No. 24A116

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, OKLAHOMA GAS AND ELECTRIC COMPANY, AND IDAHO POWER COMPANY,
Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, United States Environmental Protection Agency,
Respondents.

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

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

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After defending a forward-looking approach in the Final Rule, EPA now concedes that a technology has not "been adequately demonstrated" if it cannot "*currently* be demonstrated." EPA Resp. 30. That concession resolves this case. It is undisputed on this record that EPA cannot cite even a single example of a power-generating facility currently achieving the Final Rule's consistent, facility-wide 90%-capture standard with a CCS system. EPA instead tries to explain why facilities that currently achieve sporadic 90% capture or 90% capture of a tiny portion of facility-wide emissions *might one day* satisfy the Final Rule's far more stringent BSER, but no amount of deference to technical expertise can convert a potential demonstration into a current demonstration. At bottom, the interpretation adopted by EPA in the Final Rule represents a backdoor attempt to impose a forward-looking approach to BSER onto the Act's backward-looking text. While the Act delegates to the Administrator the authority to assess what technologies have been "adequately demonstrated," it does not authorize him to redefine that term. Applicants are therefore likely to succeed on the merits.

On irreparable harm, EPA acts as if *Ohio* v. *EPA* never happened. It ignores Applicants' detailed declarations that establish the many millions of dollars of irreparable harm that they will suffer absent a stay. And EPA pretends that those expenditures will be recouped because, even if EPA loses, it will impose another form of CCS after a remand without vacatur. *Ohio* makes clear, however, that a stay applicant's evidence of compliance costs establishes irreparable harm. Regardless of EPA's generic timeline for installing CCS, it is undisputed that *these Applicants* have suffered (and will suffer) unrecoverable

costs to begin complying with the Final Rule during the pendency of the appeal. If anything, a stay is even more strongly justified here than in *Ohio*.

Lastly, in its analysis of the balance of harms and the public interest, EPA accords no weight to regulatory stability and ignores the fact that the power industry has made great strides in CO_2 emissions reductions voluntarily and shows every indication of continuing to do so, regardless of the Final Rule's fate. For all of those reasons, EPA's Response only further confirms that a stay is warranted here.

I. Applicants Are Likely To Prevail On The Merits.

EPA stacks pieces of varying and unsupportive record evidence on top of each other to claim technical expertise and request deference for its conclusion that the Final Rule's BSER "has been adequately demonstrated." But EPA is unable to contest the dispositive fact that no power-generating facility anywhere on the planet has deployed a CCS system to achieve the consistent, facility-wide 90%-capture the Final Rule requires. Given that record, EPA could sustain the Final Rule only by redefining the central statutory terms, something it concedes it cannot do after *Loper Bright*.

A. EPA begins by discussing deference at length, but deference cannot paper over the gaping hole in the Final Rule. After all, EPA concedes that it receives no deference when interpreting the terms "has been adequately demonstrated" and "achievable." EPA Resp. 24. And in any event, EPA *agrees* with the Applicants that "Section 111's plain text—'has been adequately demonstrated'—indicates a requirement that the technology *currently* be demonstrated." *Id.* at 30.

EPA correctly notes that courts must deferentially review the Administrator's determinations regarding whether a 90%-capture CCS system "has been adequately

demonstrated," especially where his conclusions rest on "scientific determination[s]." *Id.* at 25 (quoting *Baltimore Gas & Elec. Co.* v. *NRDC, Inc.*, 462 U.S. 87, 103 (1983)). That technical deference, however, is irrelevant to this dispute. As EPA concedes, the question is whether its selected BSER has been *currently* demonstrated. And EPA never claims that any power-generating facility *currently* employs a CCS system to achieve the consistent, facility-wide 90%-capture the Final Rule requires. Thus, EPA made no determination of BSER under the proper legal standard that could be reviewed with deference for its technical expertise.

B. EPA identifies five facilities that it says are currently achieving "the 90% rate" the Final Rule requires: Boundary Dam, Petra Nova, Plant Barry, Bellingham, and Mongstad. *Id.* at 27-28.[1] But the Final Rule does not set BSER as CCS with a sporadic or partial 90% capture rate; it requires *consistent, facility-wide* capture of 90% of CO_2 emissions. 89 Fed. Reg. 39,798, 39,801-802, 39,974, 40,016 (May 9, 2024). As Applicants explained at length, Application at 12-16, none of the facilities flagged by EPA demonstrate the consistent, plant-wide 90% capture rate that the Final Rule requires. Rather, those facilities achieve 90% capture only sporadically or only for a portion of the emissions at the plant. *Ibid.* Indeed, EPA does not contest that none of these facilities are *currently* demonstrating consistent, plant-wide 90% capture rates. If EPA *had* made that claim and supported it by scientific analysis, its conclusion would be entitled to deference. But EPA

[1] EPA also identifies future plants that "target" 90%, EPA Resp. 27-28, but these do not meet EPA's own requirement of "current" demonstration.

cannot claim deference for pretending that consistent, facility-wide capture percentages of 5-10% are the equivalent of the Final Rule's 90%-capture requirement. See *ibid.*

When EPA attempts to explain why it believes two of its examples—presumably its strongest two—nonetheless support the Final Rule's BSER, its answers are self-defeating. EPA Resp. 36-37. EPA concedes that Boundary Dam "fail[ed] to consistently achieve [90%] level of performance for the full exhaust stream." *Ibid.* That should be the end of the inquiry because it means Boundary Dam does not currently demonstrate EPA's chosen BSER. Yet EPA believed it could alchemize that shortcoming into a positive demonstration by declaring that Boundary Dam's failure "reflected a lack of 'economic incentives and regulatory requirements' rather than a lack of technological capability." *Id.* at 37 (quoting 89 Fed. Reg. at 39,848). EPA thus apparently thinks that a current demonstration is not required if EPA can project a future demonstration of BSER under the right conditions. *Ibid.* (quoting 89 Fed. Reg. at 39,848) (arguing that Boundary Dam's technology "can be readily applied" to satisfy BSER at "a new CO_2 capture plant today"). If EPA can conjure adequate demonstrations out of failures via its own *ipse dixit*, then it has eliminated the statutory requirement of current demonstration from the law by agency fiat.

Similarly, EPA argues that even though Petra Nova reached 90%-capture only intermittently and only for a portion of the plant's emissions, "EPA determined that capture from a slipstream is representative of capture from the full exhaust stream." *Id.* at 36 (quoting 89 Fed. Reg. at 39,850). In other words, while Petra Nova is not *currently* achieving the Final Rule's BSER, EPA determined that it *would be capable* of doing so. If this rationale passes muster, the requirement that a technology be currently demonstrated

will be rendered a paper tiger. EPA can always point to a facility's achievement of some metric far short of the BSER and simply "determine that * * * [it] is representative" of the much stricter requirement. EPA's approach stretches deference past the breaking point and requires redefining statutory terms, something EPA concedes it cannot do.

In an attempt to misdirect attention from that fatal flaw, EPA vigorously protests that a system need not be in "widespread use" or "routinely used" for it to be "adequately demonstrated." *Id.* at 33, 35. Applicants do not argue otherwise. The problem is not that *only a handful of power plants* have successfully deployed a 90%-capture CCS system as defined by the Final Rule; it is that *no power plant anywhere* has done so. While a BSER need not be in widespread or routine use, it must be in use and achieving the mandated standard of performance *somewhere* before it can be required *everywhere*.

C. Then there are the issues with the distinct transport and storage components of a CCS system. Most concerning here is that EPA has no answer for how regulated entities are supposed to build the necessary pipeline and storage sites in time when everyone appears to agree that the existing permitting infrastructure is woefully inadequate. See Application at 18-19. EPA has nothing better than its promise to "devot[e] increased resources to the Class VI program" and an "expectat[ion] that the additional resources * * * will lead to increased efficiencies." 89 Fed. Reg. at 39,870. Those "expectat[ions]" are indistinguishable from the "speculation or surmise" that renders agency action arbitrary and capricious. *Bennett* v. *Spear*, 520 U.S. 154, 176 (1997).

EPA also claims that most power plants are relatively close to a "potential storage site." EPA Resp. 38. But what about the rest? EPA shrugs them off by taking the radical

view that "Section 111 does not require that a standard of performance be 'achievable' for every single source within a covered category." *Id.* at 40. That is squarely foreclosed by both this Court's and the D.C. Circuit's precedent. After all, "to be achievable, * * * a uniform standard must be capable of being met under *most adverse* conditions which can reasonably be expected to recur * * * ." *Nat'l Lime Ass'n* v. *EPA*, 627 F.2d 416, 431 n.46 (D.C. Cir. 1980) (emphasis added); see also *West Virginia* v. *EPA*, 597 U.S. 697, 701 (2022) (emission limits are not achievable when, "by design, there are no particular controls a coal plant operator can install and operate to attain the emissions limits").

EPA cannot get around that by pointing to the flexibilities[2] that the Final Rule allows for existing sources. EPA Resp. 40. EPA's charge is to "establish[] standards of performance for any existing source," 42 U.S.C. § 7411(d), and that means determining "a standard * * * which reflects the degree of emission limitation *achievable* through the application of the best system of emission reduction [that] * * * *has been adequately demonstrated*," *id.* § 7411(a)(1) (emphases added). The states' flexibility in applying that standard to existing sources—flexibility provided to the states by Congress in the Act—

[2] The Final Rule's purported flexibilities fall into three categories: (1) alternate forms of the presumptive standard, (2) compliance extensions, and (3) invoking a unit's remaining useful life and other factors ("RULOF"). None offers much actual flexibility. The "alternate form[s]" available to states and sources are of no practical use because the alternative form must "achieve equivalent or better emission reduction as would be achieved through the application of a rate-based standard of performance." 89 Fed. Reg. at 40,055-40,056. As for compliance extensions, those may help a little, but all they offer is the option for states to seek a 1-year compliance extension in exceptional circumstances. *Id.* at 40,014. RULOF merely authorizes a source to operate at a performance standard "no less stringent than necessary" and is only available if a state shows there are "fundamental differences" between the unit at issue and the information EPA considered in setting BSER and the accompanying standard of performance. *Id.* at 39,968, 39,976.

does not grant EPA a license to depart from its statutorily assigned task and instead identify a BSER and standard of performance that some covered sources cannot implement or achieve.

D. EPA's failure to engage on—much less offer a reasonable explanation regarding—many of these issues is an additional defect that no amount of post-hoc argument can remedy. See Application at 12-19 (detailing the Final Rule's deficiencies and EPA's failure to address them). "Perhaps there is some explanation" why these and other glaring defects somehow do not fatally undermine EPA's 90%-capture CCS BSER determination, "[b]ut if there is an explanation, it does not appear in the final rule." *Ohio* v. *EPA*, 144 S. Ct. 2040, 2054 (2024). EPA failed entirely to "supply 'a satisfactory explanation for its action'" and "instead ignored '[these] important aspect[s] of the problem' before it." *Ibid.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

II. Applicants Face Imminent And Irreparable Injury.

Applicants submitted robust, well-supported declarations that establish their irreparable harm. Those declarations explain the company- and site-specific circumstances that require commencement of compliance work immediately and detail the massive costs that must be incurred during the pendency of this challenge. Application at 20-24. Unable to rebut those painstakingly detailed declarations, EPA ignores them in favor of lodging various other arguments on irreparable harm. None are persuasive, as the uncontested declarations and controlling legal authorities establish Applicants' irreparable harm beyond peradventure.

A. First, EPA claims that no compliance work is necessary during the pendency of this challenge because "plants could wait until June 2025 to start." EPA Resp. 52. But in the Final Rule, EPA supported its proposed timeline by "assum[ing]" that regulated entities would start a year earlier than that and perform the entirety of their "feasibility work" during the period of "June 2024 to June 2025." 89 Fed. Reg. at 39,873. So, taking EPA's Final Rule at its word, companies have been incurring compliance costs for months already and will continue to do so during the pendency of this challenge—which will continue for many more months at a minimum even under the D.C. Circuit's expedited schedule.

EPA's generic timeline, moreover, does not controvert the company- and site-specific timelines provided in the declarations. EPA's timeline is a "*representative* timeline for compliance," EPA Resp. 51 (emphasis added), that is based on a CCS installation schedule for a hypothetical single plant with no complicating factors, 89 Fed. Reg. at 39,874 (citing App.328 (Sargent & Lundy Report)). Even if it were "an accurate representation of the time necessary to install CCS *in general*," that "baseline" schedule does not even purport to account for the company- and site-specific issues that can alter the timeline in particular instances. *Ibid.* (emphasis added).

The declarations detail the company- and site-specific reasons for the need to proceed with compliance work immediately. Tucson Electric Power Company and UNS Electric, Inc. need new sources of power generation by 2027 to replace retiring coal power plants and keep up with growing demand. App.780-782, 791 (Bakken Decl. ¶¶ 15-18, 44). Given the timelines for building new gas-fired power plants, they must begin that work now

and make an effectively irreversible choice between the more efficient type of base-load gas-fired units that would be subject to the Final Rule's CCS requirement or a less efficient and more costly option for supplying the needed power that would not require CCS. App.790-792 (Bakken Decl. ¶¶ 39-48).

Idaho Power must secure new sources of power generation by 2029 to meet the unprecedented growth of customer demand in its service territory. App.764, 767-768 (Adelman Decl. ¶¶ 7, 18-19, 22). Since the gas-fired power plants that Idaho Power is considering take many years to build and bring online, Idaho Power must begin that process now and decide whether it will construct the more efficient type of base-load gas-fired units that would be subject to the Final Rule's CCS requirement or opt for a less efficient and more costly option for supplying the needed power that would not require CCS. App.768-771, 775-776 (Adelman Decl. ¶¶ 23-24, 26, 28-29, 40-45). Those choices must be made now, and given the timelines and contractual commitments, they are effectively irreversible. *Ibid.*

Entergy is in the process of building two new gas-fired power plants that are subject to the Final Rule's CCS requirement. App.799-801 (Bulpitt Decl. ¶¶ 11, 18). Various site-specific issues complicate the installation of CCS on those power plants. App.800-806 (Bulpitt Decl. ¶¶ 18, 21, 23-24, 27-28). For example, Entergy likely will have to go through an additional permitting process for construction of facilities at a site where wetlands are present. App.803-804 (Bulpitt Decl. ¶ 23). Worse, "there is very little existing infrastructure to transport and store captured carbon dioxide" in the area where one of those plants is located—meaning that Entergy will be starting from scratch on not just the capture portion

of CCS, but also the transport and storage components. App.800-806 (Bulpitt Decl. ¶¶ 18, 21, 23, 27-28). Required state regulatory approvals add time as well. App.804-805 (Bulpitt Decl. ¶ 24). For all of those reasons, Entergy must begin the CCS work on those plants "immediately" if it is to have a chance of meeting the Final Rule's deadline. App.800-802, 805-807 (Bullpitt Decl. ¶¶ 18, 21, 26, 29-30).

OG&E faces unique pressures because it would have to install CCS on multiple coal power plants in a staggered manner so that all of the coal power plants are not offline at the same time. App.818 (Burch Decl. ¶ 34). The storage aspect of CCS threatens to take longer than usual for OG&E as well. There are no CO_2 sequestration facilities near its coal power plants. App.821-822 (Burch Decl. ¶ 43). And while perhaps new sequestration facilities could be constructed from scratch, that would require EPA Region 6 (which encompasses Oklahoma) to issue a Class VI well permit. App.820-821 (Burch Decl. ¶ 41). But EPA Region 6 has yet to even complete a technical review of a Class VI well permit for any company, much less to issue one. App.820-821 (Burch Decl. ¶ 41). On top of all that, OG&E also must contend with other regulatory and permitting challenges. App.816-820 (Burch Decl. ¶¶ 29, 32-33, 37, 39). That is why OG&E must begin compliance work immediately if it is to have any chance of installing CCS on its coal power plants by the Final Rule's deadline. App.814, 822-823 (Burch Decl. ¶¶ 24, 46).

EPA offers no response to any of those company- and site-specific issues that dictate the compliance timelines for these entities. Instead, EPA leans exclusively on its "representative," "baseline" schedule for "install[ing] CCS in general." EPA Resp. 51; 89 Fed. Reg. at 39,874. Even if that schedule were unassailable as a normal CCS installation

timeline, it does not defeat Applicants' irreparable harm because it does not account for the company- and site-specific timing issues that require them to begin their compliance work immediately. This Court rejected a similar effort by EPA to rely on a generic timeline to defeat stay applicants' individualized declarations of harm in *Ohio*. Compare EPA Resp. at 43-44, *Ohio* v. *EPA*, 144 S. Ct. 2040 (2024) (No. 23A349) (citing generic timelines to argue that "applicants should be able to avoid significant expenditures pending judicial review"), with *Ohio*, 144 S. Ct. at 2053 (crediting the stay applicants' declarations "that complying with the FIP during the pendency of this litigation would require them to incur 'hundreds of millions[,] if not billions of dollars'"). The result should be no different here, as Applicants are not so much "disput[ing] EPA's assessment of the record" on the timeline, EPA Resp. 54, as pointing out that EPA made no assessment of the company- and site-specific issues that drive Applicants' showing of irreparable harm.

B. Second, EPA asserts that any compliance costs incurred during the pendency of this challenge will not constitute "the type of substantial and immediate irreparable injury that justifies a stay." *Id.* at 52 (internal quotation marks omitted). To be sure, "the costs of the feasibility work in general are substantially less than other components of the [CCS] project schedule." *Ibid.* (quoting 89 Fed. Reg. at 39,874). But the costs of a CCS system run into the hundreds of millions of dollars. See App.748-749 (Buckeye Institute Comments); App.801 (Bulpitt Decl. ¶ 19); App.813, 824 (Burch Decl. ¶¶ 20, 51). So even a relatively small portion of those costs can be quite "substantial."

Whether termed "feasibility" costs or something else, the key point is that declarations establish millions of dollars of irreparable harm for these declarants alone.

App.806-807 (Bulpitt Decl. ¶ 30) ("potentially hundreds of millions"); App.775 (Adelman Decl. ¶ 43) ("$8 million to $15 million"); App.823 (Burch. Decl. ¶ 47) ("$36-45 million"); App.791-792 (Bakken Decl. ¶¶ 45-46) ("10-25% of the project cost[s] * * * are unrecoverable"). EPA does not contest those figures or the analyses that underlie them. Accordingly, once again, Applicants are not so much "disput[ing] EPA's assessment of the record," EPA Resp. 54, as proving their harm with evidence that EPA does not and cannot dispute.

EPA also essentially ignores the separate harm stemming from Applicants' need to make effectively irreversible decisions *now* on what type of power plants to build so that new power will be online when it is needed in only a few short years. See App.764, 767-768 (Adelman Decl. ¶¶ 7, 18-19, 22); App.780-782, 784, 791 (Bakken Decl. ¶¶ 15-18, 23, 44). The Final Rule's CCS requirement affects those decisions and risks forcing companies to build less efficient and more costly generation sources that would inflict harm on themselves and their customers for decades, even if this challenge were successful. App. 775-776 (Adelman Decl. ¶ 45); App.782-784, 792 (Bakken Decl. ¶¶ 20-23, 48); App.833 (Burch Decl. ¶ 84).

C. Third, EPA argues that since it will eventually require CCS at some level as the BSER even if it loses this case, regulated entities might as well start their compliance efforts now and consider that money well spent:

> Even if the D.C. Circuit accepts those arguments, applicants would be entitled, at most, to a remand so that EPA can consider setting a different capture rate or a different compliance timetable. In that scenario, any expenditures made during the pendency of the litigation would facilitate plants' ultimate achievement of whatever requirements EPA imposed at the end of that process.

EPA Resp. at 52-53. But if the Final Rule fails on any of the diverse array of arguments lodged against it—only a few of which EPA considers in the above-quoted passage—"the Clean Air Act entitles [Applicants] to 'revers[al]' of that rule's mandates on them," not a mere remand that would leave those mandates in effect. *Ohio*, 144 S. Ct. at 2055 n.11. That means there will be no compliance obligations unless and until EPA issues a new rule. Even then, no one knows—and EPA is precluded from prejudging—what that new rule will select as the BSER and standard of performance.

The most EPA could plausibly claim is that perhaps some future regulation will impose the same or similar obligations, such that not all of a company's efforts to comply with the soon-to-be-vacated regulation will have been wasted. But that is far too speculative to defeat a showing of concrete irreparable harm. Indeed, as this Court has held, incurring significant "nonrecoverable" compliance costs "during the pendency of th[e] litigation" constitutes a "strong argument[]" on "[irreparable] harm[]." *Ohio*, 144 S. Ct. at 2053; see also *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 220-221 (1994) (Scalia, J., concurring) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.") (emphasis original). And if that was true in *Ohio*—where EPA had formally stated on administrative reconsideration that it intended to reach the same regulatory result despite the flaw the Court identified, 144 S. Ct. at 2060 (Barrett, J., dissenting)—the outcome is even clearer here.

III. The Balance Of Harms And The Public Interest Favor A Stay.

EPA's analysis of the balance of harms and the public interest focuses on the negative effects of CO_2, EPA Resp. 56-58, but ignores that power companies have achieved unprecedented emission reductions voluntarily and have committed to continue doing so

even in the absence of the Final Rule, see Application at 24. EPA also cannot deny that the strong interest in regulatory stability would be best served by staying the Final Rule now rather than run the very real risk of having its novel regulatory requirements apply for many months only to be vacated at the conclusion of this challenge. See *id.* at 24-25. That whipsaw effect is in no one's interests and would wreak havoc on the power industry. It is far better to maintain the status quo while this serious challenge to the Final Rule's validity proceeds to conclusion.

CONCLUSION

This Court should stay the Final Rule pending resolution of the merits below, any petition for writ of certiorari, and merits review (if any) in this Court.

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