No. 24A463

In the Supreme Court of the United States

EAST KENTUCKY POWER COOPERATIVE, INC., APPLICANT

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONSE OF THE FEDERAL RESPONDENTS IN OPPOSITION TO THE APPLICATION FOR A STAY

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The Solicitor General, on behalf of the federal respondents, respectfully files this response in opposition to the application for a stay of agency action. This case concerns a rule issued by the Environmental Protection Agency (EPA) to address the health and environmental risks presented by coal ash, a toxic byproduct of the burning of coal to generate electricity. 89 Fed. Reg. 38,950 (May 8, 2024). For decades, power plants have deposited coal ash in vast, outdoor, man-made pools called "surface impoundments." In 2015, after a number of massive surface-impoundment failures, EPA exercised its authority under the Resource Conservation and Recovery Act of 1976 (RCRA or Act), 42 U.S.C. 6901 *et seq.*, to issue standards governing the disposal of coal ash. In *Utility Solid Waste Activities Group* v. *EPA*, 901 F.3d 414 (2018) (*USWAG*) (per curiam), the D.C. Circuit largely upheld EPA's rule, but the court vacated the rule in an important respect. The court rejected, as arbitrary and capricious, the 2015 rule's exemption for "legacy impoundments," *i.e.*, inactive impoundments at inactive power plants, which EPA had acknowledged were at least as dangerous as other coal-ash impoundments. See *id.* at 432-434, 449.

In May 2024, EPA responded to *USWAG* by promulgating the rule at issue here. The 2024 rule (in most pertinent part) amends the 2015 coal-ash regulations to address legacy impoundments. Three months later, applicant, a Kentucky utility company, filed in the D.C. Circuit a petition for review and a motion to stay the rule pending judicial review. The court of appeals denied the stay motion, allowing the rule to take effect on November 8, 2024. Applicant now seeks a stay in this Court.

The application for a stay should be denied. Applicant's principal claim is a narrow one: that EPA's new rule is unlawful because it applies to legacy impoundments from which all coal ash was removed after 2015. On applicant's account, such a site no longer contains "solid waste" subject to RCRA, so the rule exceeds EPA's statutory authority, operates retroactively, and is arbitrary and capricious.

That theory is incorrect. The evidence before EPA established that legacy impoundments leak into the surrounding soil and groundwater, so that even where coal ash has been removed from an impoundment, coal-ash leachate—which itself constitutes "solid waste" within the meaning of RCRA—would normally be expected to remain at the site. Consistent with RCRA's command, the 2024 rule requires a legacy impoundment's owner to measure groundwater under the impoundment for coal-ash constituents, and to undertake remedial measures if such constituents are found to be present, in order to ensure that "there is no reasonable probability of adverse effects on health or the environment" from the continued presence of toxic leachate at the site. 42 U.S.C. 6944(a). Those requirements fall comfortably within EPA's statutory authority. And applicant's other challenges to the rule's legality are no more likely to succeed.

Nor does applicant satisfy the other requirements for the extraordinary relief it seeks. Applicant makes no effort to show a reasonable probability that this Court

would grant a writ of certiorari if the court of appeals upheld EPA's rule. Applicant's claim of irreparable injury rests primarily on shifting, unexplained, and implausible estimates of its compliance costs—which are hardly impending in any event, as the relevant compliance deadline will not arrive until May 2028. And the balance of equities tips strongly against granting a stay in light of the serious health and environmental dangers that legacy impoundments pose and the rule's important measures to mitigate those risks. At a minimum, any stay relief should be limited to applicant's specific impoundments that are the focus of the application.

STATEMENT

A. Statutory Background

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 483 (1996). "Chief responsibility for the implementation and enforcement of RCRA rests with" EPA. *Id.* at 483-484. Subtitle C of RCRA "empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with * * * rigorous safeguards and waste management procedures." *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 331 (1994); see 42 U.S.C. 6921-6939g. That system includes "a combination of national standards established by EPA regulations, and a permit program in which permitting authorities—either EPA or states that have hazardous waste programs authorized by the agency—apply those national standards to particular facilities." *Cement Kiln Recycling Coal.* v. *EPA*, 493 F.3d 207, 211 (D.C. Cir. 2007) (citing 42 U.S.C. 6924-6926). Under the statutory definition, "'hazardous waste'" is a particularly dangerous subset of "solid waste." See 42 U.S.C. 6903(5).

The broader category of "solid waste" is governed by Subtitle D of RCRA. *USWAG*, *supra*, 901 F.3d at 424; see 42 U.S.C. 6941-6949a. "EPA's principal role

under Subtitle D is to announce federal guidelines" for management of solid waste. *USWAG*, 901 F.3d at 423-424; cf. p. 8, *infra* (discussing 2016 RCRA amendments that strengthened EPA's regulatory authority under Subtitle D). Subtitle D prohibits, in relevant part, any "disposal of solid waste * * * which constitutes the open dumping of solid waste," 42 U.S.C. 6945(a), and directs EPA to issue regulations distinguishing between facilities that are "sanitary landfills" (which are permitted) and those that are "open dumps" (which are prohibited), 42 U.S.C. 6944(a). "At a minimum," EPA's regulations must "provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." *Ibid.*

The Act generally defines "'solid waste'" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. 6903(27). The forms of "'disposal'" that are subject to the Act include "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste * * * into or on any land or water so that such solid waste * * * or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. 6903(3).

B. Factual Background

One form of waste subject to RCRA is coal ash—known in regulatory parlance as "coal combustion residuals" (CCR). Produced by coal-fired power plants and electric utilities, coal ash "contains myriad carcinogens and neurotoxins," "including arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum,

selenium, and thallium." *USWAG*, 901 F.3d at 420-421. For human beings, the risks of "exposure to the identified contaminants include elevated probabilities of cancer in the skin, liver, bladder, and lungs, as well as non-cancer risks such as neurological and psychiatric effects, cardiovascular effects, damage to blood vessels, and anemia." *Id.* at 421 (citation and internal quotation marks omitted).

Power plants commonly dispose of coal ash in nearby landfills or "aging * * * pools," called "surface impoundments," "that are at varying degrees of risk of protracted leakage and catastrophic structural failure." *USWAG*, 901 F.3d at 420-421. In 2008, for example, a surface impoundment in Tennessee failed and released "approximately 5.4 million cubic yards of Coal Residual sludge across 300 acres of land" and into a nearby river. *Id.* at 423. The coal-ash sludge "ruptured a natural gas line, disrupted power in the area, damaged or destroyed dozens of homes," and "'completely destroyed' more than 80 acres of aquatic ecosystems." *Ibid.* (citation omitted). A similar impoundment failure "resulted in a 'massive' spill of 39,000 tons of coal ash and 27 million gallons of wastewater into North Carolina's Dan River." *Id.* at 433 (citation omitted); see *id.* at 422 (describing EPA's assessment that "at least 50" existing coal-ash impoundments would likely cause loss of human life if they failed, and that another 250 posed serious nonlethal risks).

A further risk posed by surface impoundments is leakage of harmful chemicals that threaten both human health and the environment. When coal ash is stored in a surface impoundment with no protective lining or an inadequate lining, coal-ash constituents leach into the surrounding soil or groundwater. See Appl. App. 47-50; *id.* at 47 n.54 ("Leachate is produced when liquids, such as rainwater or groundwater, percolate through wastes stored in a disposal unit. The resulting fluid will contain suspended components drawn from the original waste."). Groundwater contamina-

tion from coal-ash leachate presents significant cancer risks and other health risks to humans. *Id.* at 48; see H.R. Rep. No. 1491, 94th Cong., 2d Sess. 89 (1976) ("Perhaps the most pernicious effect" of solid-waste disposal "is the contamination of ground water by leachate from land disposal of waste.").

Under EPA's longstanding interpretation of the relevant statutory term, coal-ash leachate, like coal ash itself, constitutes "solid waste" within the meaning of RCRA. See Appl. App. 48-49. Such leachate is "discarded material," 42 U.S.C. 6903(27) (defining "solid waste"), that is "part of the waste disposal problem" Congress targeted in RCRA, *American Mining Congress* v. *EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987). Cf. *Chemical Waste Mgmt., Inc.* v. *EPA*, 869 F.2d 1526, 1539 (D.C. Cir. 1989) (upholding EPA's application of "hazardous waste restrictions" to "waste which is contained in soil or groundwater"). RCRA specifically contemplates that solid waste can "leak[]" into land or water such that the "solid waste * * * or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. 6903(3) (defining "disposal" of solid waste). That language describes the risks posed by material like coal-ash leachate. See 42 U.S.C. 6901(b)(4) (congressional finding that open dumping of solid waste "contaminates drinking water from underground and surface supplies, and pollutes the air and the land").

C. Regulatory History

1. In 2015, after years of studying the problem, EPA promulgated a final rule under RCRA regulating the disposal of coal ash. 80 Fed. Reg. 21,302 (Apr. 17, 2015) (2015 Rule); see *USWAG*, 901 F.3d at 420. EPA chose to proceed under the Act's Subtitle D, "even as [the agency] continued to study factors potentially supporting regulating Coal Residuals as hazardous waste under RCRA Subtitle C." *USWAG*,

901 F.3d at 424. The 2015 Rule set "minimum criteria for the disposal of Coal Residuals in landfills and surface impoundments," including by imposing "location restrictions on landfills and surface impoundments"; "requirements pertaining to lining, structural integrity, and groundwater monitoring"; and "compliance deadlines, procedures for closing non-complying landfills and surface impoundments, and requirements that operators of these disposal sites make records of their compliance with the [2015] Rule publicly available." *Ibid.*; see 40 C.F.R. Pt. 257, Subpt. D (2015). Among other things, the 2015 Rule required all new coal-ash surface impoundments to be constructed with composite liners to prevent leakage. *USWAG*, 901 F.3d at 427; see 40 C.F.R. 257.72(a) (2015). Under the 2015 Rule, closure of a surface impoundment, whether through removal of the coal ash or installation of a cover system, would trigger requirements to take specified steps to address the potential presence of coal-ash leachate. See, *e.g.*, 40 C.F.R. 257.102(c) (2015) (requiring groundwater monitoring for units closed by removal); see also 40 C.F.R. 257.104(b)(3) (2015).

The 2015 Rule applied both to active impoundments (*i.e.*, impoundments that continue to receive new deposits of coal ash), and to inactive impoundments located at power plants that remain in operation. 80 Fed. Reg. at 21,303. The 2015 Rule did not apply, however, to "legacy" impoundments (also known as legacy ponds), which are inactive impoundments located at power plants that no longer operate. *Ibid.* Although EPA recognized the risks posed by all inactive impoundments, it chose not to regulate legacy impoundments out of "concern that the present owner of the land on which an inactive site was located might have no connection (other than present ownership of the land) with the prior disposal activities." *Id.* at 21,344.

2. The following year, Congress enacted the Water Infrastructure Improvements for the Nation Act (WIIN Act), Pub. L. No. 114-322, 130 Stat. 1628 (2016). The

WIIN Act amended Subtitle D of RCRA to authorize EPA to approve state permitting programs for coal-ash disposal that would "operate in lieu of" the 2015 Rule or its "successor regulations," so long as the programs are "at least as protective" as those regulations. *Id.* § 2301, 130 Stat. 1736 (42 U.S.C. 6945(d)(1)(A) and (B)); see *USWAG*, 901 F.3d at 426. The statute also directs EPA to implement a federal permitting program to regulate coal-ash disposal in States that do not develop their own programs; such a federal program likewise must require compliance with EPA's regulatory criteria for coal-ash disposal. 42 U.S.C. 6945(d)(2)(B). The WIIN Act provides that, absent a state or federal permit, the coal-ash impoundments remain directly subject to the 2015 Rule and any successor regulations. 42 U.S.C. 6945(d)(3) and (6).

3. Environmental groups and power-industry parties filed petitions for review in the D.C. Circuit challenging the 2015 Rule. In *USWAG*, 901 F.3d 414, the court of appeals granted the environmental groups' petition for review in part, vacating portions of the rule and remanding to EPA, but denied the industry petitions and otherwise upheld the rule. *Id.* at 449-450.

Most relevant here, the D.C. Circuit panel unanimously upheld EPA's authority to regulate inactive coal-ash impoundments. The panel rejected the industry petitioners' argument that RCRA's definition of a prohibited "'open dump'"—as a facility "where solid waste *is disposed of*," 42 U.S.C. 6903(14) (emphasis added)—meant that a "site must actively receive new waste to come within" EPA's regulatory authority. *USWAG*, 901 F.3d at 439. The panel majority held that RCRA unambiguously encompasses inactive impoundments. *Id.* at 440-442. Judge Henderson, concurring in part and concurring in the judgment in part, deemed the statute ambiguous but concluded that EPA's interpretation was reasonable and therefore should be upheld under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), overruled by *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024). *USWAG*, 901 F.3d at 451-454. Judge Henderson stated that, "if an individual were to stand on an impoundment dam looking out over thousands of tons of wet CCR and ask 'is this an impoundment where "solid waste is disposed of,"' the answer would be 'yes.'" *Id.* at 454 (citation omitted).

The court of appeals also unanimously held, however, that the 2015 Rule's exemption of legacy impoundments was arbitrary and capricious. *USWAG*, 901 F.3d at 432-434; see *id.* at 450 (Henderson, J., concurring in part and concurring in the judgment in part). The court observed that legacy impoundments present "the same substantial threats to human health and the environment" as other inactive impoundments, and that those risks are "compounded" in the legacy context "by diminished preventative and remediation oversight due to the absence of an onsite owner and daily monitoring." *Id.* at 432 (opinion of the court). The court viewed EPA's stated concern about "identify[ing] the owners of legacy ponds" as an insufficient rationale for the exemption. *Id.* at 433. Based on evidence in the administrative record of the 2015 Rule, the court concluded that EPA "knows where existing legacy ponds are" and "can feasibly identify the responsible parties." *Ibid.* The court therefore vacated the exemption. *Id.* at 449.

D. The 2024 Coal-Ash Rule

In response to the D.C. Circuit's decision in *USWAG*, EPA issued an advance notice of proposed rulemaking that requested information about legacy surface impoundments. 85 Fed. Reg. 65,105 (Oct. 14, 2020). The agency subsequently issued a proposed rule for public comment. 88 Fed. Reg. 31,982 (May 18, 2023). In May 2024, EPA issued the final rule at issue here (2024 Rule), which amended the agency's coal-ash-disposal regulations. 89 Fed. Reg. 38,950 (May 8, 2024); Appl. App. 1-173.

In the 2024 Rule, EPA determined that legacy impoundments (defined as inactive impoundments that contained coal ash "on or after" the effective date of the 2015 Rule and that are located at inactive electric utilities or power plants) are generally unlined and therefore must be closed. Appl. App. 151; see *id.* at 62, 77; see also *id.* at 45 (estimating that 194 legacy impoundments exist in the United States). EPA acknowledged that some legacy impoundments may have already closed under the auspices of state regulators. But the agency declined to exempt such impoundments from the rule altogether, finding that closures overseen by state regulators had often been insufficiently protective. See, *e.g.*, *id.* at 81 (finding it "unlikely States considered the extent to which a surface impoundment would remain saturated by groundwater after closure"). EPA concluded that "the information currently available does not demonstrate that all closures conducted under State authority 'ensure there is no reasonable probability of adverse effects on health or the environment.'" *Id.* at 80 (quoting 42 U.S.C. 6944(a)).

The 2024 Rule therefore includes tailored provisions for previously closed legacy impoundments. See Appl. 8-10. If all coal ash was already removed from the impoundment and the closure otherwise satisfied EPA's closure standards—by documenting that the underlying groundwater was not contaminated by coal-ash constituents above specified levels—the owner or operator was required only to complete a closure certification by the 2024 Rule's effective date, November 8, 2024. Appl. App. 158-159 (40 C.F.R. 257.100(g)). If the owner or operator could not so certify by that date, it may extend its certification deadline to May 8, 2028, by preparing a "notification of intent to certify closure" and conducting groundwater monitoring to establish that the impoundment's previous closure satisfied federal standards. *Ibid.* (40 C.F.R. 257.100(h)(1)). If the groundwater monitoring reveals significant levels of coal-ash

constituents, the owner or operator must take corrective action to clean up the contamination. *Id.* at 159 (40 C.F.R. 257.100(h)(2)).

In addition, the 2024 Rule extended certain elements of the preexisting coal-ash regulations to a few other categories of sites that had previously been unregulated. Those categories, which the 2024 Rule collectively termed "CCR management units," include "CCR surface impoundments and landfills that closed prior to the effective date of the 2015 CCR Rule, inactive CCR landfills, and other areas where CCR is managed directly on the land." Appl. App. 7; see *id.* at 145 (finding 195 CCR management units exist nationwide). EPA also added new provisions that enable facilities to close regulated sites by first "completing all removal and decontamination procedures" and then completing groundwater remediation "in a separate post closure care period." *Id.* at 7.

E. Proceedings Below

A number of power companies, trade associations, and States filed petitions for review of the 2024 Rule in the D.C. Circuit. See Appl. i-iii. In August 2024, applicant here, an electric utility in Kentucky, filed a petition for review and a motion to stay the rule. Appl. 14. In its stay motion, applicant principally argued that the 2024 Rule is invalid because it regulates legacy impoundments from which all coal ash has been removed. Applicant's C.A. Stay Mot. 1-2. Applicant focused on its William C. Dale Station, *id.* at 7-8, a power plant where it had maintained surface impoundments containing coal ash. Appl. App. 416.

Applicant represented that, beginning in 2014 and ending in 2019, it had closed the Dale Station impoundments by removing the coal ash "down to the level of the underlying existing soil" and confirming the removal through "visual inspection" by representatives of a state agency overseeing the closure. Appl. App. 416-417. The

state agency "did not require groundwater monitoring," so applicant did not conduct any monitoring. *Id.* at 418. Because the Dale Station impoundments "still contained CCR" as of the effective date of the 2015 Rule, they qualified as legacy impoundments subject to the 2024 Rule, obligating applicant to conduct groundwater monitoring and confirm by May 2028 that the closures satisfied federal standards. *Id.* at 419-423. Applicant asserted that it would need "to begin construction activities no later than March 2025" in order to satisfy that requirement. *Id.* at 423. Applicant estimated that "compliance with the Rule as to the Dale Station," through installation of a groundwater-monitoring system and performance of the monitoring, "will cost in excess of $16.5 million," over and above "the approximately $27 million that [applicant] previously spent to clean-close the former Dale Station impoundments." *Id.* at 424-425; see Appl. 36-37 & n.6. EPA had estimated (in a regulatory impact analysis for the 2024 Rule) that groundwater monitoring would cost $229,000 per impoundment, and applicant had estimated in an earlier filing that its costs would be about $7 million. Gov't C.A. Opp. to Stay 23.

Applicant's stay motion was opposed by the government and by several environmental groups that had intervened as respondents in defense of the 2024 Rule. A panel of the court of appeals denied the motion on November 1, 2024, and the rule took effect a week later. Appl. App. 1, 174-175; see 89 Fed. Reg. 88,650, 88,651 (Nov. 8, 2024) (confirming effective date).

ARGUMENT

The application should be denied. A stay is "'not a matter of right'" but a matter of "'judicial discretion,'" and an applicant "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken* v. *Holder*, 556 U.S. 418, 433-434 (2009) (citations omitted). The applicant must show that (1) it is likely

to succeed on the merits; (2) it will suffer irreparable injury without a stay; and (3) the equities and the public interest support a stay. *Ohio* v. *EPA*, 603 U.S. 279, 291 (2024). An applicant seeking emergency relief from this Court also must show a reasonable probability that the Court would grant certiorari. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam); see *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring). Applicant has not made the necessary showings here.

I. APPLICANT IS UNLIKELY TO SUCCEED ON THE MERITS

Applicant's challenges to the 2024 Rule are not likely to succeed on the merits. The application's principal claims share a central flaw: they rest on the premise that the removal of coal ash from a surface impoundment strips EPA of regulatory jurisdiction over the site, even if no measures have been taken to address the levels of coal-ash leachate that remain in the soil or groundwater. That premise is inconsistent with RCRA's text, and applicant's other constitutional, statutory, and arbitrary-and-capricious arguments are incorrect as well.

A. The 2024 Coal-Ash Rule Comports With RCRA

1. Applicant's main contention on the merits (Appl. 15-19) is that the 2024 Rule exceeds EPA's authority under RCRA because it regulates legacy impoundments that contained coal ash as of 2015, but from which the coal ash has since been removed. On applicant's theory, such a site falls outside EPA's regulatory jurisdiction under RCRA because it no longer contains "solid waste," and thus does not constitute a "facility or site where solid waste *is disposed of*." 42 U.S.C. 6903(14) (emphasis added); see Appl. 15 ("The present tense communicates that a site cannot fall within RCRA's purview unless solid waste 'is still *currently* "placed" or "deposited" there.'") (quoting *USWAG*, *supra*, 901 F.3d at 440).

That theory fails because its premise is erroneous: the removal of coal ash from a legacy impoundment does not mean that all "solid waste" has been removed. As noted above, and as EPA explained in the court of appeals and in the 2024 Rule, RCRA's definition of "solid waste" includes not just coal ash itself but also coal-ash leachate. See p. 6, *supra*; Gov't C.A. Opp. to Stay 7-8; Appl. App. 48. In addition, RCRA's definition of "disposal" includes "the discharge, deposit, injunction, dumping, spilling, *leaking*, or placing of any solid waste or hazardous waste into or on any land or water." 42 U.S.C. 6903(3) (emphasis added); see pp. 4, 6, *supra*. That definition makes clear that "disposal" of "solid waste" occurs not only when an owner or operator deliberately places coal ash at an impoundment, but also when coal-ash leachate "leak[s]" from the impoundment into soil or groundwater.

The evidence before EPA in both the 2015 and 2024 coal-ash rulemakings strongly indicated that the bare removal of coal ash from a legacy impoundment does not mean that the coal-ash leachate, which typically will have contaminated the soil and groundwater after decades of operation, has been removed from the site as well. See Appl. App. 48. EPA's 2014 risk assessment showed that impoundments generally, and unlined impoundments in particular, leak contaminants at levels that pose health and environmental risks and warrant regulation. *Id.* at 24. And EPA found in the 2024 rulemaking that legacy impoundments may leak even more than EPA had estimated in the 2014 risk assessment. *Ibid.*

These findings were confirmed by additional information in the 2024 rulemaking record. EPA determined, for example, that the average legacy impoundment is 55 years old; that the vast majority of legacy impoundments lacked adequate lining; that unlined impoundments "typically operate for 20 years before they begin to leak"; and that the mere removal of coal ash from such an impoundment was "highly un-

likely" to have also removed coal-ash leachate from the site. Appl. App. 49. "Consequently," EPA explained, "based on the practices that facilities have stated that they use to confirm that they have removed all CCR from a site, both leachate contaminated soil and groundwater would frequently be expected to remain on site even after CCR may have been entirely removed from the impoundment." *Ibid.*

The facilities at applicant's Dale Station appear to implicate EPA's concerns about inadequately closed legacy impoundments. Applicant does not suggest that the Dale Station impoundments were ever lined to protect against leakage, and as intervenor-respondents observed below, those impoundments received deposits of coal ash for several decades before being closed. See Intervenors' C.A. Resp. 10 (noting that two of the impoundments began receiving coal ash in 1954 and the third was built in 1977). Although applicant represented that state regulators had confirmed the removal of the coal-ash deposits through "visual inspection," Appl. App. 417, applicant did not use groundwater monitoring to check for the presence of coal-ash leachate. In crafting the 2024 Rule, EPA therefore had no basis to treat facilities like Dale Station as presenting "no reasonable probability of adverse effects on health or the environment from disposal of solid waste." 42 U.S.C. 6944(a).

2. Applicant's contrary arguments lack merit. In insisting (Appl. 15) that the removal of coal ash necessarily effects the removal of all solid waste from a surface impoundment, applicant ignores the critical fact that coal-ash leachate *also* is solid waste. Indeed, the application does not mention leachate at all, even though that point was central to the 2024 Rule's preamble and the government's opposition to applicant's D.C. Circuit stay motion. See Gov't C.A. Opp. to Stay 2, 7-12, 15; see also, *e.g.*, Appl. App. 9, 12-14, 34-35, 48-49.

Applicant scarcely disputed below that coal-ash leachate is solid waste under RCRA. See Applicant's C.A. Stay Reply Br. 2 n.1 (stating without explanation that applicant "does not concede that leachate is a 'solid waste' within the meaning of RCRA"). Instead, applicant claimed that EPA had offered only "speculat[ion] that leachate *might* be present" at a site like Dale Station. *Id.* at 2-3. As noted above, however, EPA cited ample evidence to support its finding that the mere removal of coal ash from a legacy impoundment would not normally have removed all solid waste. See pp. 10, 14-15, *supra*. The agency's assessment of that evidence is entitled to "significant deference" by reviewing courts. *Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1084 n.8 (D.C. Cir. 2008); see 5 U.S.C. 706(2)(A); *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2261 (2024).

Applicant argues (Appl. 16-17) that "risk assessments" conducted by EPA in 2014 and 2024 provide no support for EPA's findings about legacy impoundments from which the coal ash has been removed, because the assessments studied impoundments that still contained coal ash. But the "closed" legacy impoundments that are subject to the 2024 Rule recently *did* contain coal ash, and the risk assessments strongly indicated that such impoundments—typically being unlined—would have leaked contaminants that would remain in the soil or groundwater even after the coal ash itself has been removed. See Appl. App. 25-26; see *id.* at 455 (EPA explaining in 2024 risk assessment that, "[r]egardless of whether the [coal ash] is still present, the impoundment would have gone through the same lifecycle").

Applicant is likewise wrong in asserting (Appl. 17) that EPA can lawfully address legacy impoundments of this kind only by seeking injunctive relief related to "past" mishandling of waste under 42 U.S.C. 6973(a). As explained above, Subtitle D of RCRA gives EPA regulatory jurisdiction over such sites because those sites consti-

tute "open dump[s]" unless "there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facilit[ies]." 42 U.S.C. 6944(a). While applicant cites a 1980 EPA statement suggesting that Section 6973(a) is the exclusive means for "deal[ing] with the problem of inactive and abandoned sites," Appl. 18 (quoting 45 Fed. Reg. 33,154, 33,170 (May 19, 1980)), EPA made that statement in the context of Subtitle C of RCRA, which in any event was subsequently amended in relevant part, see Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 206, 98 Stat. 3239 (42 U.S.C. 6924(u)) (requiring "corrective action for all releases of hazardous waste or constituents from any solid waste management unit * * * regardless of the time at which waste was placed in such unit"). That statement made decades ago in a different context sheds little light on the proper interpretation of Subtitle D, which—as the D.C. Circuit held in *USWAG*—unambiguously authorizes regulation of inactive sites. 901 F.3d at 438-442. Notably, applicant does not argue to the contrary—it claims only that an inactive site from which coal ash has been removed is *ipso facto* exempt from regulation. For the foregoing reasons, that contention is incorrect.

B. The Rule Is Not Impermissibly Retroactive

Applicant's retroactivity claim (Appl. 19-22) fails for much the same reason. Governing legal principles distinguish between rules that involve "primary" retroactivity, which "impose[] new sanctions on past conduct" and are "invalid unless specifically authorized," and those that involve "secondar[y]" retroactivity, which "merely 'upset[] expectations'" and are "invalid only if arbitrary and capricious." *National Petrochemical & Refiners Ass'n* v. *EPA*, 630 F.3d 145, 159 (D.C. Cir. 2010) (citation omitted), cert. denied, 565 U.S. 1014 (2011); see *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 220-221 (1988) (Scalia, J., concurring); see 5 U.S.C. 551(4) (defining a

"'rule'" in pertinent part as "an agency statement of general or particular applicability and *future effect*") (emphasis added). The 2024 Rule is not invalid on either ground.

1. Applicant principally contends that "the Rule is retroactive in the primary sense" because it imposes regulatory obligations based exclusively on the earlier presence of coal ash in impoundments, like those at Dale Station, where the ash has since been removed. Appl. 21; see Appl. 20-22. As explained above, that argument reflects a misunderstanding of the rule, which imposes forward-looking regulatory duties to address the *continuing* presence of solid waste (in the form of coal-ash leachate) at legacy impoundment sites. If an impoundment owner like applicant discharges those obligations, such as by demonstrating that the impoundment was adequately closed and thus presents "no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility," 42 U.S.C. 6944(a), the rule imposes no further requirements. See pp. 10-11, *supra*. A regulation that targets a current threat to public health and the environment is not "retroactive" in the relevant sense merely because past conduct, like the disposal of decades' worth of coal ash in an unlined surface impoundment, contributed to that ongoing threat. See Appl. App. 36 ("Here EPA is merely relying on a past fact to support future application of the regulations" with "future compliance dates."). And, contrary to applicant's contention (Appl. 20), the 2024 Rule does not involve primary retroactivity simply because its applicability is keyed to the presence of coal ash in an impoundment as of 2015. A regulation's reliance on "antecedent facts" does not render it retroactive. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 n.24 (1994) (quoting *Cox* v. *Hart*, 260 U.S. 427, 435 (1922)).

2. The 2024 Rule likewise cannot be found arbitrary and capricious on a theory of secondary retroactivity, contra Appl. 22, 29-31. In issuing the rule, EPA acknowledged the reliance interests of parties that had "closed legacy impoundments * * * in compliance with State law requirements, or otherwise made business decisions premised on the absence of Federal regulation." Appl. App. 36. Far from offering only "perfunctory assurances," Appl. 31, however, the agency explained and showed that it took "these reliance interests into account in developing the regulations," Appl. App. 36, which specifically accommodate facilities that closed their impoundments under state oversight. As discussed above, such facilities that can demonstrate compliance with federal closure standards have no further obligations under the 2024 Rule. And other facilities that closed impoundments under state oversight and that meet certain additional requirements can defer compliance with the federal closure standards pending site-specific evaluations. See 40 C.F.R. 257.100(g) and (h)(1), 257.101(g). While EPA did not exempt such facilities from regulation altogether—having "surveyed State regulation of legacy impoundments" and found it "not sufficiently protective" under RCRA due to issues such as lack of "adequate groundwater monitoring and other data," Appl. App. 36—the agency tailored the 2024 Rule to account for past investment.

There is likewise no sound basis for applicant's contention (Appl. 31) that the 2024 Rule renders applicant's past investment "worthless." If applicant is correct that it actually "clean-closed" the Dale Station impoundments, see Appl. 20, 26, 32, 38-39, the rule will not require it to do so again. Applicant need only demonstrate adequate closure by conducting groundwater monitoring, which it has not previously performed. And as discussed further below, applicant's current estimate of its costs

of complying with that limited requirement is difficult to credit. See pp. 25-26, *infra*. The 2024 Rule is not impermissibly retroactive.

C. The Rule Comports With The WIIN Act

The 2024 Rule is likewise consistent with the WIIN Act, contra Appl. 23-24. As explained above, pp. 7-8, *supra*, the WIIN Act was enacted shortly after EPA issued the 2015 coal-ash rule. The Act amended RCRA to authorize EPA to approve state permitting programs governing the disposal of coal ash, or to implement EPA's own permitting programs in nonparticipating States. See 42 U.S.C. 6945(d). Under the WIIN Act, those programs must require measures at least as protective as EPA's "criteria for coal combustion residuals units under part 257 of title 40, Code of Federal Regulations"—a clear reference to the 2015 Rule, see *USWAG*, 901 F.3d at 426—or "successor regulations," a term that encompasses the 2024 Rule. 42 U.S.C. 6945(d)(1)(B) and (2)(B). Like Subtitle C of RCRA, which governs the handling of hazardous wastes, the WIIN Act thus authorizes regulation of coal ash "through a combination of national standards established by EPA regulations, and a permit program in which permitting authorities * * * apply those national standards to particular facilities." *Cement Kiln Recycling Coal.* v. *EPA*, 493 F.3d 207, 211 (D.C. Cir. 2007). While applicant describes (Appl. 23) EPA's coal-ash standards as a "gap-filler" that the WIIN Act directs EPA to replace with permitting programs, practically the opposite is true: the WIIN Act requires the permitting programs to achieve compliance with EPA's standards, which remain central to the statutory scheme.

Even if the WIIN Act's text did not foreclose applicant's gap-filler theory, the Act would not have affected EPA's authority to promulgate the 2024 Rule. The statute imposes no deadline by which EPA must approve or implement permitting programs. But cf. Appl. 7 (noting EPA's approval of permitting programs in Oklahoma,

Georgia, and Texas). And because the WIIN Act disclaims any effect on any "authority" or "regulatory determination" that predated the Act's enactment, see 42 U.S.C. 6945(d)(7), the Act could not have disturbed the statutory authorities that underlie the rule.

Applicant further contends (Appl. 23-24) that the 2024 Rule does not qualify as a "successor regulation[]" under the WIIN Act, 42 U.S.C. 6945(d), because the rule regulates matters (legacy impoundments) that were not regulated under the 2015 Rule. But every successor regulation presumably will differ from its predecessor in some material respect—otherwise there would be no need for a new regulation. See *Franklin Fed. Sav. Bank* v. *United States*, 431 F.3d 1360, 1371 (Fed. Cir. 2005) (explaining that a "'successor regulations' clause" anticipates potential "regulatory change"). The WIIN Act expressly contemplates that EPA may "revise[]" its coal-ash rules. 42 U.S.C. 6945(d)(1)(D)(i)(II). The 2024 Rule is a "successor" to the 2015 Rule under any reasonable understanding of that term. See *Webster's New World College Dictionary* 1429 (4th ed. 2009) (defining "successor" as a "thing that succeeds, or follows, another"). The 2024 Rule concerns the same subject matter as the 2015 Rule; responds to the D.C. Circuit's *USWAG* decision vacating portions of the 2015 Rule; makes substantive and technical amendments to the regulations promulgated by the 2015 Rule; and relies extensively on the factual record underlying the 2015 Rule. See, *e.g.*, Appl. App. 2, 53, 98. There is no conflict between the WIIN Act and the 2024 Rule.

D. The Rule Is Constitutional

Applicant next contends (Appl. 24-29) that the 2024 Rule and RCRA as a whole exceed the constitutional authority of the federal government. That sweeping claim is unlikely to succeed because RCRA is a valid exercise of Congress's authority under

the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and the 2024 Rule is a valid exercise of EPA's authority under RCRA for the reasons set forth above.

"Congress' commerce authority includes the power to regulate" not only the channels and instrumentalities of interstate commerce, but also "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995) (citation omitted); see *id.* at 559 (citing, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)). In *Hodel*, for instance, this Court upheld a federal law that regulated surface mining as a valid exercise of Congress's Commerce Clause authority. The Court relied in part on congressional findings, set forth in the challenged statute, that surface mining affects interstate commerce in numerous ways, including by damaging the environment. 452 U.S. at 278-283. The Court "agree[d] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282; see, *e.g.*, *Mississippi Comm'n on Envtl. Quality* v. *EPA*, 790 F.3d 138, 182-183 (D.C. Cir. 2015) (per curiam); *United States* v. *Olin Corp.*, 107 F.3d 1506, 1510-1511 (11th Cir. 1997).

RCRA is constitutional for substantially similar reasons. RCRA includes congressional findings that solid waste is generated by national economic activity; that its disposal in open dumps results in pollution of land, water, and the air; and that such pollution threatens human health. 42 U.S.C. 6901(a) and (b); see *USWAG*, 901 F.3d at 420 ("Coal Residuals make up 'one of the largest industrial waste streams generated in the U.S.'") (quoting 80 Fed. Reg. at 21,303); Appl. App. 7-8 (describing health risks from open dumping of coal ash). Congress thus had an ample basis to

conclude that solid-waste disposal substantially affects interstate commerce. Applicant's contention (Appl. 25) that RCRA unconstitutionally "regulate[s] land use" is nonresponsive and virtually identical to an argument this Court rejected in *Hodel*, 452 U.S. at 281-283.

Applicant's remaining constitutional arguments fare no better. Applicant contends that the 2024 Rule, as applied to the Dale Station impoundments, impermissibly regulates "inactivity" because those "impoundments were clean-closed years ago, [so] there is no solid waste disposal or storage activity going on there." Appl. 26 (citing *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 550-557 (2012) (opinion of Roberts, C.J.)). That argument reflects applicant's failure to appreciate that coal-ash leachate is itself "solid waste" as RCRA defines that term, and that RCRA treats "leaking" as a form of "disposal." See pp. 6, 14, *supra*. Applicant's alternative view that solid-waste disposal is not "economic activity" (Appl. 27) is both questionable, in light of Congress's findings in RCRA, and beside the point, since such disposal at least "arise[s] out of or [is] connected with" commercial activity that affects interstate commerce, *Lopez*, 514 U.S. at 561; see 42 U.S.C. 6901(a). Finally, although applicant suggests (Appl. 28-29) that this Court should overrule decades of precedents that have applied the Commerce Clause "substantial effects" test, see, *e.g.*, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), applicant makes no effort to show that the Court is likely to take that step. Applicant's constitutional claim is unlikely to succeed.

E. EPA Engaged In Reasoned Decision-Making

Applicant further contends (Appl. 29-35) that the 2024 Rule is arbitrary and capricious in various respects. Those arguments largely reprise applicant's other contentions addressed above. For example, applicant asserts (Appl. 29-31) that EPA

inadequately addressed reliance interests, but relevant provisions of the rule were deliberately designed to accommodate those interests. See p. 19, *supra*. Applicant claims (Appl. 31-32) that EPA offered insufficient evidence that solid waste remains at facilities like Dale Station, but ample evidence indicates the continued presence of coal-ash leachate at such facilities. See pp. 14-15, *supra*. Emphasizing the permitting programs that the WIIN Act authorizes, applicant faults EPA (Appl. 32-34) for maintaining national standards for coal-ash disposal. But the national standards are integral to the regulatory approach the Act contemplates. See pp. 20-21, *supra*. Applicant's characterization of those standards as "one-size-fits-all" (Appl. 3, 6, 11, 23-24, 32, 34) is baseless, as confirmed by (for instance) applicant's reference (Appl. 8) to the 2024 Rule's "multiple alternative pathways for compliance."

Applicant's only remaining argument on the merits (Appl. 35) is that the 2024 Rule irrationally "exempt[s]" legacy impoundments whose owners or operators lack sufficient records or information to determine whether their impoundments contained coal ash and liquids as of 2015. That argument is doubly flawed. First, the 2024 Rule does not entirely exempt these impoundments. It requires each owner or operator to certify the lack of available information and conduct a field investigation to determine whether its impoundment currently contains coal ash and liquids; if those are present, the impoundment is subject to the rule's closure and other requirements. See Appl. App. 58, 157. Second, while EPA might instead have chosen to apply a presumption that such impoundments contained coal ash in 2015, the agency acted reasonably in declining to penalize the impoundments' owners and operators for recordkeeping practices that predated the 2024 Rule. See *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 673 (1st Cir. 1974). The Rule is not arbitrary or capricious.

* * *

In sum, none of applicant's challenges to the 2024 Rule is likely to succeed on the merits. Furthermore, applicant makes no effort to carry—and does not even acknowledge—its additional burden of showing a reasonable probability that this Court would grant certiorari if the court of appeals upheld the rule. See p. 13, *supra*. Nor could applicant realistically expect to make that showing. In addition to lacking merit, applicant's claims focus on the rule's application to a subset of a subset of surface impoundments—legacy sites from which coal ash was removed after 2015—and thus do not implicate any question of broad significance that would likely warrant this Court's review.

II. APPLICANT HAS NOT SATISFIED THE REMAINING EQUITABLE REQUIREMENTS FOR A STAY

A. Applicant Will Not Suffer Irreparable Harm During The Pendency Of Judicial Review

The "basic requisites" of equitable relief also include "substantial and immediate irreparable injury." *O'Shea* v. *Littleton*, 414 U.S. 488, 502 (1974). In assessing irreparable harm, a court must focus on the period of time needed to complete judicial review. The "historic office" of a stay, after all, is to resolve the "dilemma" of "what to do when there is insufficient time to resolve the merits and irreparable harm may result from delay." *Nken*, 556 U.S. at 432. If an applicant does not show that it will suffer irreparable harm during the pendency of judicial review, this Court can deny relief on that basis alone and "avoid delving into the merits." *Labrador* v. *Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring in the grant of stay).

Applicant has not made the necessary showing of irreparable harm. Relying on a declaration of one of its executives, applicant primarily contends that complying with the 2024 Rule's groundwater-monitoring requirements at Dale Station would force it to incur estimated costs of "more than $16.5 million." Appl. 37 (citing Appl.

App. 424-425). The declaration provides no information about the basis for that figure, which dwarfs EPA's estimate of groundwater-monitoring costs ($229,000 per impoundment) and is more than double the estimate that applicant offered (about $7 million) at an earlier stage of this litigation. See Gov't C.A. Opp. to Stay 23. Applicant also does not explain why it will incur those costs in their entirety before this case is resolved, even though applicant's deadline to conduct groundwater monitoring is three and a half years away (May 2028). Even assuming that applicant will need to begin incurring some costs while the case is pending, applicant provides no reason to believe that those costs will be so "substantial and immediate" as to justify the extraordinary relief of a stay. *O'Shea*, 414 U.S. at 502. Indeed, applicant did not seek a stay in the court of appeals until three months after EPA issued the rule. See pp. 9, 11, *supra*.

Applicant's other projected harms do not support a stay, either. Contrary to applicant's contention (Appl. 37), nothing in the 2024 Rule requires applicant to "alter its land permanently" in ways that "cannot be undone." If (as applicant predicts, see Appl. 37 n.6) groundwater monitoring at Dale Station confirms that remedial steps are unnecessary, applicant will have no further obligations under the rule. And even if applicant were likely to prevail on its Commerce Clause challenge, there is no basis for its suggestion (Appl. 37) that demonstrating a probable constitutional violation automatically establishes irreparable harm. See, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111-112 (1983).

B. A Stay Would Harm The Public Interest

1. On the other side of the balance, a stay would substantially disserve important governmental and public interests, which "merge" in this context. *Nken*, 556 U.S. at 435. Applicant asks the Court to stay the 2024 Rule in its entirety, see

Appl. 39, which would leave all of applicant's legacy impoundments (and any CCR management units that applicant maintains) unregulated during the pendency of judicial review. As the D.C. Circuit concluded in *USWAG*, in holding that the 2015 Rule's failure to regulate legacy impoundments was arbitrary and capricious, legacy impoundments "present a unique confluence" of "substantial threats to human health and the environment." 901 F.3d at 432; see *id.* at 432-434. And in issuing the 2024 Rule, EPA found that those risks "may be even higher" than the agency had thought in 2015. Appl. App. 26. EPA explained, for example, that "a greater number of units lack an adequate liner system," and that "the practice of disposing of CCR below the water table is more common," than the agency had "previously understood." *Id.* at 26-27.

Even if any stay were limited to applicant's legacy impoundments from which coal ash has been removed (*i.e.*, the Dale Station impoundments), see Appl. 39, the public interest would be significantly harmed. Although such impoundments "may no longer continue to contribute additional contamination, removal of the CCR does not address the release of and risk from the metals or other CCR constituents in any contaminant plume." Appl. App. 48; see, *e.g.*, *ibid.* (describing cancer risks from "groundwater contamination at sites with legacy impoundments"). The Dale Station impoundments, where applicant deposited coal ash for decades and has not conducted groundwater monitoring, raise those very concerns. See p. 15, *supra*.

2. Leaving the 2024 Rule in effect would substantially benefit the public by mitigating the risks that applicant's legacy impoundments pose to human health and the environment. EPA found that the benefits would include, among others, "reduced incidents of cancer from the consumption of arsenic in drinking water, avoided intelligence quotient (IQ) losses from mercury and lead exposure, non-market bene-

fits of water quality improvements, and the protection of threatened and endangered species." Appl. App. 378. Contrary to applicant's contention (Appl. 38-39), the rule would not likely result in significant price hikes for applicant's electricity customers. EPA estimated that the rule may increase energy prices nationally by only a small fraction of one percent. Gov't C.A. Opp. to Stay 26. (The record also indicates that the disadvantaged consumers to whom applicant refers are more likely than other populations to be exposed to the dangers of legacy impoundments. *Ibid.*; see Appl. 38.) And for the reasons we have discussed, the record also refutes applicant's suggestion (Appl. 38) that the 2024 Rule will have zero environmental benefits.

Applicant is also wrong in suggesting (Appl. 39) that the six-year gap between the D.C. Circuit's decision in *USWAG* and EPA's issuance of the 2024 Rule casts doubt on the rule's importance. EPA responded to *USWAG* by issuing an advance notice of proposed rulemaking and subsequently issuing a proposed rule, each of which generated tens of thousands of public comments, and by holding public hearings on the proposed rule. See Appl. App. 6. Particularly in light of the "scale, complexity, and gravity" of the coal-ash-disposal problem, *USWAG*, 901 F.3d at 420, the timing of the 2024 Rule does not call its urgency into doubt. The public interest in allowing the rule to remain in effect as to applicant greatly outweighs any countervailing concerns.

III. THE COURT SHOULD TAILOR THE SCOPE OF ANY STAY RELIEF

At a minimum, this Court should limit the scope of any stay to the specific portions of the 2024 Rule for which the Court finds that applicant has made the requisite showings. Any stay would apply only to applicant, which is the only party to the pending D.C. Circuit review proceedings that has attempted to satisfy the prerequisites for emergency relief. See *Labrador*, 144 S. Ct. at 923 (Gorsuch, J., concur-

ring in the grant of stay) ("[A] federal court may not issue an equitable remedy 'more burdensome to the defendant than necessary to redress' the plaintiff's injuries.") (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979)) (brackets omitted). As discussed above, moreover, the application predominantly focuses on the 2024 Rule's application to a specific subset of coal-ash surface impoundments: the Dale Station impoundments from which the coal ash was removed under state regulatory oversight after the effective date of the 2015 Rule. If the Court does grant relief, it therefore should stay the relevant provisions of the 2024 Rule only as they apply to those particular impoundments. See 40 C.F.R. 257.100(g) and (h). For the foregoing reasons, however, even that narrow relief would be unjustified.

CONCLUSION

The application should be denied.

Respectfully submitted.

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NOVEMBER 2024