FILED

DEC 13 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL REGAN, Administrator, United States Environmental Protection Agency; DEBORAH JORDAN, Acting Regional Administrator, U.S. EPA Region 9, Respondents.	No. 21-71222 MEMORANDUM[*]

On Petition for Review of a Final Rulemaking of the United States Environmental Protection Agency

Argued and Submitted November 15, 2022
Phoenix, Arizona

Before: BYBEE and OWENS, Circuit Judges, and RAKOFF,[**] District Judge.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Petitioner Center for Biological Diversity challenges the Environmental Protection Agency's (EPA) approval of revisions to the Arizona Department of Environmental Quality's (ADEQ) State Implementation Plan (SIP) submitted to correct deficiencies in the preconstruction review and permitting program for minor stationary sources of air pollution. In 2020, ADEQ submitted a SIP revision responding to EPA's 2015 disapproval of multiple proposed exemptions, including an exemption for "agricultural equipment used in normal farm operations" and an exemption for minor sources with emission below a certain threshold. EPA proposed approving the two measures in late 2020 and issued a Final Rule approving the measures in June 2021. Petitioner appealed, arguing that EPA acted arbitrarily and capriciously in approving both the agricultural equipment and emission threshold exemptions because ADEQ failed to demonstrate that regulation was not necessary to attain and maintain National Ambient Air Quality Standards (NAAQS).

We have jurisdiction under 42 U.S.C. § 7607(b)(1) and review under the deferential standard of review for agency actions set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004). Under this standard of review, we must determine whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law." *Vigil*, 381 F.3d at 833 (quoting 5 U.S.C. § 706(2)(A)). An agency action is arbitrary and capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010). In this case, EPA did not act arbitrarily and capriciously, and we deny the petition.

Petitioner contends that EPA's approval of ADEQ's exemption of agricultural equipment used in normal farm operations was arbitrary and capricious because ADEQ failed to use "[m]odeling information required to support the proposed revision" to demonstrate that the exemption would not threaten the attainment or maintenance of NAAQS. 40 C.F.R. Part 51 App. V § 2.2(e). However, there is no requirement that every proposed revision must be supported by modeling. The regulatory language Petitioner cites appears in EPA's criteria for determining the completeness of plan submissions—essentially procedural rules. And though the language is somewhat ambiguous, the most natural reading of the text is that, when modeling is used, modeling information and supporting

data must be provided to EPA. This reading is consistent with EPA's own interpretation of its regulation. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415–18 (2019) (EPA's interpretation of its own regulations is subject to deferential review). Further, in response to EPA's 2015 suggestions, ADEQ provided reasonable explanations for why the exemption is quite narrow. EPA—with its substantial technical expertise—was well-situated to evaluate these explanations. *See Lands Council*, 629 F.3d at 1074 ("Moreover, we generally must be at our most deferential when reviewing scientific judgments and technical analyses within the agency's expertise." (citations and quotations omitted)). EPA reviewed ADEQ's specific responses to the particular shortcomings it identified in its earlier disapproval of the exemption and was satisfied that the exemption did not threaten the attainment and maintenance of NAAQS. Therefore, EPA did not act in a manner that meets any of the definitions of arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Petitioner also argues that EPA acted arbitrarily and capriciously in approving ADEQ's minor New Source Review (NSR) permitting thresholds for $PM_{2.5}$ and nonattainment areas because ADEQ failed to demonstrate with modeling that the thresholds are adequate to protect NAAQS. However, using a similar approach to that EPA itself used to develop the tribal minor NSR program, ADEQ

conducted a significantly improved analysis of emissions and sources covered by the state's minor NSR thresholds. ADEQ used 2014 National Emission Inventory data from the entire state to demonstrate the impact of minor sources below the proposed threshold and broke out results for nonattainment areas specifically. This analysis demonstrated that the proposed permitting thresholds cover about 87–100 percent of emissions in nonattainment areas. Further, ADEQ explained the primary sources of emissions in nonattainment areas, demonstrating that minor sources were insignificant contributors. We may not set aside agency action if the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *Vigil*, 381 F.3d at 833. Here, EPA considered ADEQ's analysis and reasonably found that it provided an adequate basis to conclude that the permitting thresholds were sufficient to attain and maintain NAAQS. 86 Fed. Reg. 31927, 31931–33 (June 16, 2021).

PETITION DENIED.