

ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1120 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

**On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
89 Fed. Reg. 39,798 (May 9, 2024)**

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS' MOTIONS FOR STAY PENDING REVIEW**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), *amicus curiae* states as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 24-1120: States of West Virginia, Indiana, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming; Commonwealths of Kentucky and Virginia.

No. 24-1121: States of Ohio and Kansas.

No. 24-1122: National Rural Electric Cooperative Association.

No. 24-1124: National Mining Association; America's Power.

No. 24-1126: Oklahoma Gas and Electric Company.

No. 24-1128: Electric Generators for a Sensible Transition.

No. 24-1142: United Mine Workers of America, AFL-CIO.

No. 24-1143: International Brotherhood of Electrical Workers, AFL-CIO.

No. 24-1144: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.

No. 24-1146: Midwest Ozone Group.

No. 24-1152: Edison Electric Institute.

No. 24-1153: NACCO Natural Resources Corporation.

No. 24-1155: Idaho Power Company.

Respondents:

Respondents are the U.S. Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency (in Nos. 24-1120, 24-1121, 24-1122, 24-1124, 24-1126, 24-1146, 24-1153, 24-1155) and the U.S. Environmental Protection Agency (in Nos. 24-1128, 24-1142, 24-1143, 24-1144, 24-1152).

Intervenors and *Amici Curiae*:

American Lung Association; Clean Air Council; American Public Health Association; Clean Wisconsin; Natural Resources Defense Council; States of New York, Arizona, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin; Commonwealths of Massachusetts and Pennsylvania; Cities

of Boulder, Chicago, and New York; City and County of Denver; the District of Columbia; California Air Resources Board; and Edison Electric Institute are movant-Intervenor-Respondents.

Chamber of Commerce of the United States of America is a movant-*Amicus Curiae* in support of Petitioners.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled “New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule,” published at 89 Fed. Reg. 39,798 (May 9, 2024).

C. Related Cases

Thirteen consolidated cases (Case Nos. 24-1120, 24-1121, 24-1122, 24-1124, 24-1126, 24-1128, 24-1142, 24-1143, 24-1144, 24-1146, 24-1152, 24-1153, 21-1155) seek review of the agency action challenged here. *Amicus curiae* is unaware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (“Chamber”) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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GLOSSARY

BSER	Best System of Emission Reduction
CAA	Clean Air Act
CCS	Carbon Capture and Sequestration
CO ₂	Carbon Dioxide
DOE	U.S. Department of Energy
EGU	Electric Generating Unit
EPA	U.S. Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
GHGs	Greenhouse Gas Emissions
MISO	Midcontinent Independent System Operator
NERC	North American Electric Reliability Corporation
PJM	PJM Interconnection
RIA	Regulatory Impact Analysis

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the business community.

The Chamber supports policies that reduce greenhouse-gas emissions as much and as quickly as reasonably possible, consistent with the pace of innovation and the feasibility of implementing large-scale technical change.² The Chamber also has a strong interest in ensuring that agency regulations comply with the law, and that judicial review of regulations is timely and effective.

¹ *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus curiae* has filed an unopposed motion for leave to file this brief.

² See U.S. Chamber of Commerce, The Chamber’s Climate Position: ‘Inaction is Not an Option’, <https://www.uschamber.com/climate-change/the-chambers-climate-position-inaction-is-not-an-option> (Oct. 27, 2021).

This Court should stay the rule under review, 89 Fed. Reg. 39,798 (May 9, 2024). Petitioners are likely to succeed on the merits. Among other failings, the Environmental Protection Agency (“EPA”) has imposed unworkable, inadequately reasoned requirements on the electric power sector based on a system of technologies that has not been “adequately demonstrated” as required by section 111 of the Clean Air Act (“CAA”). 42 U.S.C. § 7411(a)(1).

The other stay factors are also satisfied. If the rule takes effect, it will cause irreparable harm not only by imposing major, unrecoverable costs on regulated parties and the U.S. economy, but by jeopardizing the reliability and affordability of the nation’s power—which are critical not just to power companies, but to the functioning of our national economy and the activities of daily life. EPA itself projects that its rule will result in widespread retirement of dispatchable generation while severely restricting pathways for reliable electricity supplies necessary to replace it, even as demand for electricity is increasing and projected to soar in the coming decades. For similar reasons, the balance of the equities and the public interest favor staying the rule pending review. The rule should not be allowed to take effect.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits.

A. EPA Exceeded its Authority Under Clean Air Act Section 111.

Section 111 authorizes EPA to regulate power plants by setting a “standard of performance” for their emission of pollutants. 42 U.S.C. § 7411(a)(1). That standard must be “achievable” and reflect the “best system of emission reduction” (“BSER”) that EPA determines “has been adequately demonstrated” for the particular source category. *Id.* Section 111 thus requires, at least, that EPA “make sure the best system has a proven track record.” *West Virginia v. EPA*, 597 U.S. 697, 759 (2022) (Kagan, J., dissenting).

EPA’s rule, however, features a primary “best system of emission reduction” that lacks any meaningful track record and is not realistically available to the electric power industry. The rule seeks to reduce GHGs from new natural gas-fired, and existing coal-fired, electric generating units (“EGUs”), mainly by identifying carbon capture and sequestration (“CCS”) technology with 90% CO₂ capture as BSER for these units. CCS technology is highly promising, and Chamber members are investing in developing and commercializing the

technology for a range of applications. But as explained below, EPA’s hypothesized CCS system for EGUs does not exist at this time, and there is no evidence that it will be available in the near future.

EPA acknowledges this in the final rule, but asserts that section 111 authorizes it to project what *might be* demonstrated in the future. 89 Fed. Reg. 39,831. It asserts that “demonstrated” in section 111 should be interpreted to mean “explain or make clear by using examples, experiments, *etc.*,” suggesting all that is needed is a pilot “demonstration project” or “demonstration plant.” *Id.* at 39,830–31.

EPA’s interpretation lacks “textual plausibility.” *West Virginia*, 597 U.S. at 722. Among other things, it ignores the word “adequately,” which makes clear that a mere “test or study” is not sufficient. The statute requires at least a *proven* track record. What is more, the verb tense language—“*has been adequately demonstrated*”—requires that the track record be *already* proven, not in progress or anticipated. That is what makes this requirement a “meaningful constraint” on EPA’s authority. *Id.* at 758 (Kagan, J., dissenting).

To the extent EPA reads *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), and *Lignite Energy Council*

v. EPA, 198 F.3d 930 (D.C. Cir. 1999), as allowing a projection of what *might* be adequately demonstrated in the future, such a reading cannot be reconciled with the statutory text. 89 Fed. Reg. 39,878. But as Petitioners have explained, even accepting that these cases allow some extrapolation, the rule is not defensible. *See, e.g.*, State of West Virginia *et al.* Mot. to Stay at 6-10. The case law makes clear that EPA cannot undertake the sort of “crystal ball’ inquiry” that, as shown below, underlies this rule. *Portland Cement*, 486 F.2d at 391.

B. EPA’s Chosen System of Carbon Capture and Sequestration Has Not Been Adequately Demonstrated.

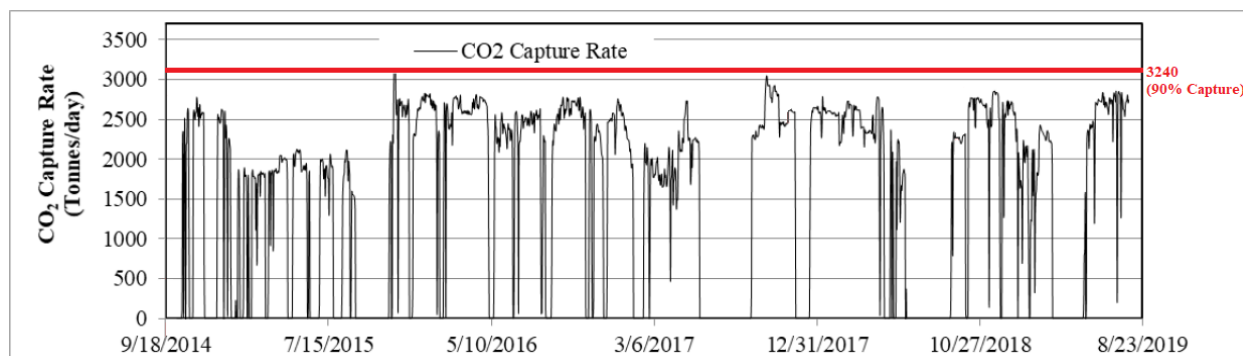
EPA’s primary “best system of emission reduction” comprises three main components: (1) capturing CO₂ at a rate of 90%; (2) transporting it by pipeline to a storage site; and (3) storing it in deep underground sites. EPA has not shown that each of these components “has been adequately demonstrated” as an integrated “system of emission reduction” for EGUs.

1. 90% Capture of CO₂ from EGUs Has Not Been Adequately Demonstrated.

First, EPA has not shown any—much less a proven—track record for 90% capture of CO₂ from EGUs.

In fact, EPA acknowledges that the primary example it offers—Unit 3 of Saskatchewan Power’s Boundary Dam coal plant—has failed to demonstrate capture at the sustained rate of 90 percent required by the rule. EPA cites a report detailing the facility’s operations and efforts to make Unit 3 more reliable despite technical challenges.³ Although the report states that the facility was *designed* to achieve a 90% capture rate, 89 Fed. Reg. at 39,848; Giannaris at 3, the report shows that such a rate was rarely achieved. As EPA acknowledged, “the capture plant has not consistently operated” at 90% total capture efficiency. 89 Fed. Reg. at 39,848. That is an understatement. The chart below (included in Giannaris at 10, Fig. 8) indicates that the facility achieved 90% capture on just a few days during a five-year period of operation.

³ See *id.* n.290 (citing Stavroula Giannaris, et al., *SaskPower’s Boundary Dam Unit 3 Carbon Capture Facility—The Journey to Achieving Reliability*, Proceedings of the 15th International Conference on Greenhouse Gas Control Technologies (Mar. 15-18, 2021), EPA-HQ-OAR-2023,0072-0053_Attachment 28 (“Giannaris”)).



As SaskPower itself said in comments on the rule: “SaskPower’s CCS facility is not capturing 90 percent of emissions from Boundary Dam Unit 3.” SaskPower Comment (Aug. 4, 2023), EPA-HQ-OAR-2023-0072-0687; *see also* 89 Fed. Reg. at 39,848 (“Boundary Dam has more recently been *capable* of achieving capture rates of 83 percent *when the capture plant is online*”) (emphasis added). EPA simply errs in treating this example as evidence of adequate demonstration.

EPA also errs in claiming that CO₂ capture “has been further demonstrated at other coal-fired steam generating units” and “other industrial processes.” 89 Fed. Reg. at 39,888, 39,926. EPA relies upon a 2009 report⁴ to assert that certain plants “clearly show the technical

⁴ *Id.* at 39,849 n.301 (citing J.J. Dooley et al., Pacific Northwest National Laboratory, PNNL-18520, *An Assessment of the Commercial Availability of Carbon Dioxide Capture and Storage Technologies as of June 2009* (June 2, 2009), EPA-HQ-OAR-2023-0072-0053_Attachment 4).

feasibility of post-combustion carbon capture.” *Id.* at 39,849. But that report states that only “[a] small fraction of the power plant[s]’ overall CO₂ [was] captured”; the rest was “vented to the atmosphere.”⁵

Finally, EPA mistakenly claims that the former CO₂ capture facility at the Bellingham Energy Center demonstrated the viability of carbon capture on a combined cycle (natural gas-fired) combustion turbine EGU.⁶ The agency report cited by EPA actually states that carbon capture systems for natural gas systems “have not been proven at full scale” and that “more effort and R&D is required to advance into full commercial application.”⁷

2. Development of a Sufficient Pipeline System for CO₂ Transportation Has Not Been Adequately Demonstrated.

Second, EPA has not shown a proven track record for the development of a pipeline system sufficient to transport CO₂ from generating facilities to sequestration sites.

⁵ *Id.* at 8.

⁶ 89 Fed. Reg. at 39,926 n.763 (citing DOE, *Carbon Capture Opportunities for Natural Gas Fired Power Systems*, EPA-HQ-OAR-2023-0072-9008 (“DOE Natural Gas CCS Report”)).

⁷ DOE Natural Gas CCS Report at 2, 4.

Again, EPA concedes as much. EPA says it “anticipates . . . in the coming years” that a “large-scale interstate pipeline network *may* develop to transport CO₂.” 89 Fed. Reg. 39,855 (emphasis added). But EPA admits to “not bas[ing] its analysis of the availability of CCS on the projected existence of a large-scale interstate pipeline network.” *Id.*

Instead, EPA pivots to predicting “the construction of relatively short lateral pipelines that extend from the source to the nearest geologic storage reservoir.” *Id.* EPA cites nothing to support this prediction either. This would require a massive number of shorter pipelines to be rapidly permitted and constructed. There’s no basis in the rule, or reality, to believe that will happen.

Pipeline permitting and construction face significant obstacles. In a 2022 report, for example, the Congressional Research Service noted that pipeline developers repeatedly “face opposition among affected landowners and advocacy groups.”⁸ “[S]iting authorities, landowner

⁸ PAUL W. PARFOMAK, CONG. RESEARCH SERV., IN11944, CARBON DIOXIDE PIPELINES: SAFETY ISSUES 2 (2022), <https://crsreports.congress.gov/product/pdf/IN/IN11944>.

rights, and eminent domain laws . . . vary from state to state, so securing rights-of-way for interstate projects is not guaranteed.”⁹

EPA failed to adequately “consider [this] important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). EPA suggests that the design and implementation of CO₂ transport can be completed within 3.5 years. 89 Fed. Reg. at 39,875 n.594. But EPA cannot point to any CO₂ pipeline project that has been permitted, constructed, and operational within that timeframe. The two main projects that EPA cites have either been cancelled (Heartland Greenway) or significantly delayed (Midwest Carbon).¹⁰

3. Development of a Sufficient System of CO₂ Sequestration Has Not Been Adequately Demonstrated.

Finally, EPA has not shown a proven track record for geologic sequestration of CO₂ at the scale required by the rule. Commercial

⁹ *Id.* at 2.

¹⁰ Leah Douglas, *Navigator CO2 Ventures cancels carbon-capture pipeline project in US Midwest*, REUTERS, Oct. 20, 2023, <https://www.reuters.com/sustainability/climate-energy/navigator-co2-ventures-cancels-carbon-capture-pipeline-project-us-midwest-2023-10-20/>.

storage for the amount of CO₂ that would result from a 90% rate of capture is neither available now nor anticipated in the near term.

Petitioners' Motion to Stay at 9, *West Virginia v. EPA*, No. 24-1120 (D.C. Cir. May 13, 2024), ECF No. 2054190.

II. If Not Stayed, EPA's Rule Will Jeopardize the Reliability of the Nation's Power.

Precisely because the rule sets unworkable standards based on unrealistic assumptions, the rule will threaten electric reliability, as well as impose major, unrecoverable costs on regulated parties and the U.S. economy, if allowed to take effect.

EPA's own modeling projects that the vast majority of regulated EGUs will not implement CCS but instead retire to achieve "efficient compliance" with the rule. Regulatory Impact Analysis at 3-25 to 3-28 (Apr. 2024), EPA-HQ-OAR-2023-0072-8913 ("RIA"). That prospect is highly concerning—not only to the Chamber, but to regional and independent electric power system operators.

For example, the Midcontinent Independent System Operator, Inc. ("MISO"), which manages the delivery of energy to roughly 45 million people in the midwestern United States, is already operating near the limits of its resource capacity. In a recent report, MISO stated

that it is time “to face some hard realities,” including “immediate and serious challenges to the reliability of our region’s electric grid.”¹¹

MISO recognized the need for “new dispatchable generation”—that is, generation “that can be turned on and off and adjusted as needed”¹²—in light of “the conventional dispatchable coal and natural gas resources that are being retired.”¹³ “[A] key risk is that many ‘dispatchable’ resources . . . are being replaced with weather-dependent resources such as wind and solar,” which lack “certain key reliability attributes that are needed to keep the grid reliable every hour of the year.”¹⁴

While “several emerging technologies may someday change that calculus, they are not yet proven at grid scale.”¹⁵ Until then, MISO “will continue to need dispatchable resources for reliability purposes.”¹⁶

MISO’s warnings about grid reliability are echoed by the North American Electric Reliability Corporation (“NERC”), the Electric

¹¹ MISO, Response to the Reliability Imperative at 1 (Feb. 2024), <https://cdn.misoenergy.org/2024%20Reliability%20Imperative%20report%20Feb.%2021%20Final504018.pdf?v=20240221104216>.

¹² *Id.* at 1, 2.

¹³ *Id.* at 2.

¹⁴ *Id.* at 1 (emphasis omitted).

¹⁵ *Id.*

¹⁶ *Id.*

Reliability Organization that the Federal Energy Regulatory Commission (“FERC”) has certified pursuant to the Federal Power Act to establish and enforce reliability standards, subject to FERC review, for the nation’s bulk-power system.¹⁷ In a recent assessment, NERC found “clear evidence of growing resource adequacy concerns over the next 10 years,” and identified large areas of the country at a “high” risk of failing to meet demand, including MISO’s 15-state area.¹⁸ In just four years, “MISO is projected to have a 4.7 GW shortfall if expected generator retirements occur despite the addition of new resources that total over 12 GW.”¹⁹

PJM Interconnection, the regional grid operator responsible for ensuring reliability for 65 million people across 13 states and the

¹⁷ See, e.g., *South Carolina Public Service Authority v. FERC*, 762 F.3d 41, 51, 79 (D.C. Cir. 2014) (discussing NERC); 16 U.S.C. § 824o(a).

¹⁸ NERC, 2023 Long-Term Reliability Assessment at 6-9 (Dec. 2023), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2023.pdf.

¹⁹ *Id.* at 7-9. For context, 1 GW is generally enough energy to power about 750,000 homes. California ISO, *Understanding electricity*, <https://www.caiso.com/about/Pages/OurBusiness/Understanding-electricity.aspx>.

District of Columbia, has expressed similar concerns.²⁰ According to PJM, EPA’s rule is likely to “drive premature retirement” of EGUs and “dissuade new gas resources from coming online,” even though such resources are needed to meet “significant increases” in demand “as a result of new data center load, electrification of vehicles and increased electric heating load.”²¹ The functioning of our national economy, and the vast majority of the small and large businesses within it, depends on a power system that can routinely handle such increases without risking interruptions in service or dramatic market disruptions.

As one global environmental organization recently put it: “the United States . . . does not have a plan to manage the reliable transition of its electricity sector.”²² EPA has finalized “binding power plant emissions reduction targets, but fully decarbonizing the electricity sector requires coordinated, regional planning and targeted investments

²⁰ PJM, *PJM Statement on the Newly Issued EPA Greenhouse Gas and Related Regulations* at 2-3 (May 8, 2024), <https://www.pjm.com/-/media/about-pjm/newsroom/2024-releases/20240508-pjm-statement-on-the-newly-issued-epa-greenhouse-gas-and-related-regulations.ashx>.

²¹ *Id.*

²² World Resources Institute, Working Paper, *Meeting the Reliability Challenges of the Clean Energy Transition* (Nov. 2023), <https://www.wri.org/research/meeting-reliability-challenges-clean-energy-transition>.

for specific types of resources, many of which are not yet commercially available.”²³

CONCLUSION

This Court should grant the motions for stay.

Dated: May 30, 2024

Respectfully submitted,

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²³ *Id.*

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this document complies with Federal Rules of Appellate Procedure 27(d)(2) and 29(a)(5) because it contains 2,558 words, as counted by Microsoft Word, excluding the parts excluded by Federal Rules of Appellate Procedure 27(d)(2) and 32(f) and D.C. Circuit Rule 32(e)(1).

This document also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) and Local Rule 27(a)(2) because it has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook font.

/s/ Elbert Lin

CERTIFICATE OF SERVICE

I certify that on this 30th day of May, 2024, a copy of the foregoing document was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elbert Lin _____