

No. _____

In the Supreme Court of the United States

WESTMORELAND MINING HOLDINGS LLC, WESTMORELAND MINING LLC, and
WESTMORELAND ROSEBUD MINING LLC,
Applicants,

v.

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

**EMERGENCY APPLICATION
FOR IMMEDIATE STAY OF FINAL AGENCY ACTION
PENDING DISPOSITION OF PETITION FOR REVIEW**

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

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PARTIES TO THE PROCEEDING

Applicants in this Court and Petitioners in the D.C. Circuit are Westmoreland Mining Holdings, LLC, Westmoreland Mining LLC, and Westmoreland Rosebud Mining LLC.

Respondents in this Court and Respondents in the D.C. Circuit are the United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency.

Respondents in this Court and Petitioners in the D.C. Circuit Consolidated Cases are, by court of appeals case number, as follows:

24-1119: State of North Dakota, State of West Virginia, State of Alaska, State of Arkansas, State of Georgia, State of Idaho, State of Indiana, State of Iowa, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Missouri State of Montana, State of Nebraska, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of Texas, State of Utah, Commonwealth of Virginia, State of Wyoming

24-1154: NACCO Natural Resources Corporation

24-1179: National Rural Electric Cooperative Association, Lignite Energy Council, National Mining Association, Minnkota Power Cooperative, Inc., East Kentucky Power Cooperative, Inc., Associated Electric Cooperative Inc., Basin Electric Power Cooperative, Rainbow Energy Center, LLC

24-1184: Oak Grove Management Company, LLC, Luminant Generation Company LLC

24-1190: Talen Montana, LLC

24-1194: Westmoreland Mining Holdings LLC, Westmoreland Mining LLC,
Westmoreland Rosebud Mining LLC

24-1201: America's Power

24-1217: NorthWestern Corporation and Electric Generators MATS Coalition
(Salt River Project Agricultural Improvement and Power District, Talen Energy
Supply, LLC, and NorthWestern Energy Public Services Corporation)

24-1223: Midwest Ozone Group

Intervenor for Petitioners in the D.C. Circuit is San Miguel Electric
Cooperative, Inc.

Intervenors for Respondents in the D.C. Circuit are Air Alliance Houston,
Alliance of Nurses for Healthy Environments, American Academy of Pediatrics,
American Lung Association, American Public Health Association, Chesapeake
Climate Action Network, Citizens for Pennsylvania's Future, Clean Air Council,
Clean Wisconsin, Downwinders at Risk, Environmental Defense Fund,
Environmental Integrity Project, Montana Environmental Information Center,
Natural Resources Council of Maine, Natural Resources Defense Council, Ohio
Environmental Council, Physicians for Social Responsibility, Sierra Club,
Commonwealth of Massachusetts, State of Minnesota, State of Connecticut, State of
Illinois, State of Maine, State of Maryland, State of Michigan, State of New Jersey,
State of New York, State of Oregon, Commonwealth of Pennsylvania, State of
Rhode Island, State of Vermont, State of Wisconsin, District of Columbia, City of
Baltimore, City of Chicago, and City of New York.

RELATED PROCEEDINGS

This application arises from an August 6, 2024 order from the D.C. Circuit Court of Appeals denying motions to stay filed in nine consolidated cases:

State of North Dakota v. EPA, No. 24-1119 (D.C. Cir.) (main docket)

NACCO Natural Resources Corporation v. EPA, No. 24-1154 (D.C. Cir.)

National Rural Electric Cooperative Association v. EPA, No. 24-1179 (D.C. Cir.)

Oak Grove Management Company, LLC and Luminant Generation Company LLC v. EPA, No. 24-1184 (D.C. Cir.)

Talen Montana, LLC v. EPA, No. 24-1190 (D.C. Cir.)

America's Power and Electric Generators MATS Coalition v. EPA, No. 24-1201 (D.C. Cir.)

NorthWestern Corporation v. EPA, No. 24-1217 (D.C. Cir.)

Westmoreland Mining Holdings LLC v. EPA, No. 24-1194 (D.C. Cir.)

Midwest Ozone Group v. EPA, No. 24-1223 (D.C. Cir.)

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6, Applicants Westmoreland Mining Holdings LLC, Westmoreland Mining LLC, and Westmoreland Rosebud Mining LLC state as follows:

Westmoreland Mining Holdings LLC has no parent corporation and no publicly held corporations own 10% or more of its stock. The company has an extensive portfolio of coal mining operations in the United States and Canada.

Westmoreland Mining LLC has no parent corporation and no publicly held corporations own 10% or more of its stock. The company has an extensive portfolio of coal mining operations in the United States and Canada.

Westmoreland Rosebud Mining LLC has no parent corporation and no publicly held corporations own 10% or more of its stock. The company has an extensive portfolio of coal mining operations in the United States and Canada.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
RELATED PROCEEDINGS.....	iii
CORPORATE DISCLOSURE STATEMENTS.....	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES.....	vi
INDEX OF APPENDICES	x
INTRODUCTION	1
OPINION BELOW.....	4
JURISDICTION.....	4
STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT.....	5
REASONS FOR GRANTING THE APPLICATION	11
I. Applicants Are Likely To Prevail on the Merits.....	12
A. It Was Not “Necessary” For EPA To Revise MATS	12
B. The Rule is Not Based on Any Valid Development Under CAA 112(d)(6).....	27
II. The Rule Will Cause Substantial Irreparable Harm	29
III. The Balance of the Equities and the Public Interest Favor a Stay	30
CONCLUSION.....	32

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alcresta Therapeutics, Inc. v. Azar</i> , 755 Fed. Appx. 1 (D.C. Cir. 2018)	29
<i>Association of Battery Recyclers v. EPA</i> , 716 F.3d 667 (D.C. Cir. 2013).	16, 22
<i>Crowe & Dunlevy, P.C. v. Stidham</i> , 640 F.3d 1140 (10th Cir. 2011)	29
<i>Dep’t of Commerce v. New York</i> , 588 U.S. 752 (2019)	3
<i>FCC v. Fox TV Stations, Inc.</i> , 556 U.S. 502 (2009)	22, 24
<i>Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.</i> , 448 U.S. 607 (1980).	17
<i>Loper Bright Enterprises v. Raimondo</i> , 603 U.S. ___, 144 S. Ct. 2244 (2024).	12
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819)	13
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015)	2, 5, 20, 22, 25
<i>Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.</i> , 463 U.S. 29 (1983)	18-19, 25
<i>Ohio v. EPA</i> , 603 U.S. ___, 144 S.Ct. 2040 (2024)	11, 12, 30
<i>Portland Cement Association v. EPA</i> , 665 F.3d 177 (D.C. Cir 2011)	25
<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994)	30

<i>Train v. Natural Resources Def. Council</i> , 421 U.S. 60 (1975)	15
--	----

<i>United States v. Menasche</i> , 348 U. S. 528 (1955)	12
--	----

STATUTES AND RULES

Clean Air Act	
42 U.S. Code § 7412	5-6, 12-17, 19, 21-22, 26-29
42 U.S. Code § 7607	4

Administrative Procedure Act	
5 U.S.C. §705	4

All Writs Act	
28 U.S.C. §1651(a)	4

28 U.S.C. §1254(1)	4
--------------------------	---

RULES AND REGULATIONS

65 Fed. Reg. 79825 (Dec. 20, 2000)	5
--	---

70 Fed. Reg. 15994 (Mar. 29, 2005)	5
--	---

71 Fed. Reg. 76603 (Dec. 21, 2006)	14
--	----

76 Fed. Reg. 24976 (May 3, 2011)	6
--	---

76 Fed. Reg. 52738 (Aug 23, 2011)	23-24
---	-------

77 Fed. Reg. 9304 (Feb. 16, 2012)	5, 6, 19
---	----------

77 Fed. Reg. 49490 (Aug. 16, 2012)	23-24
--	-------

77 Fed. Reg. 58220 (Sept. 19, 2012)	23-24
---	-------

78 Fed. Reg. 10006 (Feb. 12, 2013)	23
--	----

80 Fed. Reg. 14248 (March 18, 2015)	23-24
---	-------

80 Fed. Reg. 37366 (June 30, 2015)	23-24
--	-------

80 Fed. Reg. 50386 (Aug. 19, 2015).	24
---	----

80 Fed. Reg. 75178 (Dec. 1, 2015)	23
---	----

81 Fed. Reg. 24420 (Apr. 25, 2016)	5
84 Fed. Reg. 2670 (Feb. 7, 2019)	27
85 Fed. Reg. 31286 (May 22, 2020)	5, 6, 19-20
85 Fed. Reg. 42074 (July 13, 2020)	23
85 Fed. Reg. 45476 (July 28, 2020)	23
86 Fed. Reg. 7037 (Jan. 25, 2021)	7
87 Fed. Reg. 1616 (Jan. 11, 2022)	23-24
87 Fed. Reg. 27002 (May 6, 2022)	23-24
88 Fed. Reg. 11556 (Feb. 23, 2023)	23
88 Fed. Reg. 13956 (Mar. 6, 2023)	5
88 Fed. Reg. 33240 (May 23, 2023)	24-25
88 Fed. Reg. 24854 (Apr. 24, 2023)	7
89 Fed. Reg. 38508 (May 7, 2024) (the “Rule”)	1, 4-6, 8, 15-17, 19, 22, 24-25, 27-28, 30

OTHER AUTHORITIES

<i>2024 Update to the 2023 Proposed Technology Review for the Coal- and Oil-Fired EGU Source Category EPA-HQ-OAR-2018-0794-6919, Attachment 1</i>	6, 8, 9, 10, 17, 18, 23
<i>National Mining Association Comments EPA-HQ-OAR-2009-0234-20531, Appendix F</i>	1, 6
<i>Northwestern Energy Comments EPA-HQ-OAR-2018-0794-5980, Appendix E</i>	10
<i>Residual Risk Assessment for the Coal- and Oil-Fired EGU Source Category in Support of the 2020 Risk and Technology Review Final Rule, EPA-HQ-OAR-2018-0794-4553</i>	21
<i>Summary of Public Comments and Responses on Proposed Rule, EPA-HQ-OAR-2018-0794-6922 (Apr. 2024)</i>	16

Talen Montana Comments

EPA-HQ-OAR-2018-0794-5987, Appendix G 10-11, 23, 26

Westmoreland Mining Holdings LLC Comments

EPA-HQ-OAR-2018-0794-5935, Appendix D 8, 9, 18, 22, 26

INDEX OF APPENDICES

Appendix A: Order of the United States Court of Appeals for the District of Columbia Circuit Denying Motions for Stay (Aug. 6, 2024)

Appendix B: 42 U.S.C. § 7412

Appendix C: National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, 89 Fed. Reg. 38508 (May 7, 2024)

Appendix D: Comments of Westmoreland Mining Holdings LLC, EPA-HQ-OAR-2018-0794-5935

Appendix E: Comments of Northwestern Energy, EPA-HQ-OAR-2018-0794-5980

Appendix F: Comments of National Mining Association, EPA-HQ-OAR-2009-0234-20531

Appendix G: Comments of Talen Montana, EPA-HQ-OAR-2018-0794-5987

Appendix H: Declarations:

Exhibit 1 – Declaration of Patrick Barkey

Exhibit 2 – Declaration of Jeremy Cottrell

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

Applicants Westmoreland Mining Holdings LLC, Westmoreland Mining LLC, and Westmoreland Rosebud Mining LLC (collectively “Westmoreland”) respectfully request an immediate stay of the final rule of the United States Environmental Protection Agency (“EPA”) entitled “National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review,” 89 Fed. Reg. 38508 (May 7, 2024) (the “Rule”).

Westmoreland has a petition for review of the Rule pending in the United States Court of Appeals for the District of Columbia Circuit and, due to the immediate harm from the Rule, moved that court for a stay pending its review. That court denied Applicants’ motion for a stay, forcing Applicants to seek relief from this Court.

INTRODUCTION

Twelve years ago, EPA released the Mercury and Air Toxics Standards (“MATS”) for coal-fired power plants, imposing billions in costs to achieve at most \$6 million in benefits from reducing hazardous emissions. This Court ultimately found that EPA’s decision to ignore the massive costs of MATS was arbitrary and capricious, but the D.C. Circuit’s failure to stay MATS required companies to make compliance decisions before judicial review was complete, contributing to the retirement of nearly 20% of the coal-fired fleet. *See Nat’l Min. Ass’n Cmt.* at 2 & n.4, EPA-HQ-OAR-2009-0234-20531, App. 252. Then-EPA Administrator McCarthy

boasted that this Court’s decision never mattered absent a stay: “[W]e think we’re going to win But even if we don’t, it was three years ago. Most of them are already in compliance, investments have been made, and we’ll catch up.”¹

History repeats itself. Apparently unsatisfied with MATS’s decimation of the coal-fired fleet, EPA’s new Rule ratchets down emission limits an additional 70%, with a short timeline for compliance. Despite this Court’s admonition the last time around that “[o]ne would not say that it is even rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits,” *Michigan v. EPA*, 576 U.S. 743, 752 (2015), EPA’s monetized cost-benefit analysis acknowledges that the Rule is a net negative for society, to the tune of hundreds of millions of dollars. In fact, the Rule is the single least cost-effective rule ever promulgated by EPA in the absence of actual hazards to human health or statutory obligation. And EPA candidly acknowledges that the Rule incurs these massive costs where plants’ emissions of hazardous air pollutants, the Rule’s putative target, present no risk to public health.

But the Clean Air Act does not give EPA *carte blanche* to sock it to a disfavored industry. The Act’s text authorizes EPA to tighten hazardous-emission standards only when “necessary” in light of “developments in practices, processes,

¹ Timothy Cama and Lydia Wheeler, Supreme Court Overturns Landmark EPA Air Pollution Rule, THE HILL (June 29, 2015), available at <https://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule/>. EPA repeated this view after this Court’s decision. See EPA Connect, Official Blog of the EPA Leadership (June 30, 2015), <https://web.archive.org/web/20210507092353/https://blog.epa.gov/2015/06/30/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>.

and control technologies.” Yet the Rule rests on two purported “developments” that are entirely unrelated, much less “necessary,” to advancing the statute’s goal of eliminating the risk to public health from hazardous emissions. EPA does not contend otherwise, instead reasoning that the Act empowers it to impose any improvement in control technologies on sources, irrespective of necessity—a position at odds with the Act’s plain text restricting the agency’s power to do just that.

Ultimately, the only goal that the Rule advances is EPA’s longstanding objective to push the remaining coal-fired plants into retirement. It is no coincidence that, on the same day that EPA issued the Rule, it also released three other rules—new greenhouse gas standards, effluent guidelines, and coal combustion residual standards—all targeting the same facilities.² Given that context and EPA’s own one-sided accounting of the Rule’s heavy costs and meagre benefits, the contrivance of the agency’s approach is obvious, and this Court should not “exhibit a naiveté from which ordinary citizens are free.” *Dep’t of Commerce v. New York*, 588 U.S. 752, 785 (2019).

EPA predicts that almost half the compliance costs of the Rule will fall on a single facility, the Colstrip Power Plant, for which Westmoreland is the sole mine-mouth coal supplier. Outside the Beltway, there are real consequences to EPA’s actions. At best, Colstrip’s owners will be forced to incur hundreds of millions of dollars of nonrecoverable compliance costs in the immediate future. But it is just as

² Three weeks later, the Administration proposed to ban future coal leases, and even withdraw pending leases, in the entire Powder River Basin, which produces about one-third of U.S. coal.

likely that Colstrip will close, devastating the prosperous local community, imperiling the jobs of thousands of Montanans, eliminating hundreds of millions in income to Montana households, and striking over a billion dollars in gross output over the coming years. By contrast, EPA’s own analysis of the Rule’s compliance costs and putative benefits indicates that a stay—unlike the Rule—would be in the public interest.

EPA will surely say it is unusual for the Court to consider this stay application while applications to stay EPA’s new greenhouse gas standards are also pending. But EPA, not Westmoreland or any other applicant, set all these events into motion by promulgating both rules on the same day, seeking to evade consideration of its actions under the Congressional Review Act by a new Congress and administration. For these reasons and those discussed below, the Court should stay the Rule.

OPINION BELOW

The D.C. Circuit’s order denying Applicant’s motion for a stay is unpublished, but reproduced at Appendix A. The Rule is published at 89 Fed. Reg. 38508 (May 7, 2024).

JURISDICTION

This Court has jurisdiction over this stay application under 28 U.S.C. §1254(1), and has authority to grant Applicant relief under the Clean Air Act, 42 U.S.C. §7607; the Administrative Procedure Act, 5 U.S.C. §705; and the All Writs Act, 28 U.S.C. §1651(a).

STATUTORY PROVISIONS INVOLVED

Section 112 of the Clean Air Act is reproduced at Appendix B.

STATEMENT

1. Under Clean Air Act § 112, 42 U.S.C. § 7412, EPA regulates so-called hazardous air pollutants, or HAPs, on a source category basis. Power plants have a unique status under Section 112, with Congress initially exempting them from the program, directing the Administrator to conduct multiple studies, and authorizing regulation only if the Administrator deemed it to be “appropriate and necessary.” CAA § 112(n), 42 U.S.C. § 7412(n). EPA spent twenty-five years vacillating on the question of whether regulation of power plants is appropriate and necessary at all. *See* 65 Fed. Reg. 79825 (Dec. 20, 2000) (yes); 70 Fed. Reg. 15994 (Mar. 29, 2005) (no); 77 Fed. Reg. 9304 (Feb. 16, 2012) (yes); 81 Fed. Reg. 24420 (Apr. 25, 2016) (yes); 85 Fed. Reg. 31286 (May 22, 2020) (no); 88 Fed. Reg. 13956 (Mar. 6, 2023) (yes).

2. EPA promulgated MATS in 2012, 77 Fed. Reg. 9304 (Feb. 16, 2012), along with a salvo of other rules targeting coal-fired power plants—early shots in what soon became known as the “War on Coal.” Befitting the Agency’s inability to resolve whether *any* regulation of power plants under Section 112 was “appropriate and necessary,” MATS imposed “nearly \$10 billion a year” in costs for “\$4 to \$6 million per year” in benefits from reductions in HAPs. *Michigan*, 576 U.S. at 749-50. Notwithstanding MATS’s nominal focus on mercury, U.S. power plants were responsible for only a miniscule portion of total mercury emissions, such that even eliminating those plants’ emissions achieved no meaningful benefit. *See* 76 Fed. Reg. 24976, 25001-02, 25073 tbl. 21 (May 3, 2011).

In fact, it was not HAPs at all that drove MATS's excessive costs (or putative benefits). Most of the multi-billion annual compliance costs were related to MATS's filterable particulate matter ("fPM") emission limit of 0.030 lb/MMBtu. Filterable particulate matter is not itself a hazardous air pollutant, but a surrogate used by EPA in lieu of establishing separate standards for multiple different metal HAP emissions that share common characteristics and are controlled in a similar manner. (Indeed, nearly all the particulate matter caught by filters is not HAP emissions at all.)³ This emission limit was a so-called "MACT" limit, based on the level of control of the maximum achievable control technology in the industry. For particulate matter, that control technology was electrostatic precipitators (ESPs) and fabric filters. 77 Fed. Reg. 9304, 9461 (Feb. 16, 2012).

As EPA's leadership intended, MATS ravaged the coal-fired power plant fleet. While EPA's regulatory analysis claimed that only 4.7 GW of coal-fired units would retire as a result of MATS, *see* 77 Fed. Reg. at 9407, that estimate was off by over an order of magnitude: 60 GW of capacity retired in the Rule's aftermath. *See, e.g., Nat'l Min. Ass'n Cmt. at 2 & n.4, EPA-HQ-OAR-2009-0234-20531, App.252.*

3. In 2020, EPA completed its first review of MATS. Section 112(d)(6) requires EPA to "review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under" Section 112 every 8 years. And under Section 112(f), EPA considers whether

³ *See* EPA-HQ-OAR-2018-0794-6919, Attachment 1 (data in "Metal Ratios" tab column "M" showing industry average ratio of only 0.0043 lb metal HAP to lb fPM).

existing standards eliminate unacceptable public health risks to nearby communities. 85 Fed. Reg. 31286, 31295 (May 22, 2020). EPA determined that there were no new developments in pollution control since MATS. *Id.* at 31298. It also determined that MATS not only protects public health and prevents adverse environmental effects, but does so with an ample margin of safety—which was hardly a surprise given the negligible health benefits from MATS’s reductions in HAP emissions. *Id.* at 31314. Accordingly, EPA finalized its review of MATS without any revisions. *Id.*

4. In January 2021, President Biden issued an Executive Order directing EPA to consider rescinding EPA’s decision not to revise MATS. 86 Fed. Reg. 7037 (Jan. 25, 2021). EPA proceeded as directed, undertaking a new review. *See* 88 Fed. Reg. 24854 (Apr. 24, 2023). In its proposed rule, EPA acknowledged that its new review confirmed “all modeled exposures to HAP to be below thresholds for public health concern.” *Id.* at 24895. EPA also acknowledged that there were “no new practices, processes, or control technologies for non-Hg metal HAP.” *Id.* at 24868.

5. But EPA pivoted in the final Rule, identifying two “development[s]” that it concluded supported ratcheting down the particulate matter standard. Rule at 38510. The first was that some power plants had reported filterable particulate matter emission rates lower than the 0.030 lb/MMBtu standard set in MATS. *Id.* And the second was that power plants had “learned and adopted ‘best practices’” for monitoring ESPs, which had otherwise “not undergone fundamental changes since 2011,” and had begun using “more durable” and “easier to clean” materials for fabric

filters. *Id.* at 38530. Based on these “developments,” EPA reduced the emission limit by 66%, to 0.010 lb/MMBtu. *Id.*

Squeezing out that last drop of emission reductions would come at massive expense. EPA’s estimates put the average annualized cost at \$10.5 million per ton of non-hg-metal HAP, and \$34,520 per ton of filterable particulate matter. 2024 Update to the 2023 Proposed Technology Review, EPA-HQ-OAR-2018-0794-6919. That makes this the *least cost-effective rule EPA has ever promulgated* that does not target a public health risk or was not mandated by statute. *See Comments of Westmoreland Mining Holdings LLC*, EPA-HQ-OAR-2018-0794-5935, at 3-4 (“Westmoreland Comments”), App.121-22.

In addition to being cost-ineffective, a metric that concerns how much it costs to reduce each ton of pollution, EPA prepared a cost-benefit analysis that compared the health and environmental benefits of regulation with the compliance costs that industry would incur implementing the rule. The Rule also flunked that cost-benefit analysis. It would impose an estimated \$860 million in compliance costs. Rule at 38512. Unlike with the 2012 MATS, EPA did not identify any monetized benefits from reducing HAPs. *Id.* And even considering purported co-benefits to the climate and from non-HAP pollutant reductions, monetized costs exceed monetized benefits by \$440 million. *Id.* In fact, the reality is even worse, given that EPA’s cost-estimate omits the downstream costs of plant closures that would be caused by the Rule.

6. While the Rule applies to all coal-fired power plants nationwide, a disproportionate burden falls on a single power plant in rural Montana: the Colstrip Power Plant that Westmoreland supplies. By EPA's analysis, Colstrip will bear almost half of the Rule's total compliance cost.⁴

The Colstrip Power Plant and the Rosebud mine that supply it are the economic engine of this rural and impoverished part of the State. As a result of the well-paying jobs at the mine and power plant, Colstrip is a prosperous community with a robust local tax base, excellent schools, and quality government services. For example, Colstrip has a median household income that is more than 75% higher than the state average and a greater percentage of adults with high school diplomas (98.8%) than Bethesda, Maryland (98.3%), let alone Rosebud County, Montana (85.1%). *Westmoreland Cmts.*, Attachment (Barkey Report), at 10, App.151. And Colstrip powers hundreds of thousands of homes and businesses in a part of the country that includes little reserve capacity and where unique state laws like the Montana Major Facility Siting Act make bringing new power plants online particularly challenging. A premature retirement of Colstrip would prevent utilities from providing adequate and reliable electrical service to customers, and there is no feasible, near-term way to replace the power it provides.⁵

⁴ See EPA-HQOAR-2018-0794-6919, Attachment 1 (estimating total annualized costs of over \$87 Million, with over \$36.8 Million annually at Colstrip alone).

⁵ *Northwestern Energy Cmts.*, EPA-HQ-OAR-2018-0794-5980, at 2, App.227 (“[I]f Colstrip is closed in the near term, NorthWestern cannot provide adequate and reliable electrical service for its Montana customers without new replacement baseload capacity. Colstrip currently plays an essential role in baseload capacity for

Nearly all coal-fired power plants that implemented MATS (instead of retiring) employed fabric filters or ESPs. But the engineers at the Colstrip Power Plant were able to meet the control technology limitation using a more cost-effective technology that achieves a high level of performance at very little cost by employing a venturi wet scrubber to control particulate emissions, achieving the MACT emission limits and saving ratepayers hundreds of millions of dollars in retrofit costs.

But in the War on Coal, no good deed goes unpunished. Already cost-ineffective on an industry basis, the Rule is even more cost-ineffective for the Colstrip Power Plant, imposing costs for HAP removal that are over 50% higher than EPA's estimated average. *See* EPA-HQ-OAR-2018-0794-6919, Attachment 1 (estimating costs of \$15.8 to 16.6 million per ton). And that's crediting EPA's numbers. Unrebutted record evidence showed that EPA underestimated the cost of controls at Colstrip, with the most promising technology for meeting the new emission limit costing \$56.5 million annually and true cost-effectiveness levels of no lower than \$73,200 per ton of filterable particulate matter controlled. *See Talen Montana Cmts.*, EPA-HQ-OAR-2018-0794-5987, at 20, App.462. Going by those numbers, the actual cost for HAP removal is \$32.5 million per ton—over *three times* EPA's estimate of the industry average.

NorthWestern, and there are no near-term feasible means to replace Colstrip's capacity with other existing NorthWestern capacity or market purchases....”).

7. On June 11, 2024, Westmoreland filed a petition for review in the D.C. Circuit. On June 24, Westmoreland petitioned EPA for a stay pending review. EPA has not responded. On June 27, Westmoreland moved for a stay of the Rule in the D.C. Circuit, explaining that the Rule exceeded EPA’s statutory authority, and would cause irreparable harm to Westmoreland and others. On August 6, the D.C. Circuit denied the pending motions to stay the Rule in nine consolidated cases. The D.C. Circuit provided no rationale for its denial beyond the perfunctory statement that “Petitioners have not satisfied the stringent requirements for a stay pending court review.” App.1.

REASONS FOR GRANTING THE APPLICATION

“Stay applications are nothing new” and “seek a form of interim relief perhaps as old as the judicial system of the nation.” *Ohio v. EPA*, 603 U.S. ___, 144 S.Ct. 2040, 2052 (2024) (cleaned up). In deciding whether to grant a stay, this Court considers “(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies.” *Id.* at 2052. All four factors weigh heavily in favor of a stay here. EPA’s abrupt reversal on the need to ratchet down emissions is contrary to law and arbitrary and capricious. Absent a stay, Westmoreland and others in the industry will be forced to incur nonrecoverable compliance costs, and the Rule meanwhile threatens substantial injury to both regulated power plants and local communities dependent on those plants. Unlike in *Ohio*, where both sides had “strong

arguments about the harms they face and the equities involved,” *id.* at 2053, the administrative record here demonstrates that the equities strongly favor a stay.

I. Applicants Are Likely To Prevail on the Merits

Westmoreland is likely to succeed on the merits. The Rule exceeds EPA’s statutory authority, both by determining that the revised emission standards are “necessary” given the unprecedented cost-effectiveness, failed cost-benefit analysis, and lack of public health benefits, as well as by failing to identify any relevant “development” on which to base the Rule. EPA is owed no deference on its interpretation of either statutory term. *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244 (2024).

A. It Was Not “Necessary” For EPA To Revise MATS

1. Congress did not give EPA a blank check in Section 112(d)(6) to revise MACT standards to follow whatever policy direction the Agency’s current political leadership prefers. Instead, Congress directed EPA periodically to review emission standards established under Clean Air Act Section 112 and revise them only “as necessary (taking into account developments in practices, process, and control technologies).” 42 U.S.C. § 7412. The term “necessary” is a limitation on the agency’s discretion and authority, carrying real weight. *See, e.g., United States v. Menasche*, 348 U. S. 528, 538-539 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute.”) (cleaned up). Specifically, it requires that revision to Section 112 emission standards be necessary to achievement of Section 112’s aim—preventing harm to public health or the environment resulting from HAP emissions. After all, Congress did not direct EPA to revise standards “taking

into account developments in practices, processes, and control technologies,” but to do so only “as necessary” taking into account relevant developments.

EPA’s error in the Rule is that it loses sight of the understanding that an action or intervention can only be “necessary” with respect to some end or goal. As every law student knows, *McCulloch v. Maryland*, 17 U.S. 316 (1819), recognized that “necessary” has a spectrum of meanings ranging from absolute prerequisite (“that one thing to which another may be termed necessary, cannot exist without *that other*”) to conducive (“no more than that one thing is convenient, or useful, or essential *to another*”). *Id.* at 413 (emphasis added). Across that entire spectrum, “necessary” describes the relationship between the thing in question (*e.g.*, the national bank) and a goal or end (*e.g.*, making effective the exercise of Congress’s power to tax and spend). It would be nonsensical to discuss the necessity of the former in the absence of the latter.

Dictionary definitions echo the point. For example, Merriam-Webster defines the term as “absolutely needed,” with the example: “Food is *necessary* for life.”⁶ Similarly, the *American Heritage Dictionary of the English Language* defines “necessary” as “needed or required,” both of which terms reference some end; nothing is “needed” or “required” on its own terms. *See American Heritage Dictionary of the English Language* (5th ed. 2011) (defining “need” in relevant part as “[a] condition or situation in which something must be supplied in order for a

⁶ *Merriam-Webster Online Dictionary* (last updated Aug. 9, 2024), available at <https://www.merriam-webster.com/dictionary/necessary>.

certain condition to be maintained or a desired state to be achieved,” and defining “required” as “[t]o have as a requisite or necessity”).

Indeed, EPA itself has recognized that the term “necessary” requires consideration of the putative health or environmental benefits of regulation. For example, in a previous Section 112(d)(6) review EPA considered the “effect in reducing public health risk” in determining that it was not “necessary” to revise HAP emission standards for synthetic organic chemical manufacturers. 71 Fed. Reg. 76603, 76606 (Dec. 21, 2006). Similarly, in the original MATS Rule, EPA interpreted the term “necessary” elsewhere in Section 112 to authorize regulating HAP emissions from coal-fired power plants “for a variety of reasons, including that hazards to public health and the environment . . . remain after imposition of the requirements of the CAA.” 76 Fed. Reg. 24976, 24986 (May 3, 2011) (proposal); 77 Fed. Reg. 9304, 9311 (Feb. 16, 2012) (final). These interpretations follow naturally from Section 112’s evident aim of preventing harm to public health or the environment from HAP emissions. *See, e.g.*, 42 U.S.C. § 7412(b)(2)-(3) (providing that EPA’s authority to regulate specific pollutants turns on their “threat of adverse human health effects” or “adverse environmental effects”); *id.* § 7412(c)(3) (providing that EPA’s authority to regulate area sources turns on their emissions’ “adverse effects to human health or the environment”); *id.* § 7412(c)(9) (authorizing EPA to exempt entire source categories from regulation based on the health impact of their emissions); *id.* § 7412(e)(2) (requiring EPA to prioritize the issuance of

standards based on, *inter alia*, “the known or anticipated adverse effects of such pollutants on public health and the environment”).

The Court has interpreted the term “necessary,” as used in the Clean Air Act, in the same fashion. *Train v. Natural Resources Def. Council*, 421 U.S. 60, 98 (1975), considered 42 U.S.C. § 7410(a)(2)(H), which provides for revision of state implementation plans for national ambient air quality standard plans “from time to time *as may be necessary* to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard.” That language, the Court concluded, requires “state plans be capable of such modifications as are necessary to meet the basic goal of cleansing the ambient air *to the extent necessary to protect public health.*” *Id.*

These prior interpretations may seem unremarkable, but that is the point: of course necessity has to be measured with respect to some goal, and it is hardly surprising that, in the context of the Clean Air Act, that goal will typically be something like the protection of public health.

The Rule, however, rejects that common-sensical understanding through its departure from the plain meaning of “necessary.” Rather than assess whether developments further any goal, the Rule “is based on the premise that, to the extent there are controls available to reduce HAP emissions, and those controls are of reasonable cost, sources should be required to use them.” Rule at 38531. According to the Agency, the statute affords it absolute discretion to consider, or not, public

health and environmental effects in determining whether to revise Section 112 standards, and here it simply chose not to do so. *Id.* at 38525. But eliminating consideration of the goal of Section 112 regulation—preventing harm to public health or the environment resulting from HAP emissions—writes the word “necessary” out of the statute. All that remains is consideration of availability and cost, which do not add up to necessity: that a given control is available and that EPA believes the cost is “reasonable” does not mean that it is necessary to prevent harm to the public health or environment, or any other end.⁷

This reinterpretation of the statutory standard is the cornerstone of the Rule. Without it, EPA could not possibly justify further reductions in emissions limits that, by its own accounting, already protect public health and the environment with an ample margin of safety.

Finally, any interpretation of the term “necessary” that does not consider technological developments in light of a specific objective raises non-delegation concerns. If necessity is not justified by reference to health and environmental endpoints, there would be no “intelligible principle” for what counts as “necessary.” “A construction of the statute that avoids this kind of open-ended grant should

⁷ Defending its interpretation, EPA cited *Association of Battery Recyclers v. EPA*, 716 F.3d 667, 672 (D.C. Cir. 2013). EPA, Summary of Public Comments and Responses on Proposed Rule, EPA-HQ-OAR-2018-0794-6922 (Apr. 2024), at 144. But that decision construes Section 112(d)(6) to deny EPA discretion to consider “public health objectives... in determining whether more stringent standards were ‘necessary,’” which is at odds with EPA’s discretion-granting interpretation. In any event, the decision’s cursory analysis is unpersuasive because, among other things, it does not address the meaning of the statutory term “necessary” and adopts an interpretation depriving that term of any force.

certainly be favored.” *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980). And here that is the construction that comports with the ordinary meaning of “necessary.”

2. EPA identified two supposed benefits—eliminating lagging performers and achieving HAP emission reductions—that it contends made the Rule “appropriate” (Rule at 38529) and “a worthwhile exercise of the EPA’s CAA section 112(d)(6) authority” (*Id.* at 38553). EPA’s use of “appropriate” and “worthwhile” tacitly admit that both fall short of “necessary.” In any case, neither ground suffices to justify the Rule.

EPA claimed that “a small number of units [are] lagging behind and emitting significantly higher levels of these HAP in communities surrounding those units,” making “it appropriate to require these lagging units to bring their pollutant control performance up to that of their peers.” Rule at 38529, *see also id.* at 38524. Indeed, this is the *only* issue that EPA identifies as “what the revised standards seek to remedy.” *Id.* at 38524. EPA’s aspersions refer primarily to Colstrip, which EPA represents as “unable” to comply with the Rule’s new filterable particulate matter standard absent “the costliest PM control upgrade option,” Rule at 38531, 38522, and which will bear nearly half the costs of the entire Rule.⁸ But this argument is illogical on its face: that a given source meets the limit, but not by as large a margin as some other sources, has no relationship to whether revisions are “necessary” to

⁸See EPA-HQOAR-2018-0794-6919, Attachment 1 (estimating total annualized costs of over \$87 Million, with over \$36.8 Million annually at Colstrip alone).

meet a specific goal, let alone the goal of protecting public health and the environment from HAP emissions.

Even assuming *arguendo* that this has anything to do with necessity, the record does not support EPA's finding because *Colstrip is not, in fact, a straggler on metal HAP emissions*. EPA's contention to the contrary is an artifact of the Agency's use of filterable particulate matter as a compliance surrogate for metal HAP. Due to the low impurities in Westmoreland coal from the Rosebud mine, the filterable particulate matter emitted by Colstrip contains less metal HAP than at nearly any other power plant in America. EPA-HQ-OAR-2018-0794-6919, Attachment 1 ("Metal Ratios" tab column "M"). Accordingly, Colstrip's filterable particulate matter surrogate emissions are offset by the far lower-than-average metal HAP content of that filterable particulate matter, resulting in metal HAP emissions that are around the industry average. *See* EPA-HQ-OAR-2018-0794-6919 Attachment 1. EPA's decision to ignore the lower metal HAP content of Colstrip's emissions, which was evident on the face of the record and highlighted in Westmoreland's comments, EPA-HQ-OAR-2018-0794-5935, at 18 & 19 n.27, n.29, App.136-37, is particularly arbitrary and capricious given that Section 112 authorizes EPA to regulate HAP emissions, not filterable particulate matter. *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (An agency action is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency").

Second, despite the Rule being the single least cost-effective discretionary exercise of EPA’s Clean Air Act authority ever, and with monetized net benefits being outweighed by over \$440 million, EPA concluded that the Rule was a “worthwhile exercise of the EPA’s CAA section 112(d)(6) authority” based on “non-monetized benefits from HAP reductions.” Rule at 38553.

But reliance on non-monetized benefits is not a magic trick to transform a \$440 million deficit into a “worthwhile” exercise of authority. Monetizing benefits from HAP reductions is something EPA regularly does, even if it chose not to do so in this Rule. For example, when EPA monetized mercury reductions in the 2012 MATS, it arrived at a \$4-\$6 million benefit for reducing 20 tons of mercury, 77 Fed. Reg. 9304, 9425 (Feb. 16, 2012).⁹ This Rule would eliminate only 900-1000 pounds of mercury emissions, Rule at 38512, approximately 2.5% of the reduction from the 2012 rule. EPA does not explain its refusal to monetize HAP benefits this time around. But simple common sense suggests that EPA chose not to do so because the dollar figure would be negligible—well less than \$1 million per year—and would be dwarfed by the Rule’s massive costs. The other non-monetized benefit EPA associated with the Rule was from metal HAP reductions, but EPA has elsewhere explained those benefits are likely to be a “small fraction” of those quantified. *E.g.*, 85 Fed. Reg. 31286, 31296-97, 31304 (May 22, 2020). This truly is a situation where

⁹ EPA also suggested benefits might be significantly lower. 77 Fed. Reg. at 9428 n.371.

it is not “rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” *Michigan*, 576 U.S. at 752.

In any case, it is arbitrary and irreconcilable with the record for EPA to claim that non-monetized benefits from HAP reductions constitute a material benefit capable of trumping the Agency’s own conclusion that costs exceed monetized benefits by hundreds of millions of dollars. EPA’s quantitative risk analysis concluded that the prior MATS standard already protects health with a margin of safety *orders of magnitude* below the 100-in-1 million risk threshold EPA presumptively treats as acceptable. *E.g.*, 85 Fed. Reg. 31286, 31316 (May 22, 2020). Specifically, after modeling exposure for communities around each individual facility, including Colstrip, EPA found that “[t]here are only four facilities in the source category with cancer risk at or above 1-in-1 million, *and all of them are located in Puerto Rico.*” *Id.* at 31319; *see also id.* at 31316 (summarizing similarly low results for non-cancer risk) (emphasis added). This modeling was highly conservative, based on “‘maximum individual risk’ experienced by the most highly exposed individual living in proximity to the source, presuming continuous exposure for 70 years.” *Id.* at 31304 (emphasis added).

And the true avoided risk is infinitesimal. EPA’s quantitative analysis of risks in the 2020 residual risk review under the prior MATS standard found that, for Colstrip in particular, the Cancer Maximum Individual Risk (MIR) was 1.47E-07 (*i.e.*, 0.147 in 1 million), and predicted Cancer Incidence of 5.82E-06 (*i.e.*, 0.0000582; *i.e.*, one avoided case every 17,182 years). *See* EPA, Residual Risk Assessment for

the Coal- and Oil-Fired EGU Source Category in Support of the 2020 Risk and Technology Review Final Rule (Sept. 2019) (Docket ID EPA-HQ-OAR-2018-0794-4553), App. 10, Tables 1 and 2a.¹⁰

Reducing risk that is already less than 1-in-1-million yields no material benefit, and certainly none that could rationally counterweigh the Agency’s \$440 million net-negative cost benefit analysis. Indeed, 1-in-1 million is not just an ultra-conservative risk threshold, but is *the de minimis* risk threshold set by Congress itself, below which an entire source category may be delisted, *i.e.*, not regulated at all under Section 112. 42 U.S.C. §7412(c)(9).

3. Contrary to EPA’s suggestion, construing the term “necessary” to include health benefits does not collapse the distinction between a Section 112(f) residual risk review and a Section 112(d)(6) necessity review. Section 112(f) includes a mechanical assessment of residual risk in accordance with the pre-existing *Benzene* framework that occurs a single time following establishment of MACT standards, whereas Section 112(d)(6)’s necessity review occurs every eight years, *ad infinitum*. Moreover, residual-risk review focuses on just that, residual risk, whereas necessity review focuses on the ability of new developments to meaningfully improve public health or the environment in a cost-appropriate manner. There is no reason to

¹⁰ “Cancer incidence” is the number of excess cancer cases per year, taking into account the exposure and the population exposed. The inverse of cancer incidence is the number of years it takes to have one excess cancer case. *See, e.g., id.* at 6 (“The total estimated cancer incidence from this source category is 0.04 excess cancer cases per year, or one excess case in every 25 years [1/0.4=25].”).

believe that Congress nonsensically intended necessity review to be blind to considerations of public health that are the basis for Section 112.

4. Even setting aside the lack of any benefit or risk creating a necessity, EPA must consider costs when determining whether regulation is “necessary.” *Michigan*, 576 U.S. at 756. Furthermore, EPA’s practice is to consider “feasibility, utility, [and] cost effectiveness as part of its technology review.” *Ass’n of Battery Recyclers, Inc.*, 716 F.3d at 674. Because EPA’s practice is to rely on these factors, any unexplained failure to do so would constitute an unreasoned and therefore arbitrary and capricious reversal. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). But the Rule utterly fails to consider cost in any meaningful and non-arbitrary manner.

Cost-effectiveness, which is the cost of reducing a ton of a given pollutant, is the lodestar of cost considerations. But EPA was forced to candidly admit that “the cost-effectiveness values for [the Rule] are higher than cost-effectiveness values that the EPA concluded were not cost-effective,” Rule at 38523. That is putting it lightly. In fact, this Rule appears to be the single least cost-effective rule ever enacted by EPA where revisions were not necessary to prevent unreasonable risk to public health or the environment or mandated by law. *Westmoreland Cmts.* at 3-4, App.121-22. EPA regularly and rightly rejects such cost-ineffective controls in its Section 112 rulemakings as “unnecessary,” including for petroleum refining, iron ore processing, integrated iron and steel manufacturing, Portland cement, and lead-

acid battery manufacturing industries.¹¹ Reasonableness demanded the same here, and that’s even before taking into account the unrebutted record evidence that the costs to Colstrip are double or more than EPA’s estimates.¹²

To dodge the Rule’s transparent cost-ineffectiveness, EPA purported to “consider cost” via a grab-bag of alternative cost metrics including “typical capital and total expenditures for the power sector” “total power sector sales” and “total PM upgrade control costs and emissions of the coal fleet.” EPA’s claim that this approach was consistent with historic practice is wrong. Rule at 38532 n.52. In reality, *every* rulemaking cited by EPA either found cost-effectiveness to be within the range of values EPA had accepted historically, before considering other cost metrics,¹³ or *declined* to enact a standard due to facility-specific determinations of

¹¹ See Rule at 38522-23. According to EPA, the Rule imposes industrywide cost effectiveness of \$10.5 Million per ton of non hg-metal HAP, and \$34,520 per ton of filterable particulate matter, with EPA calculating cost-effectiveness at Colstrip’s units of \$16.6 Million and \$15.8 Million respectively per ton of non hg-metal HAP, and \$37,434 and \$35,722 per ton of filterable particulate matter. See EPA-HQ-OAR-2018-0794-6919, Attachment 1. This far exceeds thresholds EPA previously found cost-ineffective. See 80 Fed. Reg. 75178, 75201 (Dec. 1, 2015) (petroleum refining) (\$10 million/ton of non-Hg HAP metals, \$23,000 per ton of filterable particulate matter); 85 Fed. Reg. 45476, 45483 (July 28, 2020) (iron ore processing) (\$16 million per ton non-Hg HAP metals); 85 Fed. Reg. 42074, 42f090 (July 13, 2020) (\$14,000 per ton volatile HAP/\$7 million/ton non-Hg HAP metals); 78 Fed. Reg. 10006, 10,020-21 (Feb. 12, 2013) (Portland cement) (\$268,000/ton particulate matter); 88 Fed. Reg. 11556, 11565 (Feb. 23, 2023) (lead-acid battery manufacturing) (\$4.7M per ton of lead); see also EPA, The Benefits and Costs of the Clean Air Act from 1990 to 2020 (Apr. 2011) (noting that PM “controls more costly than \$15,000 per ton may not be cost-effective”).

¹² *Talen Montana Cmts.*, EPA-HQ-OAR-2018-0794-5987, p.20, App.462; see also EPA-HQOAR- 2018-0794-5789, Attachment 1 for EPA estimate of metal HAP to filterable particulate matter ratio for Colstrip.

¹³ 87 Fed. Reg. 27002, 27008 (May 6, 2022); 87 Fed. Reg. 1616, 1635 (Jan. 11, 2022); 80 Fed. Reg. 37366, 37381 (June 30, 2015); 80 Fed. Reg. 14248, 14254-56 (March 18,

“poor cost effectiveness” even after considering other cost metrics.¹⁴ Tellingly, these were the rulemakings EPA apparently thought *most helpful* to rely on. And as further indicia of arbitrariness, EPA used those alternative cost comparisons solely on an industrywide basis, Rule at 38532, despite every historic example EPA cited accounting for facility specific calculations of those same cost metrics and/or cost effectiveness. *Supra* at n.13 and n.14. It is inexplicable, and inexcusable, that EPA claimed to act consistent with its past practice, while doing the precise opposite. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

4. EPA’s action was further arbitrary and capricious by failing to consider several other highly relevant factors affecting the necessity, cost, and impacts of the Rule.

First, EPA arbitrarily failed to consider the cumulative impacts of other changes to relevant regulations applicable to the same sources. That includes EPA’s “Power Plant Rule,” which imposes carbon capture and sequestration (CCS) requirements on these very same existing coal-fired power plants under Clean Air Act Section 111, and was announced the same day as the Rule.¹⁵ In similar

2015); 77 Fed. Reg. 58220, 58226-28 (Sept. 19, 2012); *see also* 77 Fed. Reg. 49490, 49523 (Aug. 16, 2012) (EPA erroneously pincited as a technology review, whereas most of that rule was not based on section 112(d)(6), *see, e.g., id.* at 49501; regardless, the rule proposal shows EPA relied on cost effectiveness for the one change under 112(d)(6), 76 Fed. Reg. 52738, 52755 (Aug 23, 2011)).

¹⁴ 87 Fed. Reg. 1616, 1633 (Jan. 11, 2022); 80 Fed. Reg. 50386, 50398 (Aug. 19, 2015).

¹⁵ *See* “New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-

circumstances, the D.C. Circuit held that an “impending [regulatory change regarding an] undeniably related source category is clearly a ‘relevant factor[]’ or an ‘important aspect of the problem’ that must be considered.” *Portland Cement Association v. EPA*, 665 F.3d 177 (D.C. Cir 2011) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43). Yet EPA did not consider it.

EPA’s failure to consider the Power Plant Rule’s impacts undermines crucial aspects of the Agency’s reasoning in support of the Rule. Most of all, that failure renders EPA’s analysis of plant closures little better than fiction, because it does not address the fact that plant owners will need to determine how to comply with *both* rules in an integrated manner, compounding the risk of closures. Similarly, EPA’s cost analysis assumes that large capital expenditures (e.g. a fabric filter system) can be annualized based on the life of the equipment, but this arbitrarily ignores the fact that such large expenditures will have a much higher annualized cost if the Power Plant Rule leads to premature closure of facilities.

Second, EPA arbitrarily refused to consider crippling costs and societal harms associated with a potential retirement of Colstrip. These costs far outstrip any putative benefits of the Rule. As the Supreme Court made clear in *Michigan*, “‘cost’ includes more than the expense of complying with regulations; any disadvantage could be termed a cost.” 576 U.S. at 752. EPA ignored Westmoreland’s comments that the Rule threatens the viability of Colstrip and the Rosebud mine,

Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule,” 88 Fed. Reg. 33240 (May 23, 2023)

threatens their workers' livelihoods, and threatens the welfare of the Colstrip community. *Westmoreland Cmts.* at 14, App.132. Westmoreland submitted a detailed economic report showing that closure of the Rosebud mine alone would inflict a multi-billion-dollar blow on the State of Montana, destroying over 1,800 well-paid jobs, eliminating over \$330 million in annual revenue to Montana businesses, and reducing state government revenue by \$40 million per year. *Id.* Attachment (Barkey Report) at 10, App.145.¹⁶ If Colstrip closed, the damage to Montana would be even greater, costing the state over \$17 billion in lost economic production between 2028-2043. *Talen Montana Cmts.*, EPA-HQOAR-2018-0794-5987, p.6, App.448. EPA *ignored* all of this. These economic costs to the State of Montana and its citizens are a critical part of the "costs" of the Rule that would not allow EPA to reasonably or rationally find the Rule to be "necessary" under Section 112(d)(6).

* * *

In sum, Westmoreland is likely to prevail in showing that EPA's determination that it was "necessary" for the Agency to promulgate a revision to MATS is contrary to law and arbitrary and capricious.

¹⁶ Dr. Patrick Barkey, Director of the Bureau of Business and Economic Research at the University of Montana, updated his research in conjunction with this motion for stay. See Appendix H, Exhibit 1, Declaration of Dr. Patrick Barkey in Support of Petitioner's Motion to Stay Final Rule ("Updated Barkey Report").

B. The Rule is Not Based on Any Valid Development Under CAA Section 112(d)(6)

Applicants are also likely to succeed in their challenge because EPA failed to identify any “*developments* in practices, processes, and control technologies” on which to base the drastically reduced emission limits in the Rule.

Congress’s use of the term “development” entails changes in practices, process, and control technologies that are both new (*i.e.*, emerging after 2012 status quo) and significant. *See* Development, *American Heritage Dictionary of the English Language* (5th ed. 2011) (“A significant event, occurrence, or change.”); Development, Random House Kernerman *Webster’s College Dictionary* (2010) (“A significant consequence or event.”). This plain meaning of the term “development” is not only the best interpretation, but also how EPA understood the term in 2020, when it determined that there were no new developments that merited revisions to MATS. *See* 84 Fed. Reg. 2670, 2687 (Feb. 7, 2019) (listing the specific types of changes that EPA believed constituted “developments” under Section 112(d)(6)).

Here, EPA identified no developments in practices, processes, or control technologies that were either new or significant since 2012, let alone since EPA conducted its last review in 2020. Although EPA asserts that it identified “developments in practices, processes, and control technologies that warrant revisions to the MACT standards for this source category,” Rule at 38518, elsewhere the Agency more accurately characterizes its findings as “developments in the performance of sources within the category since the EPA finalized MATS,” *id.* at 38529. EPA undoubtedly made this concession because the control technologies,

practices, and processes considered by EPA are not new—each existed at the time of the 2012 MATS Rule.

In this regard, none of the putative developments identified by EPA have any nexus to the Agency’s revised filterable particulate matter limit. For ESPs, EPA recognizes that “ESP technology has not undergone fundamental changes since 2011” and instead cites industry experience “associated with monitoring ESP operation.” *Id.* at 38530. For fabric filters, EPA likewise notes improvements in materials that make filters more durable, *id.*, but the Agency never claimed that they are more effective at particulate reduction than a properly maintained fabric filter in 2011, much less by the margins EPA reduces the standard to in the Rule.

Likewise, EPA’s reliance on developments “in the costs of control technologies” (Rule at 38510, 38534) is also arbitrary, given the singular cost-ineffectiveness of the rule. The fact that a Rule which was not cost-effective in 2012 is still not cost-effective now, albeit now somewhat less costly for some facilities not the primary target of the Rule, cannot be said to be a relevant development.

The only “development” is EPA’s reinterpretation of Section 112(d)(6) as authorizing the Agency to adopt more stringent emission standards despite the lack of identified developments in the effectiveness of pollution control technology at meeting lower emission limits. Unsupported by any real and relevant developments, the Rule is, at best, an arbitrary and unreasonable regulatory capture of the “margin of error” that coal-fired power plants use to ensure compliance with MATS,

and, at worst, just another volley in the War on Coal. It is not a permissible application of Section 112(d)(6).

II. The Rule Will Cause Substantial Irreparable Harm

The applicant States make a compelling case that the Rule will irreparably harm them through the catastrophic consequences for the power grid, increases in retail electric rates, and burdens on the States themselves. In particular, the lack of any indication in the record that EPA appropriately consulted with NERC and FERC before imperiling electric reliability is inexcusable. But the Court should not lose sight of the fact that the Rule threatens the remaining coal-fired power plants and the mining companies that supply those plants.

As Talen and Northwestern explained in the court below, there is a substantial risk that Colstrip will be forced to close to avoid having to spend hundreds of millions of dollars on a cost-ineffective new pollution control system that may operate for only a few years. *See Alcresta Therapeutics, Inc. v. Azar*, 755 Fed. Appx. 1, 5 (D.C. Cir. 2018) (showing of irreparable harm satisfied where corporate official submitted a declaration attesting that the company would “likely be forced to cease operations”); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (irreparable harm where the moving party faced a “significant risk” of unrecoverable financial injury).

A shutdown of Colstrip would devastate Westmoreland. Westmoreland is dependent on the Rosebud mine for its financial well-being, and the Rosebud mine, in turn, is dependent on the Colstrip Power Plant for its survival. Cottrell Decl. ¶¶ 18-21, App.524-25. If Colstrip closes, Westmoreland will lose between 6.5 and 7

million tons of coal sales each year. *Id.* at ¶ 25, App.526. Westmoreland would need to close the mine, which would result in Westmoreland losing 26.4% of its revenue and laying off 17% of its employees. Closure of the mine would also strand over \$100 million in permitting, mine development, equipment, and associated costs to support the mine's operations. *Id.* at ¶¶ 27-29, App.527-28.

If the Rule does not shutter Colstrip, Applicants will be forced to expend substantial, unrecoverable expenditures. The compliance deadline for the Rule is only three years away, Rule at 38519, but both the owners of Colstrip and Westmoreland need to make hiring and investment decisions now. Without a stay, they will be forced to expend substantial, unrecoverable expenditures. *See Ohio*, 144 S.Ct. at 2053 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220 (1994) (Scalia, J., concurring in part and concurring in the judgment)).

III. The Balance of the Equities and the Public Interest Favor a Stay

A stay would not harm non-parties. Unlike *Ohio*, where both sides had “strong arguments about the harms they face and the equities involved,” in this Rule EPA determined that public health and the environment are *already* protected with an ample margin of safety. Rule at 38518, 38525. Indeed, given that the supposed avoided emissions from Colstrip are calculated to only result in avoiding one occurrence in multiple *millennia* under a maximum exposure scenario, 24 hours per day, 365 days per year, for decades, a stay will not materially affect any such risks. The Rule is also a net negative for society monetarily, indicating that the public interest would be harmed by the Rule going into effect, not by a stay. *Id.* at 38511-12.

On the other side of the scale, the public would benefit from a stay of this unnecessary Rule. In addition to the potential harm to ratepayers and electric consumers, the Colstrip community and the State of Montana would be devastated if the Colstrip Power Plant is forced to close rather than comply with the Rule.

Thanks to the good jobs provided by the plant and mine, and the downstream economic benefits, the median household income in Colstrip is substantially higher than the rest of Rosebud County and the state as a whole. *See Updated Barkey Report at 2, App.490.* There are fewer low-income residents in Colstrip—only 23.2% of Colstrip households make less than \$40,000 per year, while nearly half of households in the rest of Rosebud County make less than that amount—and more high income residents—25.6% of households in Colstrip have an annual household income of \$125,000 or more, compared to 10.2% in the rest of Rosebud County. *Id.* But if Colstrip closes, nearly 600 jobs would be lost overnight at the mine and plant. *Id.* at 5. The impacts of the closure would ripple through the economy, and over 3,000 jobs lost would be lost statewide. *Id.* These would not be just any jobs—with average earnings per job over \$84,000 per year, *id.* at 7, these are the jobs that supports families and communities.

In addition, the State of Montana would be irreparably injured. Personal income in the State would be reduced by \$240 million per year, *id.* at 6, with a total economic impact exceeding \$1 billion every year, *id.* at 7. The State would lose over \$100 million in revenue. *Id.* at 8. Closure of the plant and mine would also likely

cost the State thousands of residents. *Id.* at 9. And all of these injures would be for a rule that EPA acknowledges has net negative benefits.

The saga of MATS likewise shows that a stay is necessary to avoid these injuries. Twelve years ago, the courts declined to issue a stay of the original MATS rule based on EPA’s refusal to consider the costs of regulation. After this Court later held MATS to be arbitrary and capricious, petitioners were unable to obtain effective relief because, as EPA’s leaders assured their political allies following its loss at the Supreme Court, “the majority of power plants are already in compliance or well on their way to compliance.”¹⁷ The Court should not permit this history to repeat itself.

CONCLUSION

This Court should stay the Rule pending judicial review.

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¹⁷ *Supra* n.1