ORAL ARGUMENT NOT YET SCHEDULED

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

Consolidated Nos. 24-1120, -1121, -1122, -1124, -1126, -1128,
-1142, -1143, -1144, -1146, -1152, -1153, -1155

NATIONAL MINING ASSOCIATION *and* AMERICA'S POWER,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *and*
MICHAEL S. REGAN, *in his official capacity as Administrator of the United States Environmental Protection Agency*,
Respondents.

MOTION TO STAY THE FINAL RULE OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FILED BY PETITIONERS NATIONAL MINING ASSOCIATION AND AMERICA'S POWER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners National Mining Association and America's Power certify as follows:

A. Parties And Amici

Petitioners in these consolidated cases are:

- No.24-1120 (lead case): State of West Virginia; State of Indiana; State of Alabama; State of Alaska; State of Arkansas; State of Florida; State of Georgia; State of Idaho; State of Iowa; Commonwealth of Kentucky; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of New Hampshire; State of North Dakota; State of Oklahoma; State of South Carolina; State of South Dakota; State of Tennessee; State of Texas; State of Utah; Commonwealth of Virginia; State of Wyoming
- No.24-1121: State of Ohio; State of 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 are the United States Environmental Protection Agency ("EPA") and Michael S. Regan, in his official capacity as Administrator of EPA.

Intervenors for Respondents are:

- No.24-1120: American Lung Association; Clean Air Council; American Public Health Association; Clean Wisconsin; Natural Resources Defense Council; State of New York; State of Arizona; State of Colorado; State of Connecticut; District of Columbia; State of Delaware; State of Illinois; State of Hawaii; State of Maryland; State of Maine; State of Michigan; Commonwealth of Massachusetts; State of Minnesota; State of New Mexico; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin; City of Boulder; City of Chicago; City and County of Denver; City of New York; California Air Resources Board; Edison Electric Institute

B. Rulings Under Review

Petitioners National Mining Association and America's Power seek review of EPA's final action, titled "New Source Performance Standards: 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 in the Federal Register at 89 Fed. Reg. 39,798 (May 9, 2024).

C. Related Cases

There are no additional cases pending in other U.S. Courts of Appeals challenging the same final action.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners National Mining Association ("NMA") and America's Power state as follows:

NMA has no parent corporation and no publicly held company has 10% or greater ownership interest in NMA.

America's Power has no parent corporation and no publicly held company has 10% or greater ownership interest in America's Power.

Dated: May 24, 2024

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GLOSSARY

APA	Administrative Procedure Act
Basin Electric	Basin Electric Power Cooperative
BSER	Best System of Emission Reduction
CAA	Clean Air Act, 42 U.S.C. §§ 7401 to 7671q
CO_2	Carbon Dioxide
CONSOL	CONSOL Energy Inc.
CCS	Carbon Capture and Sequestration
EPA	United States Environmental Protection Agency
EVA	Energy Ventures Analysis, Inc.
Final Rule	*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*, 89 Fed. Reg. 39,798 (May 9, 2024)
Minnkota	Minnkota Power Cooperative
NACCO NR	NACCO Natural Resources Corporation
NMA	National Mining Association
NTEC	Navajo Transitional Energy Company
PEC	Peabody Energy Corporation
Prairie State	Prairie State Generating Company

Western Fuels	Western Fuels Association

LIST OF ATTACHMENTS

Exhibit A	Declaration of Tawny Bridgeford, *General Counsel & Senior Vice President, Regulatory Affairs, National Mining Association*
Exhibit B	Declaration of Michelle Bloodworth, *President & Chief Executive Officer, America's Power*
Exhibit C	Declaration of Gavin A. McCollam, *Senior Vice President & Chief Operating Officer, Basin Electric Power Cooperative*
Exhibit D	Declaration of Robert Braithwaite, Jr., *Senior Vice President Marketing & Sales, CONSOL Energy Inc.*
Exhibit E	Declaration of Seth Schwartz, *Managing Director, Energy Ventures Analysis, Inc.*
Exhibit F	Declaration of Robert McLennan, *President & Chief Executive Officer, Minnkota Power Cooperative*
Exhibit G	Declaration of Christopher D. Frietz, *Vice President-Land, Associate General Counsel & Assistant Secretary, NACCO Natural Resources Corporation*
Exhibit H	Declaration of Matthew D. Babcock, *Vice President Sales & Marketing, Navajo Transitional Energy Company*
Exhibit I	Declaration of Marc E. Hathhorn, *President US Operations, Peabody Energy Corporation*
Exhibit J	Declaration of Randy Short, *President & Chief Executive Officer, Prairie State Generating Company*

Exhibit K Declaration of Adam D. Anderson*, Chief Executive Officer/General Manager, Western Fuels Association*

Exhibit L *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*, 89 Fed. Reg. 39,798 (May 9, 2024)

INTRODUCTION

EPA wants its latest effort to regulate greenhouse gas emissions from power plants to appear different from the unlawful Clean Power Plan, but for coal-fired electric generating units, the power grid, and the People, the end will be the same: widespread electric generating plant retirements and corresponding coal mine retirements, necessitating a shift to non-coal generation resources that will impact the entire coal supply chain. The agency now offers coal-fired power plants a Hobson's Choice: take a moonshot gamble or shut down. Because electric utilities cannot gamble with the nation's electricity supply, retirements are the only realistic option for nearly all coal-fired plants, and that will close coal mines too. As EPA's own analysis confirms, the Final Rule will force Americans to begin immediately the irreversible process of shifting to resources other than coal to satisfy their growing electricity needs.

The Final Rule is plainly unlawful, including under the Supreme Court's recent decision in *West Virginia v. EPA*, 597 U.S. 697 (2022). In that landmark case, the Court explained that EPA's authority to regulate carbon dioxide ("CO_2") emissions under Section 111(d) of the Clean Air Act ("CAA") requires the agency to identify the "best system of emission

reduction" that is "adequately demonstrated" to reduce such emissions, *id.* at 709, and does not permit EPA to "devise carbon emissions caps based on a generation shifting approach," *id.* at 732–35. The Final Rule flouts the Supreme Court's holding, issued just two years ago, by forcing power plants to choose one of three options, all of which are beyond EPA's authority under the CAA and *West Virginia v. EPA*. Power plants can complete the impossible task of installing and implementing billion-dollar carbon-capture-and-sequestration ("CCS") technology to continuously capture, transport, and store 90% of CO_2 emissions before 2032. They can shift from coal to gas for at least 40% of the electricity they generate before 2030, and then retire by 2039. Or, they can simply retire before 2032 and hope to meet the fast-rising demand for electricity with non-coal generating resources. Since no power plant has ever achieved 90% CCS, and few plants can afford to attempt it now, the Rule functions as a mandatory retirement deadline. And once coal plants retire and the mines serving them close, the generation they once provided must necessarily shift to renewable, natural gas, or other non-coal resources to keep the lights on. So, EPA has once again mandated unlawful generation shifting.

This Court should stay the Final Rule, just as the Supreme Court stayed the Clean Power Plan years prior to holding the Plan's approach unlawful in *West Virginia*. The Final Rule is unlawful because its 90%-CCS-before-2032 option is an unachievable canard for most coal plants, and the natural gas co-firing option is "generation shifting" prohibited under *West Virginia*. That leaves retirement, and the resultant shifting of generation resources, as the only viable option. This result reflects the same legal infirmities identified by the Supreme Court in 2022 and that were likely the basis of that Court's stay of the Clean Power Plan in 2016.

The irreparable harm and the equities are likewise the same as those the Supreme Court considered in staying the Clean Power Plan in 2016. The Final Rule here will lead to the same massive retirements and, accordingly, will be just as devastating for the power plant and coal mine owners that comprise the members of Petitioners America's Power and the National Mining Association ("NMA"). The very few plants that would attempt to implement complex, unproven 90% CCS technology by the Final Rule's unreasonable deadline will incur irreversible, massive compliance costs. And given the long planning horizons involved in managing power plants and mines, those that do not take that risk will

be required to make irrevocable retirement decisions now, well before the Rule's illegality can be laid bare in litigation. Each of these choices will jeopardize the national economy and electricity grid, which depend upon coal to produce reliable, affordable, and dispatchable electricity.

This Court should grant Petitioners' Motion For Stay.

STATEMENT OF THE CASE

A. Section 111 of the CAA directs EPA to determine "standards of performance" for stationary sources on a "pollutant-by-pollutant basis." *West Virginia*, 597 U.S. at 709 (quoting 42 U.S.C. § 7411(b)(1)(B)). EPA must decide the "best system of emission reduction" ("BSER") that is "adequately demonstrated," considering, among other things, the "cost of achieving such reduction," and then determine a performance standard that "reflects the degree of emission limitation achievable through the application" of the identified BSER technology. 42 U.S.C. § 7411(a)(1).

For existing sources, Section 111(d) "operates as a gap-filler," allowing EPA to regulate emissions that are "not already controlled under the Agency's other authorities." *See West Virginia*, 597 U.S. at 709–10. States set the performance standards governing existing sources based upon the BSER that EPA reasonably determines "has been

adequately demonstrated" and is "achievable" for those sources. 42 U.S.C. §§ 7411(a)(1), (d)(1). The States then submit "plan[s]" to EPA containing the performance standards they intend to adopt. *Id.* § 7411(d)(1). A state plan may consider "the remaining useful life" of an existing facility and "other factors" when setting standards. *Id.*

An "adequately demonstrated" system is more than merely "feasible." *See Sierra Club v. Costle*, 657 F.2d 298, 364 (D.C. Cir. 1981). It must be "reasonably 'reliable,' 'efficient,' and 'expected to serve the interests of pollution control without becoming exorbitantly costly.'" *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 962 (D.C. Cir. 2021), *rev'd on other grounds*, 597 U.S. 697 (2022) (citation omitted). It must, moreover, be commercially "available for installation in new plants," *see Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), and capable of being "successfully applied . . . under a 'wide range of operating conditions,'" *Lignite Energy Council v. EPA*, 198 F.3d 930, 934 & n.3 (D.C. Cir. 1999) (citation omitted), by "the industry as a whole," *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 (D.C. Cir. 1980).

In *West Virginia*, the Supreme Court held that EPA may not use Section 111(d) to force "generation shifting," 597 U.S. at 730–32—that

is, "reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources,'" *id.* at 725 (citation omitted). That holding explains why the Supreme Court stayed the Clean Power Plan from taking effect several years earlier, in 2016, including because of the widespread harms to the energy industry stemming from EPA's unlawful effort to reengineer the nation's power grid through generation shifting. *See* Stay App. at 38–48, *West Virginia v. EPA*, No.15A773 (U.S. filed Jan. 26, 2016); Stay App. at 12–21, *Basin Elec. Power Coop. v. EPA*, No.15A776 (U.S. filed Jan. 27, 2016).

B. On April 25, 2024, EPA issued the Final Rule, which purports to regulate CO_2 emissions from certain new and existing sources, including existing coal-fired power plants under Section 111(d). 89 Fed. Reg. 39,798 (May 9, 2024). The Rule includes "emission guidelines" for existing coal-fired plants that require each facility to self-select into one of three buckets, two of which the Rule terms "subcategories" and one of which is a so-called "applicability exemption." *See id.* at 39,801.

The first subcategory is plants that "intend to operate past January 1, 2039." *Id.* at 39,838. EPA has identified 90% CCS as the BSER for reducing emissions from these plants. *Id.* at 39,840. The CCS process

involves designing and implementing technology that captures the CO_2 that a plant produces, compressing and transporting the captured CO_2 via pipelines or some other means of transportation, and then permanently storing it, typically deep underground. *See id.* at 39,813. EPA's standard for "long-term" plants is 90% capture of CO_2 on a continual basis. *See id.* at 39,838–40. To date, only a handful of facilities in the world have tried to implement CCS technology, and none has achieved even close to a continual 90% CO_2 capture of an entire unit's exhaust. *See infra* pp.11–13; Minnkota Decl. ¶¶ 21, 23, 25, 33, 80. EPA "assumes" that "long-term" plants will begin "work[ing]" toward "each component of CCS (capture, transport, and storage)" by "June 2024," and requires the plant to have achieved 90% CO_2 capture before January 1, 2032. 89 Fed. Reg. at 39,874.

The second subcategory is plants that make a federally enforceable commitment to retire "before January 1, 2039." *Id.* at 39,801. For these plants, the BSER is "co-firing with natural gas, at a level of 40 percent of the unit's annual heat input." *Id.* These plants must implement technology that allows the facility to combust a combination of coal and natural gas to produce electricity. *See id.* EPA "assumes" that existing

coal-fired plants will begin "work[ing]" toward co-firing by June 2024, *id.* at 39,893, and requires the plant to have achieved 40% natural gas co-firing before January 1, 2030, *id.* at 39,801.

Finally, the "applicability exemption" covers any existing coal-fired power plants that make a federally enforceable commitment "to permanently cease operation before January 1, 2032." *Id.* at 39,805. These plants "are not regulated by" the Rule, and so do not need to implement any new 90% CCS or co-firing technologies, so long as they retire prior to 2032. *See id.* at 39,843.

States have 24 months to develop plans to establish, implement, and enforce performance standards for existing plants. *See id.* at 39,997.

C. Petitioner NMA is a national trade association comprising approximately 280 corporations and organizations involved in aspects of mining, including producers, transporters, and consumers of coal. NMA represents the interests of mining before Congress, federal agencies, the judiciary, and the media. Petitioner America's Power is a national trade association that exclusively advocates on behalf of the U.S. coal fleet and its supply chain, at both the federal and state level. America's Power members consist of electricity generators, coal producers, transportation

companies, and equipment suppliers in the coal supply chain. Both Petitioners and their members have an interest in supporting existing coal-fired power plants and their suppliers, which provide continuous, affordable, reliable, dispatchable, and fuel secure electricity nationwide.

STANDARD FOR GRANTING A STAY

This Court may stay an agency rule after considering four factors: (1) the likelihood that the movant will prevail on the merits; (2) whether the movant will suffer irreparable harm absent a stay; (3) harms to nonmoving parties; and (4) the public's interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Injury is "irreparable where no 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.'" *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (citation omitted). Nonrecoverable costs of complying with an agency action later held invalid are irreparable. *See In re NTE Connecticut, LLC*, 26 F.4th 980, 991 (D.C. Cir. 2022); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring). The nonmovants' harm and the public's interest "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

REASONS FOR GRANTING A STAY

I. Petitioners Are Likely To Succeed On The Merits

A BSER must be adequately demonstrated, and otherwise lawful. *West Virginia*, 597 U.S. at 710. An "adequately demonstrated" BSER is commercially "available," *Portland Cement*, 486 F.2d at 391, as well as "reasonably reliable" and not "exorbitantly costly," *Am. Lung*, 985 F.3d at 962. A BSER is not "adequately demonstrated" when its projected availability rests on "mere speculation or conjecture," *Lignite Energy Council*, 198 F.3d at 934, or is supported only by data from "prototype" or "pilot scale" demonstration facilities or a specific type of coal, *see Sierra Club*, 657 F.2d at 341 n.157. A BSER that relies upon generation shifting—including by forcing "a large shift from coal to natural gas" or "direct[ing]" an existing coal plant to "effectively cease to exist"—is beyond EPA's authority under the CAA, including given the major questions doctrine. *See West Virginia*, 597 U.S. at 729–31 & n.3.

The Final Rule asks coal-fired plants to choose between three unlawful options: (1) implement CCS technology at an unachievable continuous capture rate of 90% CO_2 from an entire unit before 2032, (2) shift almost half of the plant's energy production to natural gas by 2030 and then shutdown before 2039 in favor of "cleaner" energy

resources, or (3) shut down before 2032. *See* 89 Fed. Reg. at 39,901. Each of these mandated paths is unlawful as not adequately demonstrated under Section 111, *see* 5 U.S.C. § 706(2)(A), (C), or because it mandates impermissible generation shifting, *see West Virginia*, 597 U.S. at 724–32.

As to the first option, continuous 90% CCS by 2032 is unachievable for almost all power plants, has never been achieved at the level mandated by the Final Rule, and so is not adequately demonstrated. The Final Rule cites no evidence that continuous 90% CCS is "feasible" or "reasonably reliable" by 2032 for any plants, let alone that the necessary technology will be broadly "available." *See Portland Cement*, 486 F.2d at 391–92. Only one large U.S. commercial electric generating plant—the Petra Nova project—has ever been equipped with CCS, and that project involves only a "slipstream" CCS application (that is, only about 33% of the unit's exhaust is directed to the capture system). *See* EPA Memo, Review of the Current Status of the Carbon Capture and Sequestration Projects at 21–24 (Mar. 2018), Doc. ID No. EPA-HQ-OAR-2013-0495-11947. In addition, unlike EPA's Final Rule, which assumes a plant will run its capture system on its own power, Petra Nova relies on a separate

natural gas combustion turbine to power the capture system, and that gas turbine itself emits CO_2 that offsets a significant portion of the emission reductions achieved from the coal unit. Comment from Tawny Bridgeford, National Mining Association at 25–26 (Aug. 8, 2023) ("NMA Comments"), Doc. ID No. EPA-HQ-OAR-2023-0072-0695.

Indeed, just a single large plant has successfully achieved 90% CO_2 capture—the Boundary Dam Power Station in Canada—but did so for only a handful of days shortly after commissioning, with technical issues since causing the facility to significantly reduce its capture rate. Comment from Jeff Jickling, SaskPower (Aug. 4, 2023), Doc. ID No. EPA-HQ-OAR-2023-0072-0687. SaskPower, the owner of Boundary Dam, submitted comments on EPA's proposed rule to explain that EPA was mischaracterizing its level of performance by claiming a 90% reduction, stating that "only a portion of the total flue gas from [Boundary Dam Unit 3] can be processed by the CCS facility" and that the system now only targets 65% to 70% of total Boundary Dam Unit 3 emissions. *See id.*

The costs that continuous 90% CCS will impose on existing coal-fired power plants are "exorbitant[ ]," which provides an independent basis for 90% CSS not being a lawful BSER. *Am. Lung*, 985 F.3d at 962.

Southern Company's Kemper project—intended to be the United States' first commercial-scale coal plant to capture a substantial portion of CO_2 emissions—was originally scheduled to be operational by May 2014 at an estimated cost of $2.4 billion. *See* NMA Comments at 26. But the project faced numerous complications, spent over $7.5 billion by June 2017, and eventually demolished its CO_2 capture system. *Id.* at 26–27. EPA conceded less than six years ago that "the high cost of CCS, including the high capital costs of purchasing and installing CCS technology and the high costs of operating it, including high parasitic load requirements, prevent CCS or partial CCS from qualifying as BSER on a nationwide basis." 84 Fed. Reg. 32,520, 32,548 (July 8, 2019).

The Rule's second option is equally unlawful, but for a different reason. Forcing coal-fired units to convert to at least 40% natural gas is "generation shifting." *West Virginia*, 597 U.S. at 728. In fact, forcing a coal plant to shift to gas is even more clearly in conflict with *West Virginia* than the Clean Power Plan—even the Clean Power Plan was built on a trading program, not a direct mandate to shift from one resource to another and then shut down. *See id.* Further, and independently fatal, requiring plants that shift to 40% gas to shut down

before 2039 constitutes unlawful generation shifting because some other resource will need to replace the one retired. *See id.* at 728 & n.3.

Requiring coal plants to retire before 2032 is similarly generation shifting. It is not for EPA to decide whether coal plants should "cease making power," *id.*, thereby "forc[ing] a nationwide transition away from the use of coal to generate electricity," *id.* at 735. All EPA may do under Section 111(d) is "guide States in 'establish[ing] standards of performance' for 'existing source[s].'" *Id.* at 728 n.3 (alteration in original) (quoting 42 U.S.C. § 7411(d)(1)).

II. Petitioners And Their Members Will Suffer Immediate, Irreparable Harm If The Final Rule Is Not Stayed

Petitioners and their members will suffer substantial, irreparable, and immediate harm if this Court does not stay the Final Rule, analogous in all material respects to the irreparable harm that EPA's prior generation-shifting mandate in the Clean Power Plan would have imposed absent the Supreme Court's 2016 stay. *See* Stay App. at 38–48, *West Virginia*, No.15A773; Stay App. at 12–21, *Basin Elec.*, No.15A776.

The Final Rule is designed to eliminate coal generation as a source for the nation's power by imposing mandates that will lead to the retirement of almost all (or, perhaps, all) coal-fired power plants. EVA

Decl. ¶¶ 6–9; CONSOL Decl. ¶¶ 17, 24. Absent a stay, the Rule will succeed in making its generation-shifting design irreversible, long before this Court can decide whether that Rule is lawful.

EPA itself "assumes" generating facilities will begin the "feasibility work" under the Rule in June 2024—*next month*—to meet the Rule's two-year timeline for developing state plans. 89 Fed. Reg. at 39,874. Here, at least, EPA's assumption is correct: a facility's *only* hope of remaining open under the Rule, however dim, is to act immediately. The "planning, engineering, and other efforts" for a plant to even attempt to install 90% CCS before 2032 would need to include not only the "development of the carbon capture equipment," but also the "necessary equipment, infrastructure, technology, permitting, and establishing right-of-way access for the transport." Prairie State Decl. ¶ 3; *see* America's Power Decl. ¶¶ 12–13; Minnkota Decl. ¶¶ 6, 43–52. As EPA recognizes, plants will need to start that work now to have any chance of meeting the Final Rule's deadline. *See* 89 Fed. Reg. at 39,874; *see also* America's Power Decl. ¶¶ 12–13. By the time this Court holds that the Final Rule is unlawful, it would be too late for a plant to turn back or recoup the

expended costs. America's Power Decl. ¶¶ 12–13; EVA Decl. ¶¶ 12–13; Prairie State Decl. ¶ 3; Minnkota Decl. ¶¶ 55, 58–59, 64, 77, 79, 85–88.

The nonrecoverable costs associated with making the irreversible decision to attempt to install 90% CCS will be immediate and exorbitant. *See* Basin Electric Decl. ¶¶ 11, 20–26; Minnkota Decl. ¶¶ 55, 60, 64. Retrofitting just a single unit at a large-scale coal-fired facility with a post-combustion CO_2 capture plant could cost over $2 billion, without accounting for substantial operating, maintenance, transportation, sequestration, and other costs. Prairie State Decl. ¶ 3; *see* Minnkota Decl. ¶¶ 56–61; Basin Electric Decl. ¶¶ 20, 22. The costs of implementing natural gas co-firing for plants that choose that option—which, again would only let them stay open until the end of 2038—will be similarly prohibitive and irreversible, in the tens of millions of dollars for a single plant. Prairie State Decl. ¶ 3; Minnkota Decl. ¶¶ 62–63; Basin Electric Decl. ¶¶ 22–26.

Most power plants will not even attempt to install still-developing 90% CCS due to its exorbitant costs and EPA's impossible timeframe, and will, instead, make irreversible decisions to retire well before this Court can issue a final decision on the merits. *See* Minnkota Decl. ¶ 6, 86–88;

see also EVA Decl. ¶¶ 10–13. Once a plant decides to retire, that sets off a process that cannot be reversed without substantial costs, if it can be reversed at all. *See* Basin Electric Decl. ¶¶ 34–41. EPA's own modeling projects near-term retirements of 11 coal-fired generating units and an industrial coal-fired boiler, which retirements will necessarily be preceded by many immediate and irrevocable decisions that will have to be made before the retirements take place and will impose substantial harm on both the plants' owners and on their downstream customers. EVA Decl. ¶¶ 10–13, 22; America's Power Decl. ¶¶ 14–18.

Many more plants will certainly follow, as few (if any) plants can bear the exorbitant costs of implementing 90% CCS under the terms set forth in the Rule. *See* Prairie State Decl. ¶ 3. By way of illustration, take the Prairie State Energy Campus in downstate Illinois, which serves 2.5 million families in communities spanning eight states and is wholly-owned by non-profit public utilities. *Id.* ¶ 2. Retrofitting Prairie State's two units to comply with the Rule would cost at least $300 million in up-front expenditures on preliminary evaluations, design, and permitting over the next 24 months; approximately $4 billion for the CCS retrofit itself; and more than $176 million *per unit, per year* in additional annual

operating and maintenance costs—all without any guarantee that these efforts and massive costs would keep the generating units online beyond December 31, 2038. *Id.* § 3. The costs and risks are not only unreasonable; they are impossible to bear. *See id.*

As a particularly bitter irony, the Final Rule could well force the few CCS projects underway today to cancel those projects and shut down. Minnkota, for instance, has been attempting to employ CCS since 2015 and, if successful, would have developed and constructed the world's largest and most effective CCS project ever built. *See* Minnkota Decl. ¶¶ 21–24. But the project is only designed to capture about two-thirds of the exhaust from the facility it will serve. *Id.* ¶ 21. Because even that best-ever achievement would not do under EPA's Final Rule, the company may have to give up on the project, forfeiting $90 million in engineering and development costs already spent ($60 million of which came from the government). *Id.* ¶¶ 6, 24.

The Final Rule's forced plant closures will devastate the nation's coal mining industry, including Petitioners' members, in a manner that cannot—and will not—be reversed when this Court invalidates the Rule. Mining operations, as well the hundreds of thousands of people whose

livelihoods depend on mining, rely upon the presence of a stable and continuing domestic market for coal. *See* NMA Decl. ¶¶ 8–9; CONSOL Decl. ¶ 23; Minnkota Decl. ¶ 72, NTEC Decl. ¶¶ 13–20. The Final Rule will, by design, throw this market into chaos by gutting demand for coal. CONSOL Decl. ¶ 22, 24. EPA projects that the Final Rule will cause the near-term retirement of 11 coal units plus one coal-fired industrial boiler, totaling almost 7,000 MW. EVA Decl. 22 ex. 1; NMA Decl. ¶ 9; America's Power Decl. ¶ 10. As coal plants close, the mines that supply them will close as well. CONSOL Decl. ¶ 21–22; Minnkota Decl. ¶¶ 63, 72, 81; NACCO NR Decl. ¶¶ 8, 14, 19–21; NTEC Decl. ¶¶ 13–16. This will include mines that are dedicated solely to these plants. *See* Minnkota Decl. ¶ 63; Western Fuels Decl. ¶ 9; *see also* NAACO NR ¶ 14. For example, the Minnkota Power Cooperative's "mine-to-mouth" Milton R. Young Station ("Young Station") is cost-effectively by nearby mines including BNI Coal, which would be severely impacted and likely forced to close if Minnkota were forced to retire its Young Station. Minnkota Decl. ¶¶ 9, 10, 63, 81; *see* Western Fuels Decl. ¶ 9–10. Further, slashing demand for coal will strand millions of dollars in investments, *see* NACCO NR ¶ 29; America's Power Decl. ¶ 13, and depress coal prices,

diminishing revenue and forcing mines to scale back production and cut jobs in the near term. CONSOL Decl. ¶ 22–23; NTEC Decl. ¶¶ 16–20; NACCO NR Decl. ¶ 5.

The Final Rule will force mining operators to make immediate, existential decisions about whether to invest in the infrastructure and workforce essential to their survival. Like the utility sector, the coal industry is highly capital intensive and must make investment decisions with long lead times. PEC Decl. ¶ 11; CONSOL Decl. ¶ 22; NACCO NR Decl. ¶¶ 6, 16. These include decisions about human capital: U.S. coal mines require a highly skilled, in-demand workforce to operate safely, and long-term planning and significant training are essential to develop the necessary talent pipeline. PEC Decl. ¶ 5. The precipitous decline in demand for coal will force operators to scale back or even eliminate these investments immediately, setting in motion the inevitable constriction or closure of these mines even if this Court determines that the Final Rule is illegal. *See* CONSOL Decl. ¶¶ 22–23; 26; PEC Decl. ¶¶ 9–12; NTEC Decl. ¶ 11; NACCO NR Decl. ¶¶ 8, 14, 19–21; Minnkota Decl. ¶ 72.

Notably, these irreparable harms are analogous in all material respects to those that were before the U.S. Supreme Court in 2016, when

that Court stayed the Clean Power Plan. *See* Stay App. at 38–48, *West Virginia*, No.15A773; Stay App. at 12–21, *Basin Elec.*, No.15A776. Now, as then, generation utilities cannot "await the outcome of this litigation to undertake" the "large scale projects" required to comply with the Rule, including "site selection," "land/right-of-way acquisition," "preliminary engineering," "environmental assessment and permitting," "final engineering and design," and "site construction," in addition to "environmental assessments or environmental impact statements" that might take "years to complete." Stay App. at 14–15, *Basin Elec.*, No.15A776. Now, as then, plants must make "near-term commitments to ensure that new power facilities are operational to offset declining coal generation and prepare for increases in natural gas and renewable generation," and will suffer "stranded costs from prematurely retired or artificially curtailed units," "operational disruptions," and "increases in electricity prices." *Id.* at 17, 20. And now, as then, these decisions will have serious and substantial downstream effects, including "cancellation of existing coal and transportation contracts," *id.* at 16, and "the closures of related coal mines," Stay App. at 46, *West Virginia*, No.15A773.

III. All Other Equitable Considerations Favor A Stay

The balance of equities and the public interest favor a stay, *Nken*, 556 U.S. at 434, for the same reasons that were before the Supreme Court in 2016 when it stayed the Clean Power Plan.

Absent a stay, the Rule's mandated, irreversible mine closures and operational reductions will eliminate hundreds of well-paying jobs, particularly in areas of the country where such jobs are scarce. The coal mining industry supports 100,000 direct mining industry jobs, and indirectly generates approximately 224,000 jobs. NMA Decl. ¶ 3. Coal mining jobs are among the best-compensated blue-collar jobs in the country, often paying far above the average salary in coal mining areas. *Id.* In some counties in coal country, jobs directly and indirectly related to coal mining are a significant percentage of all jobs. *See* Minnkota Decl. ¶ 72. CONSOL employs 2,039 individuals, and PEC provides high-paying jobs to 3,400 families in the United States. CONSOL Decl. ¶¶ 3, 9, 23; PEC Decl. ¶ 2. Similarly, NTEC employs about 1,400 individuals at four mines across the country, remitting approximately $180,000,000 in annual wages and benefits. NTEC Decl. ¶ 4. NTEC creates thousands

of other jobs by hiring contractors, procuring goods and services, and supporting the communities where its mines operate. *See id.*

The coal industry provides other substantial benefits for local communities and coal-dependent States. Millions of dollars in federal, state, and local taxes can be attributed to mining jobs, and coal mining directly contributed over $31 billion to GDP in 2023. NMA Decl. ¶ 3. Mining companies also pay significant royalties to state and local governments, which payments will cease if these mines are forced to close. Western Fuels Decl. ¶ 11. In 2023 alone, NACCO NR's Falkirk Mine and Freedom Mine paid roughly $2,500,000 and $4,500,000, respectively, to the State of North Dakota in coal severance taxes. NAACO NR Decl. ¶ 15. That same year, NTEC remitted about $225,000,000.00 in royalties and taxes to the Navajo Nation (NTEC's sole shareholder), the federal government, the States of Wyoming and Montana, and local county governments. NTEC Decl. ¶ 4–8; *see id.* ¶¶ 2, 8. These royalties and taxes are vital to state and local governments, as well as the Navajo Nation, and will cease if mining operations are forced to close due to the Final Rule. *See id.*; Western Fuels Decl. ¶ 11.

A stay is also necessary to prevent the Final Rule from jeopardizing the reliability of the nation's electric grid. Even before the Rule, grid reliability regulators and operators warned that forced coal plant closures were moving far faster than they could be reliably replaced. *See* Prairie State Decl. ¶ 5; America's Power Decl. ¶¶ 19–21; *see also* Minnkota Decl. ¶¶ 64–68. The Final Rule will accelerate this alarming pace, even as judicial review is pending, placing electricity consumers that depend on coal-fired generation at risk of losing access to reliable and affordable electricity. Prairie State Decl. ¶ 5; Minnkota Decl. ¶¶ 66, 68, 85. The Rule's mandatory closures will also force consumers to pay much more for power, particularly during extreme weather events, and as skyrocketing demand for electricity strains an already-vulnerable system transition. *See* Prairie State Decl. ¶¶ 4, 5; NTEC Decl. ¶ 10; Minnkota Decl. ¶¶ 69–70.

The States explained these same public interest concerns to the U.S. Supreme Court in 2016 when seeking a stay of the Clean Power Plan, noting that the forced "shutdown" of coal-fired "plants will cause the closures of related coal mines, resulting in the loss of jobs in some of this country's most economically depressed, rural communities." *See*

Stay App. at 46, *West Virginia*, No.15A773. Now, as then, the Rule will have "profound adverse human impacts . . . on the nation's citizens during the pendency of this litigation," including in the form of "direct employment losses of [thousands of] jobs in the electric power and coal mining sectors." Stay App. at 20, *Basin Elec.*, No.15A776. These harms are just as compelling now as they were in 2016, and require a stay of the Final Rule here.

Finally, neither EPA nor the public will suffer any harm from a stay. The public interest favors stopping "unlawful agency action," *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016), and an agency has no protectible interest in keeping in place an unlawful rule. There is no harm to the public in ensuring that the existing coal-fired power plants that are vital to this country's economy and electricity grid remain in operation, instead of being forced to choose between closing, generation shifting, or attempting a moonshot gamble at installing 90% CCS technology on an impossible schedule.

CONCLUSION

This Court should grant Petitioners' Motion For Stay.

Dated: May 24, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because this Motion contains 5,188 words, excluding the parts of the Motion exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

3. In accordance with Federal Rule of Appellate Procedure 18(a)(1) and Circuit Rule 18(a)(1), on May 16, 2024, Petitioners requested relief from EPA in a Petition For Stay of EPA's Final Rule. EPA has not acted on that request, and Petitioners now seek a stay from this Court. *See* D.C. Cir. R. 18(a)(1).

4. In accordance with Circuit Rule 18(a)(2), on May 16, 2024, counsel for Petitioners notified Respondents' counsel by email of

Petitioners' intent to file this Motion For Stay. Respondents oppose this Motion.

Dated: May 24, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2024, I filed the foregoing Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: May 24, 2024

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