines, we vacate the Wyodak disapproval. We uphold the Naughton 1 and 2 approval.

A. Wyodak[4]

We begin with Wyoming and PacifiCorp's challenge to the EPA's disapproval of the state's Wyodak BART determination. The Administrative

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[2] Powder River Basin Resource Council, National Parks Conservation Association, and Sierra Club.

[3] The petitioners initiated their challenges in 2014. We abated these challenges to facilitate settlement negotiations. Some issues were settled, but others were not. In fall 2022, we lifted the abatement to proceed with this appeal.

[4] We sua sponte ordered supplemental briefing on whether the Wyodak dispute was moot because the planning period for which the initial SIP was submitted ended in 2018, and Wyoming has since submitted a second SIP. We agree with the parties that this dispute is not moot because BART is "a one-time requirement" that must be determined "during the first implementation period." Protection of Visibility: Amendments to Requirements for State Plans, 82 Fed. Reg. 3078, 3083 (Jan. 10, 2017) (to be codified at 40 C.F.R. pts. 51 and 52). Although Wyodak "may need to be re-assessed for additional controls in future implementation periods," *id.*,

Procedure Act guides our review. *Oklahoma*, 723 F.3d at 1211. If the EPA acted arbitrarily or capriciously, abused its discretion, or otherwise did not act "in accordance with law," we must find its conduct unlawful. 5 U.S.C. § 706(2)(A). *Chevron* deference can come into play in our review of administrative actions under the Clean Air Act. *See Oklahoma*, 723 F.3d at 1207. This means that if a "statute is clear, we apply its plain meaning and the inquiry ends." *Id.* at 1207 (internal quotation marks omitted). But "[i]f the statute is silent or ambiguous about the question at issue . . . we defer to the authorized agency and apply the agency's construction so long as it is a reasonable interpretation of the statute." *Ariz. Pub. Serv. Co. v. U.S. EPA*, 562 F.3d 1116, 1123 (10th Cir. 2009) (internal quotation marks omitted).

It is well established that "[t]he Clean Air Act 'uses a cooperative-federalism approach to regulate air quality.'" *Oklahoma*, 723 F.3d at 1204 (quoting *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012)). The Act vests states with "wide discretion in formulating" SIPs, *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976), and "broad authority over BART determinations," *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002); *see also BCCA Appeal Grp. v. U.S. EPA*, 355 F.3d 817, 822 (5th Cir. 2003)

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we can offer meaningful relief to Wyoming and PacifiCorp by vacating the EPA's BART determination, *see S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997) (noting "the central inquiry" for constitutional and prudential mootness is whether circumstances have "changed since the beginning of litigation that forestall any occasion for meaningful relief").

("[S]tates have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements."). The EPA "has less discretion when it . . . reject[s] a SIP than it does when it promulgates a FIP," *Oklahoma*, 723 F.3d at 1213 n.7, because the EPA has a statutory duty to implement a sufficient plan if a state fails to do so, *id.* at 1204 (quoting § 7410(c)(1)). But the initial responsibility falls to the states.

Importantly, as previously discussed, the EPA's BART guidelines are only binding for powerplants that exceed 750 megawatts. § 7491(b). This means states have the most discretion—and the EPA owes the most deference—when it comes to BART determinations for powerplants below the 750-megawatt threshold. *See Oklahoma*, 723 F.3d at 1208 (noting that the Act "gives states discretion in balancing the five BART factors" and that the guidelines are binding only for those powerplants with "a total generating capacity of greater than 750 megawatts"). Although states must "adhere to certain requirements when conducting a BART analysis," the guidelines are not a requirement for smaller powerplants. *Id.* But other requirements still apply. For example, the state must determine BART-eligible sources, determine which of those sources is subject to BART, and then identify BART and the corresponding emission limit. Final Rule, 79 Fed. Reg. at 5036; *see also Oklahoma*, 723 F.3d at 1205 (summing up the process). Here, Wyoming completed those steps. The EPA took issue with how Wyoming conducted the third step, specifically with how the state analyzed visibility improvement and cost.

Wyodak's output is 335 megawatts, so the guidelines were not binding. Indeed, the EPA recognized this in its response to a comment in the final rule. *See* 79 Fed. Reg. at 5052–53 (agreeing that the guidelines are mandatory only for larger powerplants); *see also id.* at 5036 (noting that a state must use the guidelines for larger powerplants and that states are generally "encouraged, but not required, to follow the BART Guidelines" for smaller powerplants). And the EPA has previously acknowledged the statutory limit for smaller powerplants. Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, 70 Fed. Reg. 39104, 39108 (July 6, 2005) (to be codified at 40 C.F.R. pt. 51) (conceding "that Congress intended the guidelines to be mandatory only with respect to 750 megawatt powerplants"). But in practice here the EPA ignored this unambiguous statutory restriction when reviewing Wyoming's SIP.

This conclusion is borne out by the proposed and final rules, where the EPA treated the guidelines as more than "helpful guidance." *Id.* In the final rule, the EPA noted that it had "proposed to disapprove the State's [Wyodak] determination because the State neglected to reasonably assess the costs of compliance and visibility improvement *in accordance with the BART Guidelines*." 79 Fed. Reg. at 5050 (emphasis added) (citing Second Proposed Rule, 78 Fed. Reg. at 34784–85). Indeed, it emphasized this in its second proposed rule, continually faulting Wyoming for not following the guidelines when analyzing cost and visibility. *See, e.g.*, 78 Fed. Reg. at 34740 ("[U]pon further review of

the State's cost and visibility analyses, we determined that the State's analyses are flawed in several respects and are therefore inconsistent with the BART Guidelines and statutory requirements."); *id.* at 34747 (concluding the state "did not properly follow the requirements in the BART Guidelines and statutory requirements").

Other language in the final rule bears this out. On cost, for example, in the second proposed rule the EPA asserted,

> Wyoming calculated the baseline annual emissions used for determining cost effectiveness based on allowable emissions, rated heat input, and 7,884 hours of operation (equivalent to a 85% capacity factor), which are not representative of actual emissions from the baseline period. By contrast, the BART Guidelines state that the baseline emissions should "represent a realistic depiction of anticipated annual emissions for the source."

Id. at 34749 (quoting Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, 70 Fed. Reg. at 39167). It then went on to apply the guidelines and implement its own cost analysis. *Id.*

And on visibility, it noted, "The visibility modeling performed by PacifiCorp . . . and subsequently submitted by the State and utilized by EPA in our original proposal, deviates from the BART Guidelines by using post-control emission rates calculated in a similar manner to the pre-control emission rates." *Id.* at 34750. So, the agency engaged in "revised modeling . . . consistent with the requirements of the BART Guidelines." *Id.* Tellingly, when specifically analyzing Wyodak, the EPA "propose[d] to find that Wyoming did not properly

follow the requirements of the BART Guidelines in determining NOx BART." *Id.* at 34784. And, again, the EPA conducted its own analysis that followed the guidelines. *Id.* at 34785.

Although the EPA ultimately revised its calculations and went with selective catalytic reduction instead of selective non-catalytic reduction in its final rule, it still focused on cost and visibility. *See* 79 Fed. Reg. at 5050–51. Again, doing so because of the guidelines. Summing up its view on the matter in response to a comment, the EPA asserted "that Wyoming did not properly follow the BART Guidelines . . . in conducting its BART analyses and, therefore, did not correctly consider the costs of compliance or the visibility benefits associated with available control technologies as the [Act] requires." *Id.* at 5052. The agency also asserted that it

> is required to evaluate BART factors included in state SIPs (e.g., ultimately rejecting methodological flaws and data flaws in estimating costs of compliance and visibility, as we have done in this final action), where the flaws in the analysis prevented the State of Wyoming from conducting meaningful consideration of the BART factors, as required by the BART Guidelines, and moored to the CAA's BART and SIP provisions.

Id. at 5055. And the EPA "firmly grounded" its decisions in "the CAA provisions and BART Guidelines." *Id.* at 5056.

Certainly, the guidelines are helpful while not binding, and ordinarily no problem presents itself when the EPA references them in reviewing Wyoming's SIP. The problem arises, however, when the EPA's rejection of the state's BART

determination—supposedly for unreasonable cost and visibility analyses—is grounded in a strict application of the *nonbinding* guidelines. The EPA's final rule confirms that the agency treated the guidelines as binding for Wyodak and disregarded the state's broad discretion under the Clean Air Act.

To be sure, the Act provides for substantive and careful EPA review; the agency need not simply rubberstamp SIPs. The EPA points to *Oklahoma*, where we "decided the extent of [its] authority to review a SIP." EPA Br. at 46. There, the EPA rejected the SIP "because it failed to follow the guidelines—as required by the statute—in calculating one of [the BART] factors." *Oklahoma*, 723 F.3d at 1209.

But in *Oklahoma*, the EPA could review for strict guideline compliance because *the guidelines were binding*; the units at issue had "a total generating capacity of greater than 750 megawatts," *id.* at 1208, a material distinction the EPA attempts to downplay here, *see* EPA Br. at 51–52. This distinction is meaningful: After all, it directly implicates the Clean Air Act's limit on when the guidelines are binding.

Contrary to the EPA's arguments, *Oklahoma* does not mandate that we uphold its determination given that the guidelines are not binding here. The EPA cites other cases, like *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), to bolster its argument that it has extensive oversight authority when it comes to the Clean Air Act. There, for example, the Court addressed the Act's requirement that certain facilities be "equipped with 'the best

available control technology' (BACT)." *Id.* at 468. And it held that the EPA could "rule on the reasonableness of BACT decisions by state permitting authorities." *Id.* at 495. But general recognition of the EPA's oversight authority cannot nullify the specific statutory limitation at issue here.

Again, we do not question that the EPA has a role to play. Indeed, the Clean Air Act plainly provides for agency oversight. But the amount of oversight for regional-haze SIPs varies based on the size of the powerplant. And we must consider (because we are bound by) that statutory limitation.

As the EPA concedes, Wyoming attempted to follow the guidelines to some extent in determining BART. And everyone agrees the guidelines are helpful even when not binding. That raises the question of whether Wyoming is trying to have its cake and eat it too, *i.e.*, using the guidelines when the EPA cannot strictly police the state's use. Indeed, the EPA argues that it did not have to accept Wyoming's BART determination if the cost and visibility analyses were unreasonable. *See* EPA Br. at 50. We agree that the EPA does not have to accept unreasonable analyses that lead to an unreasonable BART determination. And in its briefing, the EPA lays out why it believes Wyoming's analyses were unreasonable. But our review of the proposed and final rules leaves us convinced that the EPA deemed the state's analyses—and the ultimate BART determination—unreasonable *because* of guideline noncompliance, not simply because they were otherwise unreasonable *and* did not follow the (helpful) guidelines. And that violated the Clean Air Act.

Allowing the EPA to deem an analysis for a smaller powerplant reasonable only if the state strictly and correctly followed the guidelines would effectively re-write the Act. Similarly, we would re-write the Act if we held that a state's voluntary use of the guidelines for smaller powerplants made those guidelines effectively binding. Congress could have easily instituted that requirement. After all, the statutory language conveys that Congress contemplated under what circumstances the guidelines are binding—when determining BART for large powerplants. But it kept them nonbinding for powerplants like Wyodak.

Wyoming had the luxury of not following the guidelines, following parts of the guidelines, or strictly following the guidelines. But its choice did not expand the EPA's authority beyond the confines of the Clean Air Act. Wyoming simply had more flexibility in applying the guidelines (if it applied them at all) while the EPA did not owe any less deference to the state. The EPA notes that "nothing in the statute precludes" considering the guidelines for smaller powerplants. EPA Br. at 59. And that is true. But consideration is different from strict compliance.

Because we cannot say that the EPA would have otherwise disapproved Wyoming's BART determination, we grant Wyoming and PacifiCorp's petition, vacate the EPA's disapproval as to Wyodak, and remand for the agency to reconsider Wyoming's BART determination while giving proper deference to the state and without treating the guidelines as binding. *See Zzyym v. Pompeo*, 958 F.3d 1014, 1034 (10th Cir. 2020) ("If we can't determine whether the agency necessarily relied on deficient reasons, it would make little sense to uphold the

agency's action."); *Berdiev v. Garland*, 13 F.4th 1125, 1138–39 (10th Cir. 2021) (remanding for agency reconsideration when we were uncertain about the agency's basis for its decision). To be sure, the EPA may again find Wyoming's BART determination unreasonable. And it may again do so because of the state's cost and visibility analyses. But if so, it must explain why Wyoming's analyses are beyond the range of reasonableness afforded to the state by the Clean Air Act.

B. Naughton 1 and 2[5]

We now turn to the Conservation Organizations' challenge to the Naughton 1 and 2 BART determination. The EPA agreed with Wyoming's BART determination, even if it did not entirely agree with Wyoming's analysis. The Conservation Organizations contend the EPA should have promulgated a FIP

[5] PacifiCorp moved for summary disposition, asserting the Naughton challenge is constitutionally and prudentially moot because it has assured Wyoming, the EPA, and this court that it will stop coal combustion at Naughton 1 and 2 by the end of 2025. *See* Fed. R. App. P. 27; 10th Cir. R. 27.3(A)(1)(b). PacifiCorp made this decision because of the EPA's updated Disposal of Coal Combustion Residuals from Electric Utilities Rule, 85 Fed. Reg. 53516 (Aug. 28, 2020) (to be codified at 40 C.F.R. pt. 257). PacifiCorp asserts that even if we vacate this portion of the final rule, selective catalytic reduction could not be installed at the units before it closes them. "Under both Article III and prudential mootness doctrines, the central inquiry is essentially the same: have circumstances changed since the beginning of litigation that forestall any occasion for meaningful relief." *Smith*, 110 F.3d at 728. PacifiCorp maintains that the EPA's coal combustion rule and its resulting commitment to stop combusting coal at the two units sufficiently changed the circumstances of this dispute. Despite PacifiCorp's commitment and the EPA's rule, we could still provide meaningful relief to the Conservation Organizations by vacating the relevant portion of the final rule and ordering the EPA to reconsider its approval of Wyoming's BART determination. This challenge is neither constitutionally nor prudentially moot, and we deny PacifiCorp's motion.

mandating the more stringent selective catalytic reduction rather than approving LNB + OFA. They assert the EPA based its decision "solely" on incremental cost-effectiveness and that the EPA overestimated the costs of retrofitting the units with selective catalytic reduction. Conservation Organizations Opening Br. at 23. In other words, the Conservation Organizations' complaint is with how the EPA handled the "costs of compliance" factor.

As with Wyodak, the guidelines are not mandatory—Naughton's three units have a total capacity of 700 megawatts.[6] And as with Wyodak, the EPA had issues with Wyoming's cost and visibility analyses. *See* Final Rule, 79 Fed. Reg. at 5049. But the EPA ultimately agreed with Wyoming that LNB + OFA was BART.[7] In reversing itself from its earlier proposal that selective catalytic reduction was BART, the EPA noted that the revised incremental cost-effectiveness—$10,384 and $8,440 per ton—was "beyond the upper end of the range" it had found acceptable in other FIPs. *Id.* at 5050.

In taking issue with the EPA's approval, the Conservation Organizations criticize the EPA's analysis of the BART factors. But as we just discussed, the BART determination for smaller power sources like the Naughton powerplant lies

[6] Unit 1 is 160 megawatts, Unit 2 is 210 megawatts, and Unit 3 is 330 megawatts. Wyoming and the EPA agreed that LNB + OFA with selective catalytic reduction is BART for Unit 3.

[7] Because the EPA and Wyoming agreed on the BART determination—even if they disagreed on the proper analysis—any error stemming from the EPA's treatment of the guidelines as mandatory for Naughton 1 and 2 was harmless.

primarily with the states. And the Conservation Organizations do not develop a full argument on why Wyoming erred to the point where the EPA should have disregarded Wyoming's discretion and mandated selective catalytic reduction. Because they have not addressed Wyoming's significant discretion and the accompanying deference required by the Act, they have not convinced us that the EPA acted arbitrarily and capriciously by approving the Naughton 1 and 2 BART determination.

And although not necessary to our disposition today, we briefly note that the EPA, like Wyoming, *could* give cost more weight than the other factors. The Act requires "consideration" of five factors without requiring that each factor receive equal weight. *See* § 7491(g)(2); *Am. Corn Growers Ass'n*, 291 F.3d at 6 ("Although no weights were assigned, the [BART] factors were meant to be considered together by the states."). And because BART "balancing is source specific," a single factor may carry more weight for one source than it does for another. *See Darwin*, 852 F.3d at 1152; *Oklahoma*, 723 F.3d at 1208 (acknowledging the Act "gives states discretion in balancing the five BART factors"). A state promulgating a SIP, and the EPA promulgating a FIP (or reviewing a SIP), can assign more weight to one factor than another. Mandating otherwise would turn the statutory balancing into a checklist where the technology that checks the most boxes is the winner.

Certainly, neither a state nor the EPA can ignore a factor. *See Am. Corn Growers Ass'n*, 291 F.3d at 6. In the final rule at issue here, the EPA focused on cost, but it also noted that it had "not changed" its earlier assessment of the other

factors. Final Rule, 79 Fed. Reg. at 5049; Second Proposed Rule, 78 Fed. Reg. at 34781–83 (earlier analysis). It is apparent that the EPA did not ignore the other factors. And the EPA did not err simply because it gave one factor more weight than others.

III. Conclusion

For the foregoing reasons, we vacate the portion of the final rule that sets BART for Wyodak and remand for further proceedings, and we affirm the portion of the final rule that sets BART for Naughton 1 and 2.