No. 24A179

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.

REPLY IN SUPPORT OF 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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INTRODUCTION

In 118 pages of responsive briefing, EPA, state intervenors, and environmental intervenors fail to identify any legally relevant, concrete, meaningful benefit or necessity for the Rule. And that is just the start of the Rule's legal problems. EPA cannot point to any rational consideration of the Rule's $440+ million in net social harms or the Rule's historic cost-ineffectiveness. Moreover, while EPA could not even bring itself to claim it satisfied the statutory term "necessary," even the two sole bases on which EPA claimed the Rule could be considered "appropriate" or "worthwhile" are both arbitrary: EPA's quantitative risk assessment identifies no meaningful health benefits, and its claim about Colstrip's purportedly outlier HAP emissions is false. Likewise, intervenor's sound and fury about abstract health benefits signifies nothing in light of EPA's own analyses showing no risk reduction in *millennia*. The lack of any statutory basis for the rule, the imminent and nonrecoverable costs imposed on Applicants, and the lopsided public interest against the Rule all support a stay.

ARGUMENT

I. Applicants Are Likely To Prevail on the Merits.

A. EPA Fails To Identify Any Necessity for the Rule.

1. Section 112(d)(6) makes clear that a development alone is insufficient to revise a standard—the revision must also be "necessary." App.12-17. EPA reads that limitation out of the statute.

EPA (at 14-20) and environmental intervenors (at 18) argue that "necessary" refers to any development in control technology. That is untenable. First, EPA's

interpretation renders the term "necessary" superfluous. *See 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). EPA's reading of section 112(d)(6) posits that, because section 112(d)(2) requires initial standards be set based on achievability and uses the phrase "emission standards promulgated under this subsection," section 112(d)(6)'s use of the term "necessary" requires a consideration of only whether "further reductions in emissions have become 'achievable' as a result of relevant developments." EPA Br.16. That interpretation quite literally reads the "as necessary" restriction on EPA's discretion out of the statute:

> The Administrator shall review, and revise ~~as necessary~~ (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

The agency's interpretation cannot be reconciled with the rule that statutes should be construed "so as to avoid rendering superfluous" any statutory language." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). Nor does this interpretation make any sense under the policies of section 112: why would Congress, in a provision aimed at driving down those emissions most harmful to human health, disregard their impact on health?

The only reading to give meaning to the whole provision is that, by directing EPA only to make such revisions "as necessary," Congress intended for EPA to undertake the common-sense analysis of whether further reductions are necessary to protect public health, in addition to being achievable. *See* App.12-16. Confirming as much is the fact—which EPA acknowledges (at 18)—that Congress used the term

"necessary" in an adjacent provision, section 112(n), to direct consideration of health. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (reciting "presumption that a given term is used to mean the same thing throughout a statute").

Moreover, when Congress intends EPA to revise emissions standards according to the same criteria used to set them initially, as EPA and intervenors contend section 112(d)(6) does, it says so using quite different language. For example, Section 109(d)(1) directs EPA to "complete a thorough review" and "make such revisions…as may be appropriate in accordance with…subsection (b) of this section." 42 U.S.C. § 7409(d)(1). That clear statutory directive to determine whether to revise a standard "in accordance with" the statutory criteria for the initial promulgation is entirely lacking in section 112(d)(6). Congress knows how to refer back to initially applicable criteria, and it did not take that approach here. *See generally Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996).

2. EPA and intervenors' reading of section 112(d)(6) makes a hash of the statute. Under EPA's interpretation, section 112(d)(2)'s "achievability" requirement governs the review and revision of all section 112(d) standards. But many section 112(d) standards, including those issued under Sections 112(d)(4) and 112(d)(5), are *not* based on achievability at all, but on "health" or "generally available control technologies or management practices." As a result, EPA's interpretation of section 112(d)(2) as requiring consideration of achievability alone under section 112(d)(6), cannot be reconciled with the Act: there is no sensible way that it could apply to non-achievability-based standards. In fact, the D.C. Circuit has previously upheld

EPA's *opposite* interpretation that section 112(d)(2), from which EPA draws its achievability standard, applies only to initial "promulgation" of a MACT floor, and does not apply to later section 112(d)(6) actions to "*revise*…emission standards *promulgated* under" 112(d)(2) (emphasis added). *Nat'l Ass'n for Surface Finishing v. EPA*, 795 F.3d 1, 7-8 (D.C. Cir. 2015). In addition to that context-specific use of "promulgated," 112(d)(2)'s use of "this subsection" cannot be assumed to necessarily reference all of 112(d)— context matters, and section 112 sometimes uses the term "subsection" to reference specific paragraphs. *See, e.g.*, 42 U.S.C. §§ 7412(c)(3), (c)(6), (c)(9)(A), (e)(1), (e)(3), (f)(5), (j)(2), (j)(5), (q)(4). The same is true of other uses of the term "this subsection," as for example in section 112(c)(9)(B) which states "The Administrator may delete any source category from the list under this subsection," a reference to 112(c)(9), which is subheaded "Deletions from this list."

3. EPA errs in its contention (at 3, 14, 24) that Westmoreland's interpretation renders section 112(d)(6)'s periodic review requirement redundant of 112(f)'s one-time residual-risk review. As a simple matter of plain meaning, the term "necessary" requires a goal or benefit to be achieved, and that drives Westmoreland's interpretation of section 112(d)(6) as requiring consideration of the goals and benefits—reductions in risk to public health and environment—that could be achieved by applying new developments in control technologies. That is separate from the question asked by section 112(f)(2), which is whether public health is protected with an ample margin of safety in accordance with the *Benzene* framework. App.21; *see also NRDC v. EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008)

(upholding EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP).

And as a practical matter, there will be no conflict. EPA sets section 112(f) risk standards at different levels, typically to protect against a cancer risk above 100-in-1-million, *e.g.*, 85 Fed. Reg. 31286, 31316 (May 22, 2020), but sometimes at twice that level, *e.g.*, 85 Fed. Reg. 49084, 49102 (Aug. 12, 2020) (compiling examples where 200-in-1-million was protective of public health). In appropriate cases, EPA may find necessity for revisions under 112(d)(6) based on developments in the industry that would allow for further protection of public health and the environment where costs were not prohibitive, cost-ineffective, or otherwise in excess of any benefits.

Contrary to EPA's contention (at 20), this scheme makes perfect sense, especially in light of the broader historical and statutory context. As noted by environmental intervenors (at 15-17), Congress was dissatisfied with the delays in setting standards occasioned by the prior statutory structure based *solely* on risk, and wanted EPA to expeditiously implement emission standards for nearly all major categories of sources. Accordingly, Congress directed EPA to set the initial MACT standards for source categories based on what was achievable at the time, and to use this as a baseline from which to consider future revisions to the extent such revisions were needed based on either the one-time risk assessments conducted under the existing *Benzene* standard under section 112(f) or as necessary thereafter under section 112(d)(6). There is nothing inherently contradictory about

an iterative time-based process where future discretionary revisions to a standard are done on a different basis than the original mandatory and deadline-constrained standard. Instead, it is EPA's new interpretation excluding health and environmental risk from the section 112(d)(6) necessity calculus that would lead to absurd results, since that could preclude EPA from tightening standards based on an increase in health risks that comes to light after the initial section 112(f) review.

4. Even assuming *arguendo* EPA is correct (at 7) that section 112(d)(6) determinations take no account of any public-health-or-welfare-based objective, section 112(d)(6) still requires that EPA take account of costs. In language EPA and intervenors often prefer to omit from their quotations, section 112(d)(2) states that EPA must "consider cost" as well as energy and non-air environmental factors. This Court has admonished that to "consider" cost under section 112 requires treating it as a "centrally relevant factor" that "requires paying attention to the advantages and the disadvantages" of the Rule. *Michigan v. EPA*, 576 U.S. 743, 753 (2015). And the obvious and overriding "advantage" that Congress had in mind throughout section 112 is reducing public health risk. App.14-15. EPA has in the past considered "effect in reducing public health risk" in determining that it was not "necessary" to revise HAP emission standards. 71 Fed. Reg. 76603, 76606 (Dec. 21, 2006). Its failure to do so here was arbitrary.

Furthermore, EPA's entire rationale that the Rule fulfills the necessity criterion of section 112(d)(6) is a post-hoc litigation justification. In the Rule, EPA *never even made a clear determination that the revision was necessary*. The closest

EPA came was stating the Rule was "appropriate" or "worthwhile" based on (1) abstract unquantified health benefits of HAP reductions, and (2) Colstrip's purported outlier status with respect to HAP emissions. As explained below, both rationales were arbitrary and contrary to EPA's own data and determinations.

B. The Only Rationales Provided in the Record Are Wholly Arbitrary, If Not Pretextual.

Although it made no finding of necessary at all, the Rule did set forth two rationales for revising the existing standards: health benefits from HAP reductions and the purportedly lagging status of Colstrip on HAP emissions. App.17; Rule at 38524, 38529, 38553. Neither holds water. The Rule must stand or fall on those two rationales, and not on any post-hoc litigation rationale. *Michigan*, 576 U.S. at 758 (it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action") (*citing SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

1. Health Benefits

The health benefits from further HAP reductions from coal fired power plants in general, and Colstrip in particular, are not just insignificant, they are non-existent in anything but a purely symbolic sense. For Colstrip, where EPA anticipates the most reductions, they amount to a whopping one avoided cancer case every *17,182 years*, based on the unrealistic assumption of maximum 24/7 exposure for the closest residents for 70 years. App.20-21. To put that in perspective, 17,000 years ago large parts of North America were covered by ice sheets, and the region was (barely) inhabited by bands hunting mammoths and mastodons. And humanity

was still 11,000 years away from the first mummy.[1] In fact, not a single coal fired power plant imposes even 1-in-1-million cancer risk from HAP emissions; the only way that EPA was able to justify it being necessary and appropriate to list them in the first place, and avoid delisting them thereafter, was by lumping them into the same category as oil-fired power plants, the only fossil fuel fired power plants with more than 1-in-1-million risk, and only in Puerto Rico. 85 Fed. Reg. 31286, 31315, 31319 (May 22, 2020); EPA, Residual Risk Assessment (Sept. 2019) (Docket ID EPA-HQ-OAR-2018-0794-4553), App. 10, Tables 1 and 2a. EPA (at 11). EPA's reliance (at 11) on statements from a neighboring Cheyenne community are entirely pretextual in light of EPA's risk analysis and, in any case, contrary to the record.

The silence of EPA and intervenors on any material risk reduction is the dog that did not bark. The best that EPA and intervenors can do is cite health impacts (cancer morbidity and non-morbidity effects) related to HAPs in general, and the bare quantity of HAP emissions anticipated to be reduced by the Rule. But no party disputes that HAPs may (or may not) pose health or environmental risks depending on the exposure in question; *that is why they are HAPs*. But with EPA having actually analyzed human health and environmental risk and having determined that it is not material, EPA's choice to disregard actual risk in favor of abstract theory is arbitrary and unreasonable. App.19-20; 85 Fed. Reg. 31286, 31296-97, 31304 (May 22, 2020). Nor could EPA reasonably rely on ancillary non-HAP

[1] Mindy Weisberger, "This Ancient Mummy Is Older Than the Pharaohs" (Aug. 16, 2018). https://www.livescience.com/63351-mummy-older-than-pharaohs.html.

emission reductions to find that further regulation under section 112(d)(6) is "necessary," because, as EPA previously and correctly acknowledged, "it would be highly illogical for the Agency to make a determination that regulation under CAA section 112, which is expressly designed to deal with HAP, is justified principally on the basis of the criteria pollutant impacts." 84 Fed. Reg 2670, 2676 (Feb 7, 2019).

Finally, EPA's conclusion (at 24; Rule at 38553) that, "when all of the costs and benefits are considered (including nonmonetized benefits), this final rule is a worthwhile exercise" of EPA's authority would still be arbitrary, even if it reflected the proper legal standard, because it is unreasoned and unexplained. EPA's attempt to escape the Rule's exorbitant costs and miniscule benefits by pointing to a black box of unquantifiable (and therefore unchallengeable) benefits is contrary to reasoned decision-making. *GPA Midstream Ass'n v. DOT*, 67 F.4th 1188, 1200 (D.C. Cir. 2023) ("Without quantified benefits to compare against costs, it is not apparent just how the agency went about weighing the benefits against the costs.").

2. Colstrip's Emissions

There is no merit to intervenors' and EPA's (e.g., at 4, 32 and 33) insinuations about Colstrip's current emissions. Colstrip's MACT-level controls have consistently successfully achieved the 2012 MATS standard.[2] They helped preserve a facility that was important to the community and state when others were forced to close. Colstrip should be applauded for its ingenuity, not punished for it.

[2] EPA unreasonably claims Colstrip "struggled" to meet the prior standard based on a single exceedance in one quarter of 2018, long since resolved. Rule at 38531.

In a masterclass of unreasoned rulemaking, the Rule claimed that "higher levels of toxic metal emissions" in communities around Colstrip are precisely "what the revised standards seek to remedy." Rule at 38524. But the inconvenient truth is that EPA's own data contradicts this rationale. Despite its higher-than-average particulate-matter emissions, Colstrip was *not* an outlier on toxic metal emissions. App.17-18.[3] As noted, EPA acknowledges that section 112 "is expressly designed to deal with HAP," and so it is illogical for EPA to regulate based on Colstrip's emissions of a non-HAP pollutant. Moreover, section 112(b)(2) expressly prohibits EPA from directly regulating PM emissions under section 112.

Having ignored this fatal flaw in the Rule's reasoning, EPA's now offers (at 33) the post-hoc rationalization that the fact Colstrip is not a laggard on HAP emissions does not matter because it has the option to demonstrate compliance through testing speciated HAPs rather than the PM surrogate. As an initial matter, the Court should ignore litigation counsel's post-hoc rationalization. The Court should also reject EPA's attempt to flip the burden of proof to Colstrip. EPA has "an initial burden of promulgating and explaining a non-arbitrary, non-capricious rule" *National Lime Ass'n v. E. P. A.,* 627 F.2d 416, 433 (D.C. Cir. 1980); *Nat. Res. Def. Council v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014) ("EPA retains a duty to

[3] HAP emission rates can be calculated by multiplying, for each of the facilities for which EPA presents data in EPA-HQ-OAR-2018-0794-6919 Attachment 1, the EPA's unit specific ratio of HAP to fPM (i.e. column M in the "Metal Ratios" tab), by each of those same unit's "Average of All fPM Data (lb fPM/MMBtu)" (i.e. column "U" from the "Unit-Level Information & Inputs" tab). This results in lb metal HAP/MMBtu emission rates for these facilities.

examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule and therefore EPA must justify that assumption even if no one objects to it during the comment period."); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (cleaned up).

In any event, this new rationale is as illogical as the old one. EPA never explained why proportionately reducing speciated HAP standards by nearly 70 percent was "necessary" or even "achievable." In fact, the only relevant data in the record demonstrated high variation in the metal HAP content of PM, meaning that cuts to PM would not proportionally reduce metal HAP emissions. EPA-HQ-OAR-2018-0794-6919, Attachment 1 ("Metal Ratios" tab column "M").

C. EPA Did Not Consider Cost in Any Meaningful and Non-Arbitrary Sense.

EPA is wrong (at 2, 17) that Applicants do not "contend that EPA failed to consider costs." Granted, no party contests that EPA *mentioned* costs. Instead, Westmoreland's stay application explained that EPA discussed cost in a superficial and arbitrary way, ignoring $440 million (or more) in net social detriments from the Rule (at 19), unreasonably departing from past cost effectiveness determinations and other cost metrics (at 22-24), and ignoring other key costs (at 25-26). Rather than explain why the Agency's novel and surface-level treatment of these issues is reasonable, EPA's brief (at 25-26) simply reasserts the Rule's unreasonable

rationalizations. For example, EPA still pretends (Rule at 38524, 38532 & n.52; repeated at EPA Br.26) that its cost considerations were consistent with prior practice, notwithstanding that Westmoreland spelled out how EPA departed from that practice, including the practice in *every* historic action EPA had cited. App.24. Among other things, EPA disregarded facility-specific cost-effectiveness calculations and abandoned the apples-to-apples cost-effectiveness values EPA had historically followed in the absence of unacceptable health risk. App.24. The Agency's unadmitted reversal is unreasoned and arbitrary on its face. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

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

EPA's discussion (at 21) of whether "development" is incremental or sudden is a straw man.[4] The point remains that the change (even if incremental) must be something new (i.e. emerging after 2012 *status quo*) and "significant." *See* App.27. Even EPA admits (at 21) the change must "have made further emissions reductions achievable" before it counts as a development. Accordingly, for EPA to make a non-arbitrary claim that the revisions are premised on developments requires demonstrating some nexus between the "developments" and the revised standard.

That nexus is precisely what is missing from the Rule. The only technology with even arguable relevance to fPM efficiency is increased durability of filter bags,

[4] It is telling that EPA was forced to rely on a British dictionary to find a definition of "development" that did not include significance or novelty.

but EPA does not contend that more durable bags have greater control efficiency.[5] The most EPA could say about such durability is that it prevents degradation of control efficiency caused by worn out bags, but that relates only to how frequently power plants must change filters, and thereby *potentially* to cost. It has nothing to do with whether the news bags *increase* control efficiency over the previously available bags, let alone by the 66 percent reduction EPA requires in the Rule.

Furthermore, EPA's claim (at 22-23) that the Rule identified intervening developments overlooked by the 2020 review is misleading. What actually happened is that EPA reinterpreted the term "development" between 2020 and 2023. *Compare* 84 Fed. Reg. 2670, 2687 (Feb. 7, 2019), *with* Rule at 38517, 38534. In fact, EPA did not claim to rely on increased efficiency of durable filters as the basis for its new emission standard, instead claiming that "the basis for the revised emissions standards" was the current "emissions performance of the coal-fired EGU fleet," Rule at 38534, something EPA (rightly) does not attempt to defend in its briefing. EPA's vacillating statutory interpretation should be a red flag to the Court. *Loper Bright Enterprises v. Raimondo,* 603 U. S. ____, slip op. at 20 (2024); *id*. Justice Gorsuch concurring, slip op. at 12-13. The Court should instead follow Applicant's (and EPA's prior) interpretation that only technological and operational "developments" with a significant nexus to the revised emission standards qualify as "developments" satisfying section 112(d)(6).

[5] EPA's discussion of technological developments in mercury control are beside the point for the fPM surrogate limit for non-mercury metal HAPs, which is the focus of Westmoreland's challenge.

II. The Rule Will Cause Substantial Irreparable Harm.

EPA acknowledges (at 38) "Colstrip's need to make immediate capital investments, and its atypical compliance costs" but argues that this harm is not irreparable because Colstrip should have complied with the MATS by employing a previously unnecessary and cost-ineffective fabric filter instead of using a cost-effective venturi scrubber. But that argument is legally irrelevant: under *Ohio v. EPA*, the fact that entities related to Colstrip must either close or incur nonrecoverable compliance costs is irreparable. 144 S.Ct. 2040, 2053 (2024). EPA's new claim that Colstrip should have already proactively installed a baghouse is also contrary to the 2012 MATS Rule itself, which stated that "the Agency is not prescribing specific technologies" and will "allow[] the industry to find the most cost-effective approach to meeting the requirements…." 77 Fed. Reg. 9417 (Feb. 16, 2012). It takes chutzpah for EPA to fault Colstrip for taking the Agency at its word.

The history of MATS likewise illustrates the need to stay the Rule. As environmental intervenors discuss (at 5-7), when this Court declined to stay or vacate the 2012 MATS, that resulted in the Rule being in effect for over a decade after this Court found EPA's original decision to be unreasoned. No judicial review was possible during this time due to EPA's continuation of its decades-long vacillation over whether any section 112 regulation of power plants was appropriate or necessary. *See* Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (July 7, 2023) (#2006881). But after the retirement of much of the industry, and the remainder already complying with the rule due to attrition, and given the looming presence of

this Rule, it is unsurprising that the industry did not expend the resources on yet another legal challenge to EPA's most recent "appropriate and necessary" finding.

Nor would the "expedition" claimed by the government prevent irreparable harm. Contrary to EPA's repeated assertions (at 2, 5, 13, 36, 37), the D.C. Circuit has *not* issued an order expediting this case. To the contrary, it denied, without explanation, Westmoreland's request to decide the case by the end of 2024. This stands in stark contrast to the D.C. Circuit's order on the Power Plant GHG Rule that is before this Court in Case No. 24A95, which expressly provided for briefing "to ensure this case can be argued and considered as early as possible…." Order Denying the Motions to Stay, No. 24-1120 (D.C. Cir., July 19, 2024). Here, the only thing "expedited" is a joint briefing schedule that is somewhat shorter than the default. In any case, there is no reasonable probability of any decision by the D.C. Circuit in 2024 to avoid non-recoverable compliance costs.

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

EPA's entire equities argument (4-5, 39-40) is circular. EPA's assertion of an abstract political harm presupposes that the Rule is a valid exercise of its delegated powers. But that response collapses into the likelihood of success on the merits. Critically, EPA does not contest that the Rule is a net negative for society, instead defending it as an "achievable" one. Accordingly, the record demonstrates that the equities and public interest strongly favor a stay. App.30.

CONCLUSION

This Court should stay the Rule pending judicial review.

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