

**In the Supreme Court of the United States**

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NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,  
*Applicant,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and  
MICHAEL REGAN, in his official capacity as Administrator of the United States  
Environmental Protection Agency,  
*Respondents.*

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TO THE HONORABLE JOHN G. ROBERTS, JR.,  
CHIEF JUSTICE OF THE UNITED STATES AND  
CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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**REPLY IN SUPPORT OF  
APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION  
PENDING APPELLATE REVIEW**

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## TABLE OF CONTENTS

	<b>Page</b>
Table of Authorities .....	ii
Introduction .....	1
Argument .....	4
I. Applicant NRECA is likely to succeed on the merits.....	4
A. The Rule exceeds EPA’s statutory authority.....	4
1. EPA misreads Section 111 of the Clean Air Act. ....	4
2. EPA’s “90% CCS” system has never been demonstrated.....	7
3. The Rule’s emission limits based on the “90% CCS” system are not achievable.....	12
4. The Rule’s alternative compliance options violate the Act.....	13
B. The major-questions doctrine confirms that the Rule is unlawful. ....	15
C. The Rule is arbitrary and capricious. ....	16
II. NRECA’s members face imminent, irreparable harm. ....	17
III. The equities and relative harms favor a stay.....	20
Conclusion.....	20

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Loper Bright Enters. v. Raimondo</i> , 144 S. Ct. 2244 (2024) .....	4
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015) .....	17
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.</i> , 463 U.S. 29 (1983) .....	15
<i>Ohio v. EPA</i> , 144 S. Ct. 2040 (2024) .....	19, 20
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943) .....	19
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022) .....	1, 3, 14, 15, 16
<i>West Virginia v. EPA</i> , No. 24-1120 (D.C. Cir. Aug. 9, 2024) .....	18
<b>Statutes</b>	
42 U.S.C. § 7411.....	1, 4, 5, 6, 9, 12, 15
42 U.S.C. § 15962.....	6, 10
<b>Other Authorities</b>	
89 Fed. Reg. 39,798 (May 9, 2024) .....	2, 5, 8, 9, 10, 11, 13, 17, 18, 19
EPA, <i>Greenhouse Gas Mitigation Measures for Steam Generating Units Technical Support Document</i> (April 2024), <a href="https://perma.cc/LEY3-VC2F">https://perma.cc/LEY3-VC2F</a> .....	14

NRECA's Application showed that no power plant has ever implemented the system that EPA's Rule mandates: capturing, transporting, and storing 90% of an entire power plant's annual CO<sub>2</sub> emissions. Application 1-3, 13-24. EPA's response brief neither directly contests nor indirectly rebuts that reality. There is no scientific or technical dispute on this. The core dispute in this Application is a question of law, not fact: Whether such a system of emission reduction "has been adequately demonstrated" within the meaning of Section 111 of the Clean Air Act, 42 U.S.C. § 7411(a)(1). Under any plain reading of that text, a system that has never been done before has not been adequately demonstrated. Nor does this text come anywhere close to "clear congressional authorization" for this Rule under the major-questions doctrine. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022). That doctrine applies because EPA asserts "newfound" and "transformative" power to impose an emission-reduction system that has never before been accomplished. Application 31-32 (quoting *West Virginia*, 597 U.S. at 724). The Rule also violates the major-questions doctrine by requiring generation-shifting to EPA's preferred sources. *See id.* at 29-30 (citing *West Virginia*, 597 U.S. at 706, 728 & n.3). A stay is necessary to prevent the immediate, significant costs of this industry-transforming regulation.

NRECA has direct experience with the promise of CCS, but also with its present limitations. NRECA members are at the forefront of carbon capture, working to help this emerging technology reliably accomplish substantial capture rates. *See* Application 1-2. For example, Minnkota Power Cooperative has spent a decade and millions of dollars on engineering, planning, and permitting for Project Tundra—all to someday demonstrate huge improvements in CCS. App.766-68a (Minnkota

Comments 11-13). That project is possible only because of generous public funding, motivated state regulators, and the plant's location near geological formations approved to store CO<sub>2</sub>. *Id.* at 2, 16. But not even Project Tundra—with its fortuitous geography and geology, millions in investments, and years of work—would comply with EPA's Rule if built as designed, meaning the project may grind to a halt because of the Rule. *Id.* at 11-13.

EPA's response brief ignores all this. The Rule expressly and prominently relies on Project Tundra. 89 Fed. Reg. at 39,850-51. Yet EPA's brief spends just one-half of one sentence barely mentioning Project Tundra—even though it is the Nation's leading planned CCS project and would be the largest CCS system in the world if built. The little EPA does say obscures reality. EPA asserts that "Project Tundra" is "designed to achieve '95 percent' capture rates." Resp. 27. It is not, as NRECA told EPA in comments and briefing below. *See* Application 21. Project Tundra is designed to capture *only 70%* of emissions from the plant's two units. App.768a (Minnkota Comments 13). EPA claimed otherwise only by describing capture of "the treated flue gas"—a slipstream capturing only *part* of the plant's emissions. 89 Fed. Reg. at 39,850. Minnkota could not apply that same trick to comply with the Rule, because the Rule requires 90% capture from a full stream of *all* emissions from every covered unit. *See id.* at 39,841. That is why Project Tundra may never be built if this Rule takes effect. App.757a, 768a, 771a (Minnkota Comments 2, 13, 16). If this Court does not stay the Rule, a decade's worth of planning and spending for the world's largest CCS project falls into jeopardy. *Id.*

Rather than confront these realities, EPA largely resorts to misdirection. It

incorrectly asserts there is no dispute about the statutory text because CCS qualifies as a “system of emission reduction” under *West Virginia*. Resp. 2-3, 13-19. That merely sidesteps the central statutory-interpretation dispute here: Whether the text “has been adequately demonstrated” can be interpreted so broadly as to include systems not yet in existence. *See* Application 12. Similarly, EPA waxes on about the use of CCS “writ large”—at any capture rate, for any fraction of emissions, or over any time period, however fleeting. Resp. 26; *see id.* at 26-29. But the “system” EPA’s Rule imposes is *not* any-CCS-will-do; it is CCS capturing, transporting, and storing (1) 90% of CO<sub>2</sub> emissions (2) for an entire power plant (3) over the course of a full year, every year. No power plant has ever accomplished even close to this.

Because 90% CCS is undemonstrated and emission limits based on 90% CCS are unachievable, the bulk of NRECA’s members will have no choice but to shutter coal plants and build new gas units with artificially constrained capacity. Yet Congress did not authorize EPA to “force a nationwide transition away from the use of coal to generate electricity.” *West Virginia*, 597 U.S. at 735. So with this unlawful Rule, NRECA’s members are facing imminent and irreparable harms. EPA downplays these near-term costs because they are a small portion of the Rule’s more massive overall costs. Resp. 51-52. But that portion is still hundreds of millions of dollars. *See* Application 5-6. Shutdowns are an irreparable harm, too. Even if these retirements will not be completed until 2032, the momentum becomes irreversible long before then given how long it takes to plan and build replacement power. *See* Application 39; *contra* Resp. 53. A stay is critical to preventing these irreparable harms, and to protecting the Nation’s electricity supply, while this litigation is pending.

**I. Applicant NRECA is likely to succeed on the merits.**

**A. The Rule exceeds EPA’s statutory authority.**

**1. EPA misreads Section 111 of the Clean Air Act.**

Contrary to EPA’s position, this case does present a “fundamental statutory-interpretation issue” (Resp. 2): Whether the statutory text “has been adequately demonstrated” covers a “system” that has never been implemented. 42 U.S.C. § 7411(a)(1). EPA agrees this Court “must independently interpret” this text. Resp. 24 (citing *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024)). Yet EPA never responds to NRECA’s plain-text analysis of Section 111, showing that Congress’s use of the present perfect tense necessarily means the system “has been adequately demonstrated” only if its actual use has been completed in the past. Compare Application 12, with Resp. 24-26.

EPA instead pretends this is just a dispute about the agency’s technical judgment. But there is *no* dispute—scientific, technical, or otherwise—that the Rule’s selected system of 90% annual carbon capture from an entire unit has never been accomplished in the past. No “technical task of assessing” the Rule’s “system” can change that. Resp. 24. The question is whether a system that has never been accomplished is one that “has been adequately demonstrated” within the meaning of the Act. It is not a technical or scientific question that merits reflexive deference, but a legal question that courts must decide *de novo*. See *Loper Bright*, 144 S. Ct. at 2266.

EPA’s main argument is really a strawman trying to evade the “system” selected by this Rule. EPA wants to talk about CCS “writ large” in some generalized sense. Resp. 26. But that is not the “system” imposed by the Rule. This Rule requires each

covered power plant (1) to capture 90% (2) of its *annual* CO<sub>2</sub> emissions (3) from *all* of its emissions. *See* 89 Fed. Reg. at 39,841. It does not matter whether *some* lower amount of CO<sub>2</sub> has been captured from *part* of the emissions at a few individual moments in the past. *Contra* Resp. 26-28. Unless EPA can show that its selected 90% CCS “system” in this Rule “has been adequately demonstrated,” the Clean Air Act does not delegate EPA power to impose that system. 42 U.S.C. § 7411(a)(1).

In fact, it appears from EPA’s latest brief that some interpretive disputes have fallen by the wayside. In both the Rule and the court below, EPA vigorously defended the Rule on the basis that Section 111 allowed it to engage in “reasonable projection” by “extrapolating” from existing technology. D.C. Cir. Stay Opp. 37-39, 42-43; *see* Application 20. But now EPA shifts course, saying it “did no such thing,” disclaiming any reliance on “future predictions” in its “adequately demonstrated” determination. Resp. 29-30. Now that EPA claims it has not engaged in predictive judgment, it is clearer than ever that any “system” that has never been in actual use cannot have “been adequately demonstrated.”

Similarly, NRECA never argued that the Act requires a system to be in “widespread use” (Resp. 35) before EPA can determine that it “has been adequately demonstrated.” Certainly, a system must be *capable* of widespread adoption, or else it is not *achievable*. *See* Application 25. But the separate, key issue for adequate demonstration is that EPA’s mandated 90% CCS system has never been used *at all*. Resolution of that issue does not require any analysis under the “arbitrary-and-capricious standard,” Resp. 25 (although EPA’s reasoning is independently arbitrary and capricious, *see* Application 32-35). Instead, this statutory-interpretation question



depends on whether a never-before-used “system” can ever qualify as one that “has been adequately demonstrated” under Section 111’s text. It cannot.

Lacking plain-text arguments, EPA cites congressional funding statutes. Resp. 45-46. None of these statutes endorse EPA’s chosen 90% CCS system as having already been demonstrated for purposes of Section 111. Quite the opposite. These laws support development of technologies like CCS through funding while *eschewing* mandates—a balance EPA now seeks to upset. For example, the Energy Policy Act of 2005 authorized funding for “clean coal” projects that “advance . . . environmental performance . . . *well beyond* the level of technologies that are in commercial service or *have been demonstrated* on a scale that the Secretary [of Energy] determines is sufficient to demonstrate that commercial service is viable as of August 8, 2005.” 42 U.S.C. § 15962(a) (emphases added). Congress then expressly foreclosed using these funding programs as a basis for EPA imposing mandatory requirements under Section 111: “[n]o technology, or level of emission reduction, solely by reason of the use of the technology, or the achievement of the emission reduction, by 1 or more facilities receiving assistance under this Act, shall be considered to be adequately demonstrated for purposes of section 7411 of this title.” 42 U.S.C. § 15962(i)(1).

In other words, Congress provided taxpayer funding for developing technologies like CCS precisely *because* those technologies have not yet been demonstrated. At the same time, Congress denied EPA the power to conclude that technologies used in projects that receive these funds have therefore been adequately demonstrated under Section 111. *Id.* EPA chose to seize that power anyway. That is unlawful.

## **2. EPA’s “90% CCS” system has never been demonstrated.**

NRECA’s Application emphasized that “EPA cannot identify a single power plant that has demonstrated its 90% CCS system.” Application 18. That remains true, and EPA’s response brief did not identify anywhere in the record where it had. EPA cursorily avers to three examples of coal plants that have deployed CO<sub>2</sub> capture, and two designs for unbuilt, undemonstrated facilities. Resp. 27. None of these projects have accomplished what the Rule requires: 90% CCS of an entire facility’s annual emissions. The same is true of EPA’s two purported examples of natural gas plants.

a. EPA first asserts that Petra Nova, Barry, and Boundary Dam “already achieved” the “90% rate required by the Rule.” Resp. 27. That obfuscates. NRECA’s Application showed how each facility never accomplished the Rule’s 90% CCS system. Those plants have occasionally and intermittently captured substantial CO<sub>2</sub> from a “slipstream” or portion of their emissions, but the Rule requires consistent capture (and transportation and storage) of 90% of all annual CO<sub>2</sub> emissions. *See* Application 13-17. None of these facilities would have complied with EPA’s Rule.

The practical differences between full-stream capture and slipstream capture are crucial. *E.g.*, App.849a (EERC Comments 5). Using the full-stream denominator that the Rule requires for covered facilities, Boundary Dam captures only “65 to 70 per cent” of its total emissions, App.784a (SaskPower Comments 1); Petra Nova captured no more than 33%; and Barry captured just 3%, Application 16-17. EPA claims (Resp. 27) that “carbon capture has been adequately demonstrated for coal plants at the 90% rate” only by using a different denominator—*i.e.*, slipstreams capturing only part of a facility’s total emissions—than the one required by the Rule.

Commenters raised this issue repeatedly, alerting EPA that it could not convert slipstream performance to unit-wide performance. *E.g.*, App.796a (Cichanowicz Comments 3 & n.7); App.849a (EERC Comments 5); App.784a (SaskPower Comments 1). Despite “hundreds of pages of scientific and technical analysis” (Resp. 35), EPA identifies no responses to these comments. It cryptically cites page 39,850 of the Rule as evidence that “EPA determined that capture from a slipstream is representative of capture from the full exhaust stream.” Resp. 36. The only thing that page says about “slip stream[s]” is that Petra Nova used one. 89 Fed. Reg. at 39,850. That just reiterates the issues commenters raised; it does not address them. In the end, EPA only cites slipstream projects, but those projects (like Boundary Dam) use slipstreams specifically to mitigate the problems that variable loads cause in the full stream. *See* App.784a (SaskPower Comments 1). The siphoned-off slipstream eliminates the variability in the capture stream even as the plant as a whole experiences variable loads—but only by using a slipstream. *See id.*

Nor can simply scaling up be the answer. Scale itself is not the key difference between slipstream and full-stream capture. Full-stream systems experience dynamic responses to shifting pressures and volumes that accompany changes in generation load as grid requirements vary throughout the day—a crucial factor that slipstreams never need to contend with. *See* Application 14-15 (citing 89 Fed. Reg. at 39,853 n.358). That key difference means that no conglomeration of increasingly larger slipstream projects could ever show that full-stream capture has been demonstrated. Rather, this is the sort of predictive “projection” and “extrapolation” that EPA now claims the Rule does not rely upon. *See* Resp. 29-30.

For Boundary Dam in particular, EPA now claims that this project captured CO<sub>2</sub> from only a slipstream due to “a lack of ‘economic incentives and regulatory requirements’ *rather than* a lack of technological capability.” Resp. 37 (emphasis added) (quoting 89 Fed. Reg. at 39,848). EPA’s brief ignores the “technical challenges” the Rule also blamed for Boundary Dam’s failures. 89 Fed. Reg. at 39,848. Boundary Dam’s operator told EPA that the full stream of emissions “*cannot* be processed through the CCS facility.” App.784a (SaskPower Comments 1 (emphasis added)). And “[t]o ensure a higher level of overall equipment reliability,” the plant “targets” a capture rate of “65 to 70 per cent.” *Id.* EPA never explains why it is more of an expert on what Boundary Dam can accomplish than the project’s owner and operator.

EPA next contends that the technical issues plaguing these CCS projects can be overcome, such that *future* plants *should* be able to implement consistent 90% full-stream capture, even if present plants have not. Resp. 36-37. This is speculative projection and extrapolation, not demonstration (the very reasoning that EPA now disavows). Speculation that future plants will not suffer from the same technical problems fails to show the system “has been adequately demonstrated.” So too for speculation that these new designs will not create new problems, or that those new problems will be solvable. The uncertainties and consequences from imposing on the nation’s power generators a system EPA hopes the *next* power plant will demonstrate are exactly why Congress rejected such an approach in Section 111’s text.

In the end, EPA never asserts that Boundary Dam accomplished what the Rule requires: capturing 90% of the entire facility’s annual CO<sub>2</sub> emissions. Meanwhile, Petra Nova and Barry were funded by the Energy Policy Act of 2005—the funding

statute described above. EPA *concedes* that federal law prohibits it from relying on such projects as necessary support for the Rule, meaning some other evidence must “by itself” be “sufficient” to justify the Rule. Resp. 46-47 (citing 89 Fed. Reg. at 89,855); *see* Application 16-17 (citing 42 U.S.C. § 15962(i)(1)). In any event, Petra Nova and Barry also never accomplished the Rule’s system that EPA insists “has been demonstrated.” Application 16-17.

**b.** EPA then retreats to projects that have been “designed” but not built and operated. Resp. 27. This tellingly confirms that no unit has already accomplished the Rule’s 90% CCS system.

NRECA and its members know that better than anyone. Its member Minnkota Power Cooperative spent most of the last decade designing Project Tundra—the Nation’s leading CCS effort. App.771a (Minnkota Comments 16). EPA says this project is “designed to achieve ‘95 percent’ capture rates.” Resp. 27 (quoting 89 Fed. Reg. at 39,850). But Project Tundra is designed to capture *only 70%* of emissions for the plant’s two units. App.768a (Minnkota Comments 13).<sup>1</sup> The Rule claimed otherwise only by describing capture of “the treated flue gas”—a slipstream. 89 Fed. Reg. at 39,850. Minnkota, meanwhile, cannot rely on a mere slipstream to comply with the Rule, which requires 90% capture from the full stream of all emissions. *See id.* at 39,841. At any rate, Project Tundra has not yet been built, let alone demonstrated. And it may never be built because the Rule threatens Project Tundra’s

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<sup>1</sup> Moreover, designs do not always translate into reality. Boundary Dam, for example, was designed to capture 90% of the CO<sub>2</sub> from its total emissions, but it never has. App.784a (SaskPower Comments 1).

viability. App.757a, 768a, 771a (Minnkota Comments 2, 13, 16).

The unbuilt “other projects” and statements from “technology vendors” that EPA cites fare no better. Resp. 27-28 (cleaned up). EPA argues that “the fact that plants are ‘actively pursuing the installation’ of 90%-capture systems confirms that ‘the basic technology already exists.’” Resp. 37. But those unbuilt projects have not demonstrated anything yet. EPA’s forward-looking guesswork about what may someday come to pass—an approach it has now disclaimed, Resp. 29-30—is inherently incompatible with the Act’s command to assess what “has been adequately demonstrated” already. EPA’s prognostications about what might be demonstrated in the future are prohibited no matter whether they later prove correct.

**c.** The two gas plants that EPA cites accomplished only minuscule capture rates. Measured by the full-stream denominator that the Rule requires, the Bellingham project did not achieve “‘95 percent’ capture” (Resp. 28), but rather performed on a slipstream capturing only 10% of the unit’s total emissions. Application 17. And the Mongstad slipstream pilot project in Norway captured only about 5% of unit-wide emissions, Application 18—far less than the “‘capture rates of over 98 percent’” EPA claims, Resp. 28 (citation omitted). EPA’s response brief does not dispute these full-stream figures. *See* Resp. 28. These two plants also never transported or stored CO<sub>2</sub>, and the Rule cites them only as examples of CO<sub>2</sub> *capture*. 89 Fed. Reg. at 39,926-27.

**d.** Finally, EPA never responds to the argument that the individual aspects of its tripartite CCS system—90% capture, transportation, and storage—have never been demonstrated in combination. Application 23. That important omission means that the Rule’s CCS system is undemonstrated even apart from the never-accomplished

90% capture rate.

**3. The Rule's emission limits based on the "90% CCS" system are not achievable.**

The meaning of "has been adequately demonstrated" is not the only statutory issue presented. EPA's emissions limitations under Section 111 must also be "achievable." 42 U.S.C. § 7411(a)(1). This Rule's emissions limits are not achievable, which is an independent reason that the Rule is unlawful and a stay is warranted.

EPA's response confirms its confusion about what "achievable" means. EPA first concedes that a standard is "achievable" if "affected sources 'can adopt' [it]." Resp. 24 (citation omitted). But later, EPA turns around and says the opposite, arguing that "Section 111 does not require that a standard of performance be 'achievable' for every single source." Resp 40. In fact, the Act requires EPA's emissions limits to be "achievable" at every source on which it is imposed. *See* Application 25.

For the same reasons that EPA's 90% CCS system has not "been adequately demonstrated," emissions limits based on this system also are not "achievable." 42 U.S.C. § 7411(a)(1). Because EPA's CCS system has never been adequately demonstrated, it is impossible to see how every source could achieve the emissions limitations that are premised on that system. And EPA identifies no other technology that could even come close to the emission reductions that the agency says 90% CCS can achieve. *See* Application 25-26.

Missing pipelines and storage sites are another reason that EPA's emissions limitations are not achievable. The Rule requires a nationwide network of CO<sub>2</sub> pipelines and sequestration sites that "regulated plants would be expected to install

(or hire contractors to install).” Resp. 31. But pipelines exist only in limited locations. Application 26. And EPA does not address that the trendline is moving in the wrong direction, with widespread pipeline *cancellations* occurring since it proposed the Rule. See Application 26. Similarly, EPA does not address the regional variability that stands in the way of storage. Application 34. Such large-scale buildouts are far beyond what every source can achieve. Finally, for both transport and storage, EPA never responds to the NEPA concerns that NRECA raised. Application 28-29. These environmental reviews (and the litigation that follows) add *years* to project timelines—years that EPA ignores. Even if these massive buildouts were somehow achievable, EPA’s timelines are not. See, e.g., App.461a (McLennan ¶47).

#### **4. The Rule’s alternative compliance options violate the Act.**

EPA does not dispute that the Rule requires shutdowns (for coal) or drastic curtailments (for gas) as a prerequisite to any reprieve from the Rule’s unlawful 90% CCS system. See Application 8-10. Because EPA’s 90% CCS system cannot be done by the vast majority of plants, these alternative compliance options are thus the only *real* option EPA gives. Under *West Virginia*, that violates the Clean Air Act.

a. EPA grants a dispensation to existing coal-fired plants facing the Rule’s undemonstrated 90% CCS system: With a promise to shut down by 2032, a plant need not do more. 89 Fed. Reg. at 39,842-43. Further, if a plant promises to shut down by 2039 (but after 2032), it must transform into a combined coal-and-natural-gas plant (provided it uses natural gas for at least 40% of its fuel). *E.g.*, Resp. 10. This is unlawful twice over. EPA cannot force plants to “cease making power altogether.” *West Virginia*, 597 U.S. at 728. And EPA cannot require them to transform



themselves into co-firing plants any more than it can “requir[e] coal plants to become natural gas plants.” *Id.* at 728 n.3.

EPA pretends that operators can “choose to remain in operation” by selecting one of the Rule’s alternative compliance mechanisms. Resp. 18. But that is no choice at all, because 90% CCS is so far out of reach for almost everyone. *E.g.*, App.329a (Matheson ¶33) (“[A]mong the 75+ coal-fired units that are wholly or partially owned by NRECA members . . . only 3 units . . . are in a position to even consider attempting 90% CCS”). So the only choice for almost all units is whether to “cease making power altogether” in 2032 or 2039. That mandatory generation-shifting violates *West Virginia*. See 597 U.S. at 728.

**b.** Even beyond this fundamental defect with the Rule’s so-called alternative compliance mechanisms, other problems pervade EPA’s gas co-firing scheme.

EPA wrongly insists that transforming a coal unit to co-fire with gas “requires only ‘minor changes’” (Resp. 19), and that this is no different from requiring a coal plant to burn a lower sulfur coal (*i.e.*, “fuel switch”). In the record, EPA recognized that such transformation requires, among other things, “installation of burners and supply piping,” “modifications to combustion air ducts and control dampers,” and “possible modifications” to hundreds of millions of dollars of boiler components (such as the “steam superheater, reheater, and economizer heating surfaces that transfer heat from the hot flue gas”). EPA, *Greenhouse Gas Mitigation Measures for Steam Generating Units Technical Support Document* at 9 (April 2024), <https://perma.cc/LEY3-VC2F>. Even determining whether and how the conversion can be done at a specific unit takes years of engineering and studies. *Id.* at 10-11. That is

why EPA is not requiring the co-firing conversion to be complete until 2030.

Furthermore, EPA failed to consider “important aspect[s] of the problem” that make co-firing unobtainable for many units. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Burning that much natural gas requires access to a large supply of natural gas. *E.g.*, App.288a (NRECA Comments 15). But this portion of the Rule applies to existing coal plants that were built without regard to a natural gas supply. Many would require the construction of long, cost-prohibitive pipelines, some cannot get a sufficient gas supply at all, and others would need to commit to decades of gas service to justify pipeline construction for a plant EPA would require shutting down in just nine years. *See App.287a* (NRECA Comments 14).

**B. The major-questions doctrine confirms that the Rule is unlawful.**

The major-questions doctrine applies in at least two, independent ways to this Rule. Application 30-32. First, Congress did not provide clear authorization for EPA to impose a “system” of emission reduction that has never been accomplished. *Id.* at 31. Whatever the statutory text “has been adequately demonstrated” means, 42 U.S.C. § 7411(a)(1), it does not clearly delegate EPA the “novel” and “transformative” power to require systems that have not yet been accomplished. *See Application 31* (quoting *West Virginia*, 597 U.S. at 724). Second, Congress in Section 111 did not clearly delegate EPA power to impose generation-shifting, which is exactly what the Rule’s alternative compliance options entail. *See id.*; *West Virginia*, 597 U.S. at 728.

EPA never disputes that the same issues of vast economic and political significance are at stake here as in *West Virginia*. *See Application 31*. EPA instead

argues that the statutory power here is not “novel.” Resp. 21. Yet EPA identifies no prior rulemaking in which it designated a “best system” that had *never before* been used anywhere. Instead, EPA cites a few prior rules where the identified systems were not necessarily “routinely” used. Resp. 34. There is a notable difference between an agency requiring a system previously used (albeit not “routinely”) versus a system never-before-used anywhere. The latter is a paradigmatic example of “novel” agency action, requiring clear authorization from Congress. *West Virginia*, 597 U.S. at 724. EPA also argues that its newfound power is not “extravagant.” Resp. 21. But if EPA can set standards in its sole discretion based on systems that have not yet been accomplished, then the power EPA claims could hardly be more extravagant.

**C. The Rule is arbitrary and capricious.**

A stay should be granted based on EPA’s violation of its statutory authority, and this Court need not reach any arguments about EPA’s arbitrary and capricious reasoning. But the Rule is also arbitrary and capricious. Application 32-25.

The Rule ignored comments and expertise from CCS project owners such as Minnkota (Project Tundra) and SaskPower (Boundary Dam). *Id.* at 32-33. EPA’s response brief does the same. Minnkota told EPA that the Rule may prevent the yet-to-be-built Project Tundra, and that even this state-of-the-art project would not satisfy the Rule’s 90% CCS system anyway. App.757a, 768a, 771a (Minnkota Comments 2, 13, 16). As in the Rule, EPA’s response brief just parrots the fanciful conclusion that Project Tundra somehow demonstrates the Rule’s 90% CCS system. Resp. 27. And while SaskPower says Boundary Dam “cannot” implement 90% CCS, App.784a (SaskPower Comments 1), EPA simply asserts it believes “those ‘challenges

have been sufficiently overcome,” Resp. 36 (citation omitted).

EPA also fails to rehabilitate the Rule’s illogical treatment of transport and storage. These two elements of CCS are closely related. The fewer the storage sites, the greater the need for “a large-scale interstate pipeline network . . . to transport CO<sub>2</sub>.” 89 Fed. Reg. at 39,855. But EPA says no such network is necessary, because “relatively short” pipelines will work instead. *Id.* But the shorter the pipelines, the more storage sites will be necessary (because the lack of transport will tend to prevent multiple projects from sharing the same storage site). That, in turn, means a drastic increase in the Class VI permits that EPA needs to issue. *See id.* at 39,870. Yet EPA never disputes the lengthy wait times for these permits. *See* Application 28. Nor does EPA dispute that it is forcing billions of dollars in expenditures based on its guesses about “potential storage sites,” not the availability of actual storage sites. Resp. 38.

Finally, EPA ignores the fundamental irrationality in concluding that some “legal or practical compulsion” (Resp. 35) is necessary to induce private actors to implement technology that the Rule claims will earn them net revenue. *E.g.*, 89 Fed. Reg. at 39,879. It is not “logical and rational” to conclude that cost- and revenue-conscious actors will ignore free income until EPA issues a rule that requires them to pocket it. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (citation omitted).

## **II. NRECA’s members face imminent, irreparable harm.**

EPA attempts to minimize the enormous costs that the Rule foists upon the not-for-profit rural electric cooperatives comprising NRECA’s membership. *E.g.*, Resp. 51-53. But these costs will not sit dormant “during the pendency of the expedited review proceedings in the court of appeals” and beyond. Resp. 5. Operators “must

begin spending money now for engineering, planning, design, siting, permitting, fuel procurement, and construction.” App.368a (McCollam ¶47); *see* App.525a (Hasten ¶27) (similar); App.596a (Porath ¶27) (“Dairyland must act *now* in order to preserve its ability to claim the Final Rule’s one-year compliance extension mechanism . . .”). That is why, “as early as next year,” rates are “expected to increase more than 50% above the increase that would be expected” without the Rule. App.503a (Tudor ¶32); *see* App.411a (Purvis ¶42) (“[A]n average Kentucky household would receive electricity bills that are double.”).

Even though EPA itself “assumes” that this spending began months ago, in “June 2024,” 89 Fed. Reg. at 39,874, 39,893, it attempts to downplay the immediacy of these costs. Resp. 53. EPA does so by arguing that federally enforceable commitments to retire a plant cause no harm until an operator actually turns off the lights. *See* Resp. 53. But even for plants that will retire by 2032, operators “must immediately begin the process of securing replacement generation.” App.617a (Soderberg ¶23); *see, e.g.*, App.557a (Grooms ¶32) (similar). For all other existing plants, operators must “immediately begin taking steps to procure new equipment”—whether for 90% CCS or co-firing. App.500a (Tudor ¶28); *see, e.g.*, App.597a (Porath ¶28) (similar).

EPA also argues that the expedited briefing schedule in the D.C. Circuit alleviates the need for a stay. *E.g.*, Resp. 2, 51. The expedition below is welcome, but it does not obviate the need for a stay. Briefing will not be complete until November 1, 2024, and oral argument has not been scheduled. *See West Virginia v. EPA*, No. 24-1120 (D.C. Cir. Aug. 9, 2024) (Scheduling Order). The ink on the D.C. Circuit merits briefs will hardly have dried before rural cooperatives must begin making

“Permanent Cessation of Operation” decisions (“November 12, 2024”). 89 Fed. Reg. at 40,062. Other key decisions are also fast approaching. Power plants that wish to operate into 2032 and beyond must decide between the undemonstrated 90% CCS standard and an impossible-for-many gas co-firing standard (which itself requires eventual shutdown) by May 2026. *Id.* at 39,958, 40,056.

EPA next muses that, even if Applicants prevail, at most they would obtain only a remand for EPA to determine some *lower* level of CCS than the Rule’s 90% system, so any expenditures now to prepare for CCS would not be in vain. Resp. 52-53. That is wrong for all sorts of reasons. The Clean Air Act requires courts to “reverse,” not remand, unlawful agency action. *Ohio v. EPA*, 144 S. Ct. 2040, 2052, 2054, 2055 n.11, 2057 (2024) (quoting 42 U.S.C. § 7607(d)(9)). EPA has nowhere proposed or analyzed a lower-capture-rate system of CCS, so it cannot divine one now—and certainly not without adequate notice-and-comment procedure. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Besides, even lower carbon-capture rates will run into the significant problems related to full-stream capture, the need for a vast network of yet-to-be built CO<sub>2</sub> pipelines, and the paucity of permitted storage sites.

Finally, EPA dismisses the magnitude of the immediate spending required by the Rule, arguing that the costs of this work are “substantially less than other components of the project schedule.” Resp. 52 (citation omitted). Preliminary expenses such as “[e]ngineering costs typically represent approximately five percent of project costs.” App.353a (McCollam ¶121). But EPA cites no authority for ignoring present costs simply because they are “less” than the immense billions that NRECA members are facing overall. *E.g.*, App.346a (McCollam ¶11); App.409a (Purvis ¶38).

Without a stay, hundreds of millions of dollars would still be “immediately” spent to “redo engineering, conduct new FEED Studies, . . . redo environmental permits,” and more. App.465a (McLennan ¶55); *see, e.g.*, App.554a (Grooms ¶28); App.527a (Hasten ¶31); App.412a (Purvis ¶43); App.488-89a (Tudor ¶8); App.346a (McCollam ¶11).

NRECA’s members do not have hundreds of millions of dollars to spare. Nor do they have investors who can foot the bill. They have no choice but to pass these immense compliance costs on to their consumers. *E.g.*, App.481a (McLennan ¶85). Many of those same consumers are already “faced with a daily choice between food, electricity, and medicine.” App.389a (Purvis ¶7). Yet the Rule would cause dramatic rate increases, *see* App.410-11a (Purvis ¶42); App.503a (Tudor ¶32), all to pay for early retirements, replacement power, new equipment, and dozens of other irrecoverable outlays that would never occur but for EPA’s unlawful Rule.

### **III. The equities and relative harms favor a stay.**

EPA ignores the public harms that NRECA highlighted in its Application—including electricity costs, reliable supply of electricity, and threats to the public health. Application 39-40. Rather than weigh or balance those harms, EPA just asserts harms of its own. Resp. 56-58. At worst, “the harms and equities are very weighty on both sides,” and resolution of NRECA’s stay request “ultimately turns on the merits.” *Ohio v. EPA*, 144 S. Ct. at 2052-53 (citation omitted). Because no power plant has ever accomplished EPA’s 90% CCS system—and for the many other reasons explained in its Application and above—the merits strongly favor NRECA.

### **CONCLUSION**

The Court should grant the requested stay.

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