

No. 23A350

In the Supreme Court of the United States

KINDER MORGAN, INC.; ENBRIDGE (U.S.) INC.;
TRANSCANADA PIPELINE USA LTD.;
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA;
AMERICAN PETROLEUM INSTITUTE,
Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Emergency Application to Stay Final Agency Action During Pendency of
Petitions for Review

**BRIEF OF ENERGY INFRASTRUCTURE COUNCIL
AS *AMICUS CURIAE* IN SUPPORT OF APPLICANTS**

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE
UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT

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STATEMENT OF INTEREST¹

The Energy Infrastructure Council (“Council”) is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure. Its membership comprises a large segment of the American pipeline community, including numerous interstate and intrastate natural gas and liquids pipelines, gatherers of natural gas, crude oil, and natural gas liquids, as well as owners and developers of, and investors in, other energy-related infrastructure. The Council’s members include the owners and operators of natural gas pipelines that transport natural gas using the kinds of reciprocating internal combustion engines regulated by the Environmental Protection Agency (“EPA”) rule at issue here. As an association representing energy infrastructure companies and other entities in the energy supply chain who are regulated by this rule, *amicus* has a significant interest in, and can offer a unique nationwide perspective on, the issues in this case.

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its members funded the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Absent a stay pending judicial review, near-term implementation of EPA's rule will cause cascading adverse financial, operational, and market consequences across the natural gas supply chain. These consequences include the possibility of widespread natural gas pipeline outages as numerous compressor stations are taken offline simultaneously for equipment replacement or upgrades, affecting natural gas prices and availability, and the reliability of the natural gas pipeline and electric grids. Compliance efforts will also impose staggering and unrecoverable financial costs on pipeline operators, their shareholders, and ultimately their customers and natural gas consumers. This Court should grant a stay pending review by the Court of Appeals to avoid those irreparable harms to regulated industry and adverse effects on the public interest.

ARGUMENT

Amicus files this brief in support of the emergency application for a stay pending review filed by Applicants Kinder Morgan, Inc. ("Kinder Morgan"), Enbridge (U.S.) Inc., TransCanada Pipeline USA Ltd., Interstate Natural Gas Association of America, and American Petroleum Institute. That application and supporting declarations document the adverse financial, operational, and practical impacts of EPA's rule on the nation's interstate natural gas pipeline grid, the companies who own and operate such pipelines, those who transport gas via pipeline, and the hundreds of millions of end-users of natural gas and gas-generated electricity nationwide. This *amicus* brief provides additional context on irreparable injury to

regulated pipelines absent a stay and harms to the public interest. See *Nken v. Holder*, 556 U.S. 418, 434 (2009).

EPA’s “Good Neighbor” rule limits nitrogen oxide emissions from stationary, natural gas-fired reciprocating internal combustion engines with a maximum rated capacity of 1,000 horsepower or greater. 88 Fed. Reg. 36,654, 36,820 (June 5, 2023). The Rule will apply to more than 3,000 pipeline engines nationwide, some 1,200 of which will require retrofits or other upgrades, and scores of which are located in states where EPA’s regulatory framework is not currently subject to a judicial stay—and thus where efforts at compliance must begin most urgently. Attempting to meet the Rule’s May 2026 deadline will require pipeline operators to plan and execute prolonged and simultaneous outages across the nation’s natural gas pipeline grid during the pendency of proceedings in the Court of Appeals, with adverse reliability and price effects on myriad end-users of natural gas, including schools, hospitals, homes, manufacturers, businesses, and gas-fired electric generators. The impacts will be felt by energy users nationwide, with disproportionate harms to low-income and historically disadvantaged communities. Absent a stay, the nation’s natural gas pipeline operators will incur hundreds of millions of dollars in compliance costs during the pendency of proceedings in the Court of Appeals. Efforts to comply by the Rule’s May 2026 deadline also face numerous practical and regulatory obstacles.

I. The Rule Will Have Significant, Near-Term, Nationwide Energy Scarcity Consequences.

Natural gas accounts for nearly a third of the United States’ overall energy consumption, including residential, commercial, and industrial uses, transportation,

and electric generation.² And natural gas accounted for nearly 40 percent of U.S. electric generation in 2022—up from 30 percent a decade ago—and is now the largest fuel source for electricity generation in the United States.³ A broad range of end-users nationwide depend on the reliable and uninterrupted supply of pipeline gas to generate electricity, operate industrial plants, cook food, and heat homes and businesses.⁴ Widespread and prolonged natural gas shortages would have grave effects on public health and safety. Yet, efforts to comply with EPA’s Rule by May 2026 will risk precisely those consequences.

A. Compliance Will Require Widespread Outages on Multiple Pipeline Systems Simultaneously.

EPA’s rule requires pipelines to implement control technologies by May 1, 2026. 88 Fed. Reg. at 36,756. The extent and scope of work required to implement the mandated infrastructure upgrades make that compliance target all but impossible on an industry-wide scale. Modifying existing, operational pipeline engines is a “significant, custom, costly, and time-intensive undertaking.” Kinder Morgan Comment Letter at 28 (550a).⁵ EPA itself has estimated that thousands of pipeline engines would be subject to the rule. 88 Fed. Reg. at 36,824. Those engines

² U.S. Energy Info. Admin., *U.S. Energy Facts Explained*, <https://bit.ly/2P0AvyO> (last updated Aug. 16, 2023).

³ U.S. Energy Info. Admin., *Electricity Explained: Electricity in the United States*, <https://bit.ly/44OKwUO> (last updated June 30, 2023).

⁴ U.S. Energy Info. Admin., *Natural Gas Explained: Use of Natural Gas*, <https://bit.ly/2wmN8hm> (last updated Apr. 28, 2023).

⁵ Citations to page numbers in the format “XXa” are to the Appendix to the Emergency Application for Stay of Final Agency Action filed by Kinder Morgan, Inc. and other applicants on October 13, 2023.

provide pressure and flow control for intrastate and interstate pipelines, as well as natural gas storage facilities; impeding the operation of those facilities can impact the entire natural gas supply chain, from wellhead to burner tip. Given the practical, technical, and legal complexities involved in retrofitting existing, operational pipeline engines, compliance by May 2026, if feasible at all, will require pipelines “to take affected units offline *simultaneously*, reducing throughput throughout the nation because the natural gas pipeline system is highly integrated.” Commissioner James Danly, Fed. Energy Reg. Comm’n, *Responses to Questions for the Record for June 13, 2023 House Energy & Commerce Oversight Hearing 22* (Aug. 9, 2023), <https://bit.ly/3DQyhv5> [hereinafter Danly Responses] (636a).

Absent a stay, during the 12–18 months it would likely take the Court of Appeals to adjudicate the pending petitions for review, pipelines will need to begin shutting down numerous engines for several months at a time, including during the peak summer and winter seasons, thus threatening the interruption of natural gas services when demand is highest. Emergency Application 25; Grubb Decl. ¶¶ 61–69 (685a–693a); Wooden Decl. ¶ 11 (702a). One pipeline’s modeling of anticipated outages necessary to attempt to comply by May 2026 predicts, for just one illustrative high-demand market, an inability to provide volumes of natural gas needed to heat approximately 1.7 million homes, and a “20 percent overall deficit in meeting the Chicago market peak demand on winter days.” Grubb Decl. ¶ 66 (688a–689a). With multiple companies taking pipeline engines offline at the same time, options for re-routing flows of natural gas will be “severely limited,” “threaten[ing] overall system

reliability.” Yeager Decl. ¶ 22 (728a). Commissioner James Danly of the Federal Energy Regulatory Commission (“FERC”) recently expressed concern that EPA had not consulted with his agency about the risk that the rule’s compelled retrofitting of natural gas compressor stations “could reduce already constrained [pipeline] capacity and affect electric reliability.” Danly Responses 24 (638a).

To take another example, New England’s independent electric grid operator has warned about the serious “energy-security risk[s]” presented by a lack of natural gas pipeline capacity to serve that region’s gas-fired electric generators, leading to “reliability risks,” “price volatility,” and increased “air emissions” as power generators use alternate fuels during times of high demand. See ISO New England, *Natural Gas Infrastructure Constraints*, <https://bit.ly/44ZOxG3> (last visited Oct. 10, 2023); see also Danly Responses 23 (637a) (“Areas like New England are already severely constrained and cannot afford to have *any* capacity taken offline.”). Such risks are particularly acute in regions—or under operating conditions, such as those likely to be created by this rule—where gas flows cannot be “routed around” pipeline outages. See ISO New England, *supra*.

To similar effect, a 2017 case study examined a hypothetical outage of one major natural gas compressor station near the Florida-Alabama border. It predicted that reduced natural gas flows and subsequent delivery to natural-gas-fired power plants could lead to a statewide blackout. Edgar C. Portante et al., *Modeling Electric Power and Natural Gas System Interdependencies*, 23(4) *J. Infrastructure Sys.* 1, 11

(2017). Curtailment intensity was estimated to range from 10 to 100 percent, with a total load loss of nearly half the state’s peak summer load. *Id.* at 12.

Although EPA’s rule applies to engines in certain specific states, the negative impacts on natural gas supplies and prices will not be geographically limited. 88 Fed. Reg. at 36,654. The natural gas pipeline grid is a complex network that works as an integrated whole, and is “heedless of state boundaries.” See *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014). The natural gas outages required to comply with this rule will have cascading downstream impacts. Disruptions will be exacerbated by the reality that interstate gas pipelines are “overall, running closer to their total capacity more frequently throughout the year” than in the past, given increased domestic gas production and increased reliance on natural gas for electric power generation. U.S. Gov’t Accountability Office, GAO-20-658, *Gas Transmission Pipelines: Interstate Transportation of Natural Gas Is Generally Reliable, but FERC Should Better Identify and Assess Emerging Risks* 17 (Sept. 2020). As recent severe weather events have illustrated, natural gas supply and related power outages can result in millions of Americans being unable to heat their homes, refrigerate life-saving medicines, and keep and prepare food, with potentially tragic results.⁶ EPA’s reliance on “average annual capacity utilization” data (385a, 394a) to suggest the existence of spare capacity ignores the practical and operational reality that the

⁶ *E.g.*, FERC, *The February 2021 Cold Weather Outages in Texas and the South Central United States: FERC, NERC, and Regional Entity Staff Report* 172 (Nov. 2021), <https://bit.ly/3rOD0dR> (concluding that natural gas supply issues were the second largest cause of unplanned electric outages during Winter Storm Uri).

pipeline grid is designed (and must be able) to meet *peak capacity* demands on the hottest and coolest days, when need for air conditioning, heating, and electricity is most acute.⁷

Because oil and gas are often produced simultaneously in some key regions, disruptions in the flow of natural gas can also ultimately affect crude oil production. Outages at natural gas compressor stations and reductions in pipeline throughput could lead to supply backups upstream. And because crude oil and natural gas are often produced together, restrictions in natural gas transportation capacity could require flaring of excess gas supply (if allowed by regulation) or limiting crude oil production outright. See Scott Disavino, *U.S. Permian Natgas Flaring Could Rise in 2024, Report Shows*, Reuters (May 23, 2023), <https://bit.ly/47oQyNC>; EPA, *Overview of the Oil and Natural Gas Industry*, <https://bit.ly/3Ov6SUI> (last visited Oct. 10, 2023).

B. The Rule Will Impose Significant Costs on Energy Users, Including Disadvantaged Communities.

EPA’s rule will inflict billions of dollars in compliance costs on the pipeline industry alone. Yager Decl. ¶ 10 (712a) (estimating \$2.4 to \$6.1 billion in costs for INGAA members). At least some of those costs will ultimately be borne by downstream customers of natural gas and electricity, including disadvantaged

⁷ See generally U.S. Dep’t of Energy, *Assessment of the Adequacy of Natural Gas Pipeline Capacity in the Northeast United States* 6 (Nov. 2013), <http://bit.ly/46yJrkK> (analyzing “adequacy of the pipeline system to meet ‘essential human needs’” in Northeast market during “peak winter and summer demand periods”).

communities—increasing the cost of energy for nearly every American family, including those who can least afford it. See Kinder Morgan Comment Letter 36 (558a). Low-income and minority households often devote a significantly higher proportion of their total income to meeting energy needs than the nationwide average;⁸ that disproportionate burden will be exacerbated by price increases from this rule.

II. Natural Gas Pipelines Will Be Irreparably Injured Absent a Stay.

A. Natural Gas Pipeline Operators Are Already Incurring Significant and Irreparable Costs.

The interstate natural gas pipeline community has estimated that retrofitting *a single engine* to comply with the EPA rule will cost millions of dollars, and could take more than a year to complete. Grubb Decl. ¶¶ 26, 52 (665a–666a, 681a); Wooden Decl. ¶ 11 (702a); Yeager Decl. ¶ 19 (726a). The pipeline industry as a whole is facing billions of dollars in compliance costs. Pipelines must begin spending money now to have an outside chance of meeting the May 2026 deadline.

Pipelines will also incur significant and irreparably lost revenue during compliance-related outages while engines are being upgraded or replaced. Generally speaking, FERC-regulated natural gas pipelines collect revenue via a “reservation” charge to secure firm pipeline capacity and a “commodity” or “usage” charge based on

⁸ Press Release, The American Council for an Energy-Efficient Economy, Report: Low-Income Households, Communities of Color Face High “Energy Burden” Entering Recession (Sept. 10, 2020), <https://bit.ly/3OfieP> (providing that low-income households spend 3.5 times more of their income on energy than the nationwide average).

the actual throughput of natural gas. Pipelines will forego all commodity/usage charge revenue during system outages. And pipelines must credit customers for reservation charges in periods when a pipeline is not able to provide nominated firm service. *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 at PP 55–59 (2011). Overall, interstate pipelines will forego billions of dollars of lost revenue—upwards of \$120 million for just three *segments* of a single pipeline—on top of capital expenditures related to the EPA rule. Grubb Decl. ¶¶ 12, 70–72 (657a, 693a–694a) (modeling reservation charge credits in one scenario).

As the delivered price of natural gas increases to recover the billions of dollars of costs associated with the rule, these costs will eventually flow downstream to pipelines’ direct and indirect customers, and to the ultimate consumers of natural gas and electricity. Costs flowing downstream will include the costs of capital upgrades to replace or modify existing operational engines.

B. Compliance Efforts Will Face Significant Legal and Practical Obstacles.

EPA has suggested that pipelines should simply “coordinate outages” to minimize impacts. See EPA, *NOx Emissions Control Technology Installation Report Timing for Non-EGU Sources, Final Report*, EPA-HQ-OAR-2021-0668-1077, ES-8 (Mar. 14, 2023) (385a). Such coordination, however, poses significant physical challenges and could raise concerns under applicable competition laws. See Emergency Application 19. It could also implicate FERC’s Standards of Conduct. The latter restrict a pipeline’s “transmission function employees” from disclosing non-public, transmission-related information (such as outage schedules) to “marketing

function” employees, responsible for communicating with customers. See 18 C.F.R. Pt. 358 (2022). Coordinating simultaneous outages across multiple pipeline systems, affecting various pipeline customers, could be difficult or impossible given these restrictions.

Compliance will also require extensive engineering, project planning, and regulatory work long in advance of installing replacement units. For instance, pipeline operators must seek and obtain new or modified state and federal permits applicable to the construction and operation of regulated engines. Grubb Decl. ¶ 52 (681a–682a); Yager Decl. ¶ 20 (716a–717a). Indeed, to the extent pipelines must replace existing engines with new, more efficient units, or upgrade other connected infrastructure to accommodate the modified engines, they may need approval from FERC, the Army Corps of Engineers, the Fish & Wildlife Service, federal land management agencies, or a range of state and local authorities. More significant replacements or remediation work could trigger extensive approval processes and delays before construction activity could begin.

CONCLUSION

Because implementing the rule during the pendency of proceedings in the Court of Appeals would cause irreparable harms to pipelines and disserve the public interest, the emergency application for stay of EPA’s “Good Neighbor” rule should be granted.

Respectfully submitted,

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