No. _____

In the Supreme Court of the United States

Talen Montana, LLC and NorthWestern Corporation,

Applicants,

v.

U.S. Environmental Protection Agency and
Michael S. Regan, Administrator, U.S. Environmental Protection Agency,

Respondents.

ON EMERGENCY APPLICATION FOR STAY TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants submit the following statement.

Talen Montana, LLC ("Talen Montana") is a power generation company, which operates and partially owns Colstrip Unit 3 (and has an economic interest in Colstrip Unit 4), which are power plant units affected by EPA's final action subject to this Application for an Immediate Stay of Final Agency Action. Talen Montana, LLC is an indirect, wholly owned subsidiary of Talen Energy Corporation. Talen Energy Corporation is a publicly traded corporation. No publicly held company owns more than 10% of Talen Energy Corporation's stock.

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") is a wholly owned subsidiary of NorthWestern Energy Group, a publicly traded company (Nasdaq: NWE) that is incorporated in Delaware. Based on an August 15, 2024, review of the most recent statements filed with the Securities and Exchange Commission pursuant to Sections 13(d), 13(f), and 13(g) of the Securities Exchange Act of 1934, two publicly held companies own 10% or more of NorthWestern Energy Group's stock: BlackRock Inc. and Vanguard Group Inc.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Talen Montana, LLC and NorthWestern Corporation d/b/a NorthWestern Energy. Respondents in this Court and Respondents below are the U.S. Environmental Protection Agency and Michael S. Regan, as Administrator of the U.S. Environmental Protection Agency.

The other parties to the consolidated proceedings below are, by Court of Appeals case number, as follows.

24-1119. ***Petitioners*****:** 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, and State of Wyoming. ***Respondent*****:** U.S. Environmental Protection Agency. ***Intervenor in Support of Petitioners*****:** San Miguel Electric Cooperative, Inc. ***Intervenors in Support of Respondents*****:** (1) 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, the Ohio Environmental Council, Physicians for Social Responsibility, and Sierra Club; (2)

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, City of New York.

24-1154. ***Petitioner***: NACCO Natural Resources Corporation. ***Respondents***: U.S. Environmental Protection Agency and Michael S. Regan, as Administrator of the U.S. Environmental Protection Agency.

24-1179. ***Petitioners***: 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, and Rainbow Energy Center, LLC. ***Respondents***: U.S. Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency.

24-1184. ***Petitioners***: Oak Grove Management Company LLC and Luminant Generation Company, LLC. ***Respondents***: U.S. Environmental Protection Agency and Michael S. Regan, as Administrator of the U.S. Environmental Protection Agency.

24-1194. ***Petitioner***: Westmoreland Mining Holdings LLC, Westmoreland Mining, and Westmoreland Rosebud Mining LLC. ***Respondents***: U.S. Environmental Protection Agency and Michael S. Regan, as Administrator of the U.S. Environmental Protection Agency.

24-1201. ***Petitioners***: America's Power and Electric Generators MATS Coalition. ***Respondent***: U.S. Environmental Protection Agency.

24-1223. ***Petitioner***: Midwest Ozone Group. ***Respondents***: U.S. Environmental Protection Agency and Michael S. Regan, as Administrator of the U.S. Environmental Protection Agency.

The related proceedings are as follows.

- *North Dakota* v. *EPA*, No. 24-1119 (D.C. Cir.) (lead case)
- *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* v. *EPA*, No. 24-1184 (D.C. Cir.)
- *Talen Montana, LLC* v. *EPA*, No. 24-1190 (D.C. Cir.)
- *Westmoreland Mining Holdings LLC* v. *EPA*, No. 24-1194 (D.C. Cir.)
- *America's Power* v. *EPA*, No. 24-1201 (D.C. Cir.)
- *NorthWestern Corp.* v. *EPA*, No. 24-1217 (D.C. Cir.)
- *Midwest Ozone Group* v. *EPA*, No. 24-1223 (D.C. Cir.)

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Applicants	Talen Montana, LLC and NorthWestern Corporation d/b/a NorthWestern Energy
Colstrip	Colstrip Power Plant
EPA (or Agency)	U.S. Environmental Protection Agency
Final Rule	*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)
FIP	Federal Implementation Plan
fPM	Filterable particulate matter
Greenhouse Gas Rule	*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-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 89 Fed. Reg. 39798 (May 9, 2024)
HAP	Hazardous Air Pollutant
NorthWestern	NorthWestern Corporation d/b/a NorthWestern Energy
SIP	State Implementation Plan
Talen Montana	Talen Montana, LLC

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

Applicants Talen Montana, LLC ("Talen Montana") and NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") (collectively, "Applicants") respectfully request an immediate stay of the U.S. Environmental Protection Agency's ("EPA" or "Agency") final rule 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) ("Final Rule").

INTRODUCTION

The Final Rule imposes enormous costs without any meaningful benefits, and therefore seeks to drive down emissions without any statutory basis. In so doing, EPA contravened not only the Clean Air Act, but also this Court's admonitions to not prioritize emissions reductions as the end-all-be-all without accounting for the impacts from those reductions. See *Michigan* v. *EPA*, 576 U.S. 743 (2015).

The Final Rule will have broad industry-wide impacts, but the Colstrip Power Plant ("Colstrip") in Montana is uniquely impacted. Almost half of the Final Rule's regulatory costs are imposed on Colstrip, even though EPA failed to show that additional emission reductions are necessary to achieve any measurable health benefits. Indeed, EPA has determined that there is no meaningful risk from Colstrip's current emissions, meaning that any "public health" benefits from additional reductions amount to statistical noise. The current cancer risk from Colstrip is 0.147- in-1 million, which is almost seven times lower than the 1-in-1 million risk threshold that EPA itself has deemed

scientifically insignificant. Indeed, Congress specified that such performance in the sector would exempt the entire source category from Clean Air Act Section 112's regulation altogether. See 42 U.S.C. § 7412(c)(9).

In addition to benefit-cost irrationality, EPA also failed to account for the interaction of the Final Rule with contemporaneous major rulemakings. Despite imposing half of the Final Rule's regulatory costs on Colstrip, EPA turned a blind eye to the impacts the Final Rule would have on Colstrip when combined with the Agency's contemporaneous Greenhouse Gas Rule. 89 Fed. Reg. 39798 (May 9, 2024). The Greenhouse Gas Rule, if upheld, will force the plant's retirement by the end of 2031 because Colstrip cannot implement carbon capture and sequestration or co-fire natural gas. These two rules—*taken together*—put an untenable burden on Colstrip. First, the Final Rule imposes $350 million worth of unnecessary costs. Second, the Greenhouse Gas Rule limits Colstrip's remaining life to just a few years, providing insufficient time to recoup the investment.

During the comment period, Applicants Talen Montana and NorthWestern urged EPA to consider the negative interactions of the two rules on Colstrip and the corresponding devastating risks to the Montana economy and electric reliability. Talen Montana and NorthWestern further urged EPA at least to coordinate the potential retirement dates under the two rules and provide a subcategory that would allow Colstrip the option to operate until a date certain without additional controls, followed by an orderly retirement. Despite these requests, and despite EPA's own acknowledgement that the Final Rule imposes a huge burden on Colstrip, EPA failed to critically consider

the negative interaction of these two rules on Colstrip. Given the Final Rule's unique and targeted impacts on Colstrip, it was incumbent on EPA to do so. Instead, by undertaking contemporaneous rulemakings, and ignoring Applicants' comments, EPA sidestepped any attempt to meaningfully analyze the interactions of the two rules on Colstrip.

Because compliance with the Final Rule would require engineering and construction to begin immediately, Colstrip faces a stark choice during the pendency of the appeal of the Final Rule—(1) decide now to retire by the Final Rule's compliance date (July 8, 2027) to avoid any expenditures, or (2) decide now to spend $350 million on new pollution control equipment until the Greenhouse Gas Rule, if upheld, forces a retirement four and a half years after. Either choice is both irreversible and highly consequential for Colstrip, its owners, and Montana, as described further herein. Without a stay of the Final Rule, Colstrip's owners are forced to make this decision without knowledge of the playing field: will the Final Rule survive review and necessitate the expenditure or, will the expenditure be wasted? Will the Greenhouse Gas Rule survive review and shorten Colstrip's life, or will it be struck down and allow a longer timeframe to recoup Final Rule compliance costs? With a stay, Colstrip's fate can be decided based on a full understanding of the regulatory constraints it faces.

This Court previously admonished EPA not to prioritize emission reductions without accounting for the impacts of those reductions: "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan*, 576 U.S. at 752–753.

In *Michigan*, the Court's admonition came too late because the litigation took three years and companies were, in the interim, forced to install control technology to comply with the invalid rule. Whether or not EPA is consciously running the same playbook with the Final Rule, Applicants here seek to avoid the same result. Applicants request that the Final Rule be stayed so that once this Court (or the D.C. Circuit) decides on the rule's validity, irreversible choices have not been made in the interim. Colstrip's future should not depend on a rushed decision-making process while this case is pending. Potentially catastrophic outcomes can be avoided through a stay.

DECISION BELOW

The D.C. Circuit's order denying Applicants' motion for a stay pending review is unpublished. The order is reproduced at App. 88a. EPA's Final Rule is published at 89 Fed. Reg. 38508 (May 7, 2024) and reproduced at App. 5a.

JURISDICTION

This Court has jurisdiction over the Application under 28 U.S.C. § 1254(1) and § 2101(f). This Court has the authority to grant the Applicants' requested relief under the Administrative Procedure Act, 5 U.S.C. § 705, the All Writs Act, 28 U.S.C. § 1651, and Supreme Court Rule 23.

STATUTORY PROVISIONS INVOLVED

The core statutory provision at issue is 42 U.S.C. § 7412. It is reproduced at App. 91a.

STATEMENT OF THE CASE

I. Legal Background and Regulatory History

A. Clean Air Act Section 112's Statutory Framework

1. Clean Air Act Section 112 governs hazardous air pollutants ("HAPs") such as mercury, or non-mercury HAP metals including lead, arsenic, and cadmium. 42 U.S.C. § 7412. It directs EPA to set nationally applicable HAP emission standards for source categories that emit above a certain HAP threshold. For most of these source categories, once they are listed under Section 112 based on the amount of HAPs they emit, the Section imposes a two-step process.

First, EPA sets an emission standard that is technology-based and formulaic. For example, the emission standard "shall not be less stringent" than "the average emission limitation achieved by the best performing 12 percent of the existing sources" (or best five if the number of sources is fewer than thirty). *Id.* § 7412(d)(3). Cost is not a consideration. See *ibid.*

Second, EPA promulgates "the maximum degree of reduction in emissions of [HAPs]" that is "achievable." *Id.* § 7412(d)(2). Here, EPA must "consider[ ] the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." *Ibid.*

2. By contrast, Congress required an additional threshold requirement for "electric utility steam generating units," i.e., power plants that support the electrical grid. *Id.* § 7412(n)(1). EPA may regulate such plants under Section 112 only if the Agency finds such regulation "appropriate and necessary." *Id.* § 7412(n)(1)(A). Under this

framework, the Agency must consider costs, even under the first step of Section 112 regulation.

3. Eight years after establishing an emission standard for a source category, EPA must conduct a one-time assessment of the remaining residual risk. *Id.* § 7412(f)(2). If "necessary," EPA must tighten the standard to "provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990)," and "taking into consideration costs, energy, safety, and other relevant factors, [to prevent] an adverse environmental effect." *Id.* § 7412(f)(2)(A). This legislative directive embodies two benchmarks.

First, the clause "as in effect before November 15, 1990" codifies EPA's pre-1990 "*Benzene* standard" safety interpretation. See *NRDC* v. *EPA*, 529 F.3d 1077, 1082 (D.C. Cir. 2008). This 1989 EPA rule, which set the emission standard for benzene (a carcinogenic HAP), determined that "a maximum excess [cancer] risk of 100-in-one million" provided an ample margin of safety. See *id.* at 1081–1083. Importantly, the *Benzene* standard, now written in statute, has demanded considering cost. See *id.* at 1083 ("including costs and economic impacts" (emphasis omitted); see also 54 Fed. Reg. 38044, 38045 (Sept. 14, 1989).

Second, the aspiration is to reduce cancer risks from HAP emissions to negligible thresholds, i.e., "to less than one in one million." 42 U.S.C. § 7412(f)(2)(A). Once that threshold is achieved, Congress provided that the entire source category may be

removed from regulation under Section 112 if all sources in that category present a risk of less than 1-in-1-million.[1] *Id.* § 7412(c)(9).

4. Lastly, at least on an eight-year recurring schedule, EPA must undertake a technology review. *Id.* § 7412(d)(6). The Agency "shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies)" the emission standards. *Ibid.* EPA has typically combined the first set of eight-year reviews, commonly referred to as a "Risk and Technology Review."

B. *Michigan* v. *EPA* and the Aftermath

Regulation of coal-fired power plants under Clean Air Act Section 112 holds a long, tortured past. EPA first determined over two decades ago that it was "appropriate and necessary" under Section 112(n)(1)(A) to regulate HAP emissions from fossil fuel-fired power plants. 65 Fed. Reg. 79825 (Dec. 20, 2000).

In 2012, the Agency reaffirmed that determination and, for the first time, issued emission standards for coal- and oil-fired power plants pursuant to Section 112(d). 77 Fed. Reg. 9304 (Feb. 16, 2012). For this rule, EPA calculated $4 to $6 million of benefits from reducing HAPs and $9.6 billion a year in costs. *Id.* at 9425, 9428. EPA concluded "costs should not be considered" when deciding whether coal- and oil-fired power plants should be regulated under Section 112. This was so because, according to

[1] The origins of the "1-in-1 million" standard is a U.S. Food & Drug Administration rulemaking where the agency determined that such standard "can properly be considered of insignificant public health concern." 42 Fed. Reg. 10412, 10421 (Feb. 22, 1977). Congress and agencies have since extensively used that metric as the gold standard for risk evaluation. See generally John D. Graham, *The Legacy of One in a Million*, 1 Risk in Perspective (1993), https://www.hsph.harvard.edu/hcra/wp-content/uploads/sites/1273/2013/06/The-Legacy-of-One-in-a-Million-March-1993.pdf.

EPA, decisions on whether to regulate other source categories under Section 112 (i.e., the initial listing decision and the first step in setting emission standards) do not consider costs. *Id.* at 9326–9327.

This Court invalidated EPA's rule. *Michigan*, 576 U.S. at 760. The Court stated: "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* at 752. It also rejected EPA's reasoning—i.e., that reducing the "volume of pollution emitted" is Clean Air Act Section 112's overarching purpose. See *id.* at 756–757. Indeed, the Court commented that such "reasoning overlooks the whole point of having a separate provision about power plants." *Id.* at 756.

But by then, it was too late. Given the rule's regulatory timeline, and without any stay while the merits were heard, power plants had already been forced to make compliance and retirement decisions in the interim. Power plants expended billions of dollars to meet the standards. Alternatively, many of them shut down permanently. In turn, EPA's 2012 HAP emission standards stayed intact; on remand, the Agency merely concluded that its consideration of costs did not change the Agency's determination that regulating HAP emissions from coal- and oil-fired power plants is appropriate and necessary. 81 Fed. Reg. 24420 (Apr. 25, 2016). No one challenged the Agency's reaffirmation that the regulation was appropriate and necessary. After all, there was no point in litigating an issue that was rendered moot due to the irrevocable compliance decisions.

In 2020, EPA conducted the first Risk and Technology Review of the 2012 emission standards. 85 Fed. Reg. 31286 (May 22, 2020). EPA determined that existing emission standards "provide[d] an ample margin of safety to protect public health and prevent an adverse environmental effect." *Id.* at 31314. Consistent with the Court's decision in *Michigan*, EPA also determined there was no cost-effective control technology that would further reduce emissions. *Ibid.* Lastly, EPA changed its position and found it was not "appropriate and necessary" to regulate HAP emissions from coal- and oil-fired power plants (albeit keeping the emission standard intact because EPA did not delist the coal- and oil-fired power plant source category). *Id.* at 31313.

A new Administration arrived, and EPA flipped again, but only partially. The Agency first redetermined that it was appropriate and necessary under Clean Air Act Section 112 to regulate HAP emissions from coal- and oil-fired power plants. 88 Fed. Reg. 13956 (Mar. 6, 2023). But EPA did not disturb the finding that existing controls provide an ample margin of safety. EPA's view is that, notwithstanding such degree of safety, Section 112 reflects a congressional directive that "[l]ess is better." See App. 636a (EPA Stay Opp'n at 1). And so it marched ahead, promulgating the Final Rule at issue.

II. Factual and Procedural Background

Other parties and emergency stay applicants discuss the legal issues with the Final Rule at large. Applicants in this challenge focus on the Colstrip Power Plant in Montana as an exemplar of the deficiencies of the Final Rule and its immediate, severe effects.

A. The Colstrip Power Plant

Among the entities affected by EPA's Final Rule, Colstrip stands out. No party to this lawsuit denies that Colstrip is the primary and deliberate target of the Final Rule. The Final Rule acknowledges that "42 percent" of the regulatory costs of the entire rule will fall on Colstrip. See 89 Fed. Reg. at 38533. The preamble even calls out the facility by name: "[O]nly two [electric generating units] at one facility (Colstrip)" must install "the costliest" control technology. *Id.* at 38522.

Colstrip is the largest coal-fired power plant west of the Mississippi River. It supplies power throughout Montana and the Pacific Northwest. It is critical to maintaining the stability of the electrical grid in Montana. App. 831a, 838a–839a, 844a–846a, 848a (Hines Decl. ¶¶ 27, 41–52, 61–65, 72). Additionally, it drives the region's economy. Approximately 3,000 jobs, $200 million in disposable, after-tax income, and over a billion dollars in economic output to Montana hinge on Colstrip. App. 754a, 792a (Lebsack Decl. ¶ 58 and Attachment C); App. 124a–125a (Talen Mont. Cmts. 6–7). The lower court record reflects that even the declarants supporting various environmental and public health organizations intervening in the case "do not advocate for the closure of the Colstrip plant." App. 851a, 854a (Wetherelt Decl. ¶¶ 4, 12).

Colstrip has complied with all currently applicable environmental standards. Other than a fully-resolved compliance issue in 2018, Colstrip has conformed with the current standards for the past decade. In response to the 2018 incident, Colstrip improved its emission controls and has been over-complying since then by a significant margin. The current emission limits are 0.030 lb/MMBTU for filterable particulate

matter ("fPM"), the HAP at issue in this Application. Colstrip achieves an emission limit of approximately 0.022 lb/MMBTU. App. 750a (Lebsack Decl. ¶ 48 n.12).

Colstrip's emissions are slightly higher than some other plants due to the differences in control technology. To meet the Final Rule's emission limit of 0.010 lb/MMBTU, Colstrip would need to add additional emissions control technology (a new baghouse) on top of its already dedicated control technology, at a capital cost estimated at $350 million. Colstrip already achieves 99.6 percent reduction in fPM with its current control technology (as opposed to the 99.8 percent demanded by the Final Rule). The health risks from Colstrip's current fPM emissions are an order of magnitude below levels which EPA has deemed to provide an ample margin of safety to protect public health and not inflict any adverse environmental effect. App. 750a (Lebsack Decl. ¶ 48).

So long as investments continue to be made for maintenance, Colstrip could operate for at least another twenty years. But despite Colstrip's continued operability and its importance to Montana and the surrounding region, the plant's future is now in jeopardy due to EPA's new power plant emissions regulations.

B. The New Power Plant Air Emissions Regulations

1. With the last incoming Administration, the Agency reviewed the 2020 Risk and Technology Review and proposed to revise the HAP emission standards for coal- and oil-fired power plants. 88 Fed. Reg. 24854 (April 24, 2023).[2] EPA endorsed the 2020 Risk

[2] To be precise, EPA's proposal consisted of three independent regulatory actions. First, EPA proposed to amend the surrogate standard for non-mercury metal HAP emissions for existing coal-fired power plants. *Id.* at 24857. Second, EPA proposed to amend the mercury emissions for certain coal-fired power plants (the ones firing lignite coal). *Ibid.*

and Technology Review's finding that residual risks from the coal-fired power plant's HAP emissions were "low" (as in "below 100-in-1 million" cancer risk and "low likelihood of adverse noncancer effects") and "acceptable." *Id.* at 24865. Current emission standards "provided an ample margin of safety to protect public health," and "more stringent standards were not necessary to prevent an adverse environmental effect." *Ibid.*

Nonetheless, EPA concluded that certain existing control technologies "are more widely used, more effective, and cheaper" and proposed to lower the emission limit for filterable particulate matter ("fPM"), which is the surrogate air pollutant for non-mercury metal HAP emissions. *Id.* at 24866–24872.

2. Meanwhile, EPA contemporaneously proposed to regulate greenhouse gas emissions from fossil fuel-fired power plants pursuant to Clean Air Act Section 111. 88 Fed. Reg. 33240 (May 23, 2023). In general, this proposed rule subcategorized coal-fired power plants based on their operating horizon and set emission standards accordingly, with the purported aim of such plants either installing carbon capture and sequestration or co-firing natural gas. As *proposed*, the Greenhouse Gas Rule provided:

- Units planning to cease operation before 2032 need not take extra measures.
- Units planning to operate beyond 2031 but cease operation before 2035 and operating on a low load basis ("annual capacity factor limit of 20 percent") also need not take extra measures.

Third, EPA proposed to amend what would constitute the "startup" period for the plants affected by the rule. *Ibid.* At issue in this Application is the first action.

- Units planning to operate beyond 2031 but also to cease operation before 2040 and producing greater power loads must co-fire natural gas starting 2030.
- Units planning to operate beyond 2040 must install carbon capture and sequestration starting 2030.

See *id.* at 33359 (Table 5). Thus, under the Greenhouse Gas Rule, it would be possible for an operator to choose its operation horizon, i.e., not install any controls but commit before 2030 to retirement instead. See *id.* at 33341.

Applicants opposed both proposed rules for many reasons.[3] Additionally, Talen Montana commented that the *combination* of the rules targeting coal-fired power plants further complicates Colstrip's future. App. 124a–125a (Talen Mont. Cmts. 6–7). As such, Applicants requested that if EPA believes that the Greenhouse Gas Rule is lawful (it is not), EPA should then establish in the Final Rule a subcategory with units making an enforceable commitment to retire, "in line with how EPA is providing lead time for older sources in other rulemakings," including the Greenhouse Gas Rule. App. 139a–140a (Talen Mont. Cmts. 21–22 & n.68); see App. 162a, 182a–183a (NorthWestern Cmts. 4, 24–25).

3. EPA issued both rules on the same day (and published them in the Federal Register two days apart). The Final Rule reduced the fPM limit for existing coal-fired

[3] Applicants both submitted adverse comments on the two proposals. See App. 119a (Talen Mont. Greenhouse Gas Rule Cmts.); App. 159a (NorthWestern Greenhouse Gas Rule Cmts.). Further discussed *infra* note 6, Applicants are also members of entities that have challenged the Greenhouse Gas Rule. Applicants' comments and arguments that EPA acted arbitrarily and capriciously by failing to account for the combined effect of both the Greenhouse Gas Rule and this Final Rule is in no way a suggestion that either rule is valid. Both are unlawful.

power plants by 67 percent, from 0.030 lb/MMBtu to 0.010 lb/MMBtu. 89 Fed. Reg. at 38518–38519. Plants must meet this limit by July 8, 2027. *Id.* at 38519. A one-year extension may be available, in accordance with Clean Air Act Section 112(i)(3)(B), 42 U.S.C. § 7412(i)(3)(B). 89 Fed. Reg. at 38519.

EPA also finalized the Greenhouse Gas Rule. 89 Fed. Reg. 39798. Now, if that rule survives judicial review, units must either install carbon capture and sequestration or co-fire natural gas if they choose to operate past 2031. EPA eliminated the near-term subcategory that would have permitted operation without additional controls until 2035. As described in more detail in the challenges to the Greenhouse Gas Rule, the control "choices" that the Greenhouse Gas Rule provides are illusory for the vast majority (if not all) coal-fired power plants. Putting aside the feasibility, cost, and energy consequences of these two "choices," there is simply not enough time to do either. In Colstrip's case, it cannot co-fire natural gas or install carbon capture and sequestration. App. 748a, 779a (Lebsack Decl. ¶ 43 and Attachment B). Therefore, under the final Greenhouse Gas Rule, Colstrip has no choice but to cease operation before 2032. 89 Fed. Reg. at 39801, 40057.

4. Combining the two finalized EPA rules together, Colstrip faces the following pending death-spiral:

- Under the Final Rule, Colstrip must install new control technology costing an estimated $350 million by mid-2027. This requirement by itself—while still flawed in its own right—might be more financially feasible if those installation costs could be recovered (presumably, from customers and ratepayers) during a period of two

decades, which is the remaining operating timeframe that was expected for the facility prior to these rules.

- The proposed version of the Greenhouse Gas Rule shortened that cost-recovery period. Because Colstrip cannot install carbon capture and sequestration or co-fire natural gas, at minimum Colstrip would have had to retire before 2035 and curtail its operations by 80 percent after 2032 under the proposed version of the rule. Thus, the cost-recovery period would have been less than seven years (2027 to 2034), with the output of the plant severely restricted for half of them.
- The final version of the Greenhouse Gas Rule shortened that period further. The Greenhouse Gas Rule forces Colstrip to retire before 2032. The cost-recovery window is now a little more than four years.
- The possibility of a one-year compliance extension under the Clean Air Act, see 42 U.S.C. § 7412(i)(3)(B), does not lessen the blow. In fact, it would exacerbate it by further shortening the cost-recovery period from four and a half years to three and a half years (i.e., the cost-recovery timeframe would become mid-2028 to 2032).
- Because the finalized rules force Colstrip to incur a $350 million expense with at most four and a half years for the plant to recover those costs by selling power, the capital costs of controls are economically irrational for the facility (over and above the inherent irrationality of the Final Rule). This poses a high risk of Colstrip prematurely retiring before the 2027 compliance deadline of the Final Rule to avoid the expenditures. For NorthWestern, as a regulated utility, premature

closure of Colstrip would bring devastating effects on grid reliability and its ability to meet load.

In sum, the cumulative effect of the two rules dramatically compounds the harm. Colstrip must install fPM control technology by 2027 to comply with one rule, only to close four and a half years later due to another rule. Notwithstanding these concerns raised during the comment period by Applicants, EPA failed at every turn to meaningfully consider this interaction.

5. The ratcheting down of emissions under the Final Rule, and the risks that poses to Colstrip, is all the more irrational and unnecessary when put in context of EPA's determination of the relative risks of coal-fired power plants' HAP emissions and the Final Rule's costs. Starting with risk, no source in the fossil fuel-fired power plant category presently poses a cancer risk that exceeds 100-in-1-million, the "ample margin of safety" under Clean Air Act Section 112(f)(2)(A) (which codified the *Benzene* standard, discussed *supra*, p. 6). 88 Fed. Reg. at 24865. More importantly, the highest risk is driven by nickel emissions from a handful of *oil*-fired power plants. *Id.* at 24863. Indeed, *all coal-fired power plants* including Colstrip demonstrated a lifetime cancer risk of less than 1-in-1-million and a non-carcinogen hazard index/quotient of less than 1. *See ibid.*[4] As a result, EPA would have been justified in delisting the entire source category from further regulation under Clean Air Act Section 112, but for the fact that not all oil-fired facilities

[4] See also EPA's Residual Risk Assessment at Tables 1 and 2a of Appendix 10, https://www.regulations.gov/document/EPA-HQ-OAR-2018-0794-4553 (select excerpts of the 990-page document also reproduced at App. 400a).

yet meet the 1-in-1 million threshold. Continuing regulatory jurisdiction over coal-fired power plants thus hangs by the barest, most indirect of threads.

Moreover, the cost of the Final Rule's tightened emissions standard is hundreds of millions of dollars, 89 Fed. Reg. at 38555, and highly concentrated on Colstrip. EPA did not even attempt to estimate any quantifiable benefits from HAP reductions from the revised standards.[5] In fact, on a national scale, "EPA estimates negative net monetized benefits of this rule." 89 Fed. Reg. at 38511. No assessment of Colstrip-specific benefits exists in the record. EPA instead reasoned that the costs of the rule, spread over the entire industry, are small with respect to the industry's revenues and similar metrics; therefore, EPA concluded that tightening the standard is "worthwhile" due to the unquantifiable benefits to HAP reductions. *Id.* at 38553.

C. Procedural History

Applicants filed petitions for review in the D.C. Circuit, which have been consolidated under the lead case, *North Dakota* v. *EPA*, No. 24-1119 (D.C. Cir. filed May 8, 2024).[6] After filing the petitions, Applicants moved to stay the Final Rule. Talen Montana and NorthWestern filed their joint motion for stay on June 27, 2024. The D.C. Circuit denied Applicants' motions on August 6, 2024. App. 88a–89a.

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[5] At best, EPA attempted to calculate co-benefits unrelated to the reduction of HAP emissions, such as benefits from reducing other non-HAP emissions such as carbon dioxide. Such calculation is statutorily barred as discussed *infra*, pp. 20–23.

[6] Applicants are also part of an ad hoc coalition of electric generating companies that challenged the Greenhouse Gas Rule. The consolidated case, *West Virginia* v. *EPA*, No. 24-1120 (D.C. Cir. filed May 9, 2024), is pending with a similar stay application filed in this Court, *Electric Generators for a Sensible Transition* v. *EPA*, No. 24A106 (U.S. filed July 26, 2024).

REASONS TO GRANT THE APPLICATION

The Court considers four factors when resolving a stay request: (1) likelihood of success on the merits; (2) irreparable injury to the applicant absent a stay; (3) injury to other parties from a stay; and (4) the public interest. *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). The first two factors "are the most critical." *Ibid.*

All four factors favor a stay. Applicants are likely to succeed on the merits for at least two, independent reasons. The Final Rule flouts this Court's direction in *Michigan* v. *EPA* and the statute's directive to consider costs in the proper context. That context includes Clean Air Act Section 112(d)(6)'s directive to revise emission standards only if "necessary," accounting for technological "developments." 42 U.S.C. § 7412(d)(6). Here, EPA decided that a rule costing hundreds of million dollars with no statistically meaningful improvements to human health was "worthwhile." 89 Fed. Reg. at 38553.[7] The rule is also arbitrary and capricious, as EPA brushed off Colstrip's concern that the Final Rule and the Greenhouse Gas Rule combined create a unique death spiral.

In *Michigan* the merits did not matter at all, for EPA ran out the clock. Notwithstanding a Supreme Court decision, EPA achieved its goals prior to judicial review. The then-Administrator proudly admitted: "But even if we [lose], it was three years ago. Most of them are already in compliance, investments have been made, and

[7] In the D.C. Circuit, Applicants also argued that EPA exceeded its statutory authority granted under Clean Air Act Section 112(d)(6), for EPA revised the fPM emission standard even though it could not identify any "developments" in emission-reducing control technology. Other emergency stay applicants address the same issue. In the interest of minimizing redundancies, Applicants incorporate the arguments submitted therein. Applicants' original argument in the D.C. Circuit are also included in App. 530a.

we'll catch up. And we're still going to get at the toxic pollution from these facilities."[8] A stay here would ensure that at least a decision on the merits would matter for Colstrip.

I. Applicants Will Likely Prevail.

A. EPA Violated the Directives of Section 112 and *Michigan* v. *EPA* to Consider "Costs" in the Proper Context.

Administrative law and common sense dictate it is irrational to promulgate a rule costing hundreds of millions of dollars when infinitesimal benefits result from reducing the targeted pollutants. As the Court admonished EPA in *Michigan*, "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." 576 U.S. at 753. The Court plainly rejected EPA's refusal to "consider whether the costs of its decision outweighed the benefits." *Id.* at 750.

It is well-established that cost is a major consideration in technology review rulemakings like the Final Rule, in which courts have identified a "clear statement" in Section 112(d) to consider costs. See, *e.g.*, *Ass'n of Battery Recyclers, Inc.* v. *EPA*, 716 F.3d 667, 673–674 (D.C. Cir. 2013) (per curiam). Accordingly, the fact that the Final Rule was based on EPA's isolated identification of supposed technological developments cannot escape *Michigan*'s maxim that the Agency must still weigh the costs of the regulation in comparison to the benefits *intended by Congress* when it set Section 112 the way it did: protecting public health from HAPs. See 576 U.S. at 751.

[8] Timothy Cama & Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, The Hill (June 29, 2015), https://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule/.

After all, the source category implicated in this Final Rule is not just any source category (such as certain manufacturing sectors). It is the same category *Michigan* examined and Congress singled out for additional regulatory protection requiring that EPA must make an "appropriate and necessary" finding to regulate. *Id.* at 748; see 42 U.S.C. § 7412(n)(1)(A). Put differently: a Section 112(n)(1)(A) "appropriate and necessary" finding is a prerequisite to regulating coal-fired power plants under Section 112(d). That finding requires a consideration of costs and benefits per *Michigan*. Adding those two necessary conditions together, any regulation of coal-fired power plants under Section 112(d), by virtue of extending Section 112(n)(1)(A) and *Michigan*, likewise require a consideration of costs and benefits.

And to be clear, the "benefits" does not mean reduction of HAP emissions for reduction's sake, as EPA claims. See, *e.g.*, 89 Fed. Reg. at 38525 ("wherever feasible"); App. 636a (EPA Stay Opp'n 1) ("Congress's view on toxic air pollution is simple: Less is better."). This Court already rejected that approach to Section 112. *Michigan*, 576 U.S. at 756–757 (rejecting EPA's focus on the "volume of pollution emitted"). Moreover, such claim is belied by the statute itself and the provisions' demand to protect "public health,"[9] reflected in at least three different iterations spread throughout Section 112 (also discussed *supra*, pp. 6–7):

[9] Nor could EPA shoehorn its myopic focus on emissions reduction in the name of preventing "adverse environmental effects." See 42 U.S.C. § 7412(b)(2). At best, Clean Air Act Section 112 makes clear that such is a factor EPA must account for in parallel with public health, see, *e.g.*, *ibid.*, and on many occasions, with costs, *id.* § 7412(f)(2)(A). Regardless, EPA has already found that the existing emission standards prevent an adverse environmental effect. 85 Fed. Reg. at 31314. Thus, the Final Rule would still be irrational.

- Section 112(f)(2)'s express adoption of the *Benzene* standard of 100-in-1 million as the risk metric for what would constitute "ample margin of safety," which by reference requires the Agency to consider costs.
- Section 112(f)(2)'s directive to "reduce lifetime excess cancer risks to the individual most exposed to emissions from a source," in which the target is set at a maximum individual risk of 1-in-1 million.[10]
- Section 112(c)(9) setting that same threshold of 1-in-1 million in which an entire source category could be delisted and not regulated under Section 112 at all.

To be sure, "public health" is not limited to cancer risks. For non-carcinogen effects of all HAPs (including HAPs, such as mercury, that are not carcinogens), EPA has not changed its practice of assessing the "hazard index" or a "hazard quotient." A hazard quotient seeks to quantify the estimated non-cancer health risks from a pollutant's exposure, and a hazard index seeks to quantify the "aggregate effect" of a pollutant by summing up the "hazard quotients for substances that affect the same target organ or organ system." App. 433a (EPA's Residual Risk Assessment, *supra* note 4, at 34). A hazard quotient and/or index of less than 1 indicates negligible risk. See *ibid.*

Applying the above framework to the Final Rule, EPA did not find any coal-fired power plant that exceeded the 1-in-1 million cancer threshold. It only found four "oil-fired" units in Puerto Rico that exceeded such standard. 85 Fed. Reg. at 31319.

[10] "The MIR [maximum individual risk] is defined as the cancer risk associated with a lifetime [(70 years)] of [continuous] exposure at the highest concentration of HAP where people are likely to live." App. 409a, 414a (EPA's Residual Risk Assessment, *supra* note 4, at 10, 15).

Additionally, EPA found no power plant with a hazard index/quotient that exceeded 1. *Id.* at 31315 (Table 2 and accompanying text); App. 468a–469a (EPA's Residual Risk Assessment, *supra* note 4, at Tables 1 and 2a of Appendix 10).

Notwithstanding such public health findings, EPA still decided to tighten emission standards by 67 percent for coal-fired power plants. Strikingly, the standards for *oil-fired* plants (i.e., the power plants that did have cancer risks greater than 1-in-1 million) were not reduced at all. The Final Rule targets "coal-fired" plants only, all with cancer risks one to several orders of magnitude less than 1-in-1-million and hazard quotients/indices likewise less than 1.

Reducing cancer risk that is already less than 1-in-1-million or non-cancer hazard indices already less than 1 yields negligible public health benefits, if any.[11] Indeed, Congress provided a mechanism to delist source categories if their emissions' cancer risk falls below 1-in-1-million and their non-cancer hazard indices are less 1. 42 U.S.C. § 7412(c)(9)(B). And requiring hundreds of millions of dollars to be expended for such infinitesimal benefits is not a rational result from reasoned decision-making. An irrational regulation cannot stand. *Michigan*, 576 U.S. at 750.

Finally, EPA cannot sidestep the benefits issue by paying odes to "unquantifiable benefits" of reducing HAPs or claiming it "considered" costs by comparing them to the industry's revenues and other similar financial data. The former was rejected by

[11] See generally Nicholas Rescher, *Risk: A Philosophical Introduction to the Theory of Risk Evaluation and Management* 37–38 (1983) (discussing the "chance of death by natural disasters (or 'acts of God'), roughly 1/1,000,000 per annum in the U.S.A * * * as something akin to the 'noise level' of a physical system and fatality probabilities significantly smaller than this would thus be seen as negligible").

Michigan as well, both in the decision itself and the oral argument leading up to it. See 576 U.S. at 749 (noting EPA "could not fully quantify the benefits of reducing power plants' emissions of hazardous air pollutants"); cf. Transcript of Oral Argument at 59–63, *Michigan*, 576 U.S. 743 (No. 14-46) (Chief Justice Roberts noting EPA's reference to co-benefits as "an end run" that "raises the red flag" because the co-benefits concern a different criteria pollutant subject to Clean Air Act Section 109). The latter involves no consideration of benefits at all, much less "whether the costs of its decision outweighed the benefits." *Id.*, 576 U.S. at 750. At its core, both approaches are still dodging the statutory directive to put costs in context of public health benefits from reducing HAP emissions.

B. EPA's Final Rule Never Grappled with How the Two Power Plant Rules Would Interact with Each Other.

1. The Final Rule failed to meaningfully consider how it would interact with EPA's flagship Greenhouse Gas Rule issued that same day, in at least four different contexts:

- The collective impact of these two rules that could risk Colstrip retiring by 2027.
- The failure to assess the cost-effectiveness (i.e., dollars per ton of pollutant removed) implications of Colstrip installing controls but then retiring shortly thereafter at the end of 2031 under the Greenhouse Gas Rule.
- The failure to assess the grid reliability impacts from Colstrip's retirement forced by the interaction among the two rules.
- The failure to address Applicants' request for a retirement subcategory to ameliorate all the effects discussed above.

Applicants raised all of these issues in comments on the proposed rule, which EPA effectively ignored, notwithstanding that Colstrip is the facility most impacted by the Final Rule, and one that EPA has admitted to targeting both publicly,[12] and on the administrative record.[13]

2. Applicants made clear in comments on the proposed rule that the "one-two punch" of the two regulations would hasten Colstrip's retirement. The combination of huge compliance costs under the Final Rule by mid-2027 (meaning immediate efforts would be necessary to comply) and a limited cost-recovery timeframe prior to forced retirement before 2032 by the Greenhouse Gas Rule puts Colstrip in an impossible situation with the likely result that Colstrip would be forced to avoid the expenditures and retire by the Final Rule's 2027 compliance deadline. Despite substantial comments on this interaction, EPA did not meaningfully respond; rather, EPA avoided the issue by finalizing the rules contemporaneously and ignoring their interactions on Colstrip.

3. Just two months ago, this Court stayed an EPA air regulation because it was "likely" that the rule (1) was "not 'reasonably explained,'" (2) lacked "a satisfactory explanation," and (3) "ignored 'an important aspect of the problem' before it." *Ohio* v.

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[12] *E.g.*, *Fiscal Year 2025 Request for EPA: Hearing Before the H. Comm. on Appropriations*, 118th Cong., at 31:59, (Apr. 30, 2024) (statement of Hon. Michael S. Regan, Administrator, EPA) (accusing Colstrip of "cheating the system" even though Colstrip meets all currently applicable emission standards), https://appropriations.house.gov/events/hearings/budget-hearing-fiscal-year-2025-request-environmental-protection-agency.

[13] *E.g.*, 89 Fed. Reg. at 38531 ("Colstrip is * * * the only facility where the EPA estimates the current controls would be unable to meet a lower fPM limit."); App. 222a (EPA's Response to Comments 39) (acknowledging that "compliance costs will fall disproportionately on * * * Colstrip in particular").

EPA, 144 S. Ct. 2040, 2053 (2024) (citations omitted); see also *Motor Vehicle Mfrs. Ass'n, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring an agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (citation omitted)).

Specifically, EPA in *Ohio* finalized a nationwide emission standard (a "Federal Implementation Plan" or "FIP") and "determined which emissions-control measures were cost effective * * * based on an assumption that the FIP would apply to all covered States." 144 S. Ct. at 2050. That assumption was "inextricably linked" to EPA disapproving various state emission standards (a "State Implementation Plan" or "SIP") so that the FIP could replace the state plans. *Ibid.*

Put differently, one agency action (EPA's cost-effectiveness analysis on the FIP) was largely tied to another (EPA's SIP disapproval). Thus, when commenters flagged that legal defects over EPA's SIP disapproval poisons EPA's cost-effectiveness analysis on the nationwide standard, and when EPA "offered no reasoned response" on the two Agency actions' interplay, this Court stayed the rule. See *id.* at 2051, 2053–2054.

If anything, Colstrip's situation is a more egregious example of the same problem. Here too EPA assessed the technology upgrade costs to be spread out for fifteen to eighteen years because EPA assumed that Colstrip is not retiring. 89 Fed. Reg. at 38526. Applicants provided EPA with a separate analysis that explained how, under the real risk that Colstrip's remaining life might be closer to four years (if EPA's companion Greenhouse Gas Rule is upheld), Colstrip's annualized control costs would skyrocket. App. 134a–139a, 146a, 149a (Talen Mont. Cmts., 16–21 and Attachments B, C). EPA

simply ignored the altered cost-effectiveness calculation that Applicants presented, which the Agency cannot do. See *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency 'must examine the relevant data and articulate a satisfactory explanation for its action ∗ ∗ ∗ ∗'").

4. EPA has nevertheless been adamant that it "considered" the interaction between the Greenhouse Gas Rule and the Final Rule. See, *e.g.*, App. 670a, 675a (EPA Stay Opp'n 35 n.13, 40). EPA's record speaks otherwise. Rather than identifying how such consideration occurred, EPA's Response to Comments blithely contended that (1) the two rules have "no impact" on the other because the rules are authorized from different sections of the Clean Air Act, App. 221a, 248a (EPA's Response to Comments 38, 65), and (2) EPA "generally considers finalized, rather than proposed, rules" for its analyses, App. 310a (EPA's Response to Comments 127).

With respect to the reasons EPA gave on the record for *not* considering the two rules together, no part of the Act, let alone general administrative law principles, allows EPA's regulations to be so partitioned. Rather, EPA must "acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking." *Portland Cement Ass'n* v. *EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (per curiam). This is true especially because an "impending [regulation] of an undeniably related source category is clearly a 'relevant factor[]' or an 'important aspect of the problem' that must be considered." *Ibid.* (second alteration in original) (citation omitted). Otherwise, "newly acquired evidence" and

"significant factual predicate[s]" could be brushed aside, just like EPA did so here. See *ibid.* (citations omitted); see also *Ohio*, 144 S. Ct. at 2053–2054.

5. In fact, the record (or lack thereof) shows how little EPA considered the two rules' combined effect on Colstrip. In its fifty-plus page briefing paper for the D.C. Circuit, EPA made two passing references to argue that the Agency considered the issue. App. 670a, 675a (EPA Stay Opp'n 35 n.13, 40). EPA's contentions largely boil down to two points: (1) an insistence that coal-fired power plant retirements will be orderly; and (2) a bare, unprincipled rejection of Applicants' request to harmonize the Final Rule with the Greenhouse Gas Rule.

6. Starting with EPA's assertion that an orderly plant retirement is still possible (and thus resolves any reliability concerns), the Agency cites to the Resource Adequacy Analysis that EPA prepared in developing the Final Rule, which makes generalized observations about the nation's grid reliability. See App. 670a (EPA Stay Opp'n 35 n.13); App. 368a–370a, 373a, 377a (EPA's Resource Adequacy Analysis 7–9, 12, 16). Similar sentiments are sprinkled in the Final Rule, where EPA declared that commenters offered "no credible information" that the Final Rule would lead to premature retirements and further "disagree[d] that this rule would threaten resource adequacy or otherwise degrade electric system reliability." 89 Fed. Reg. at 38526. But as Applicants such as NorthWestern have raised in their comments, there is no nationwide grid, only a patchwork of regional grids. App. 171a (NorthWestern Cmts. 13). The proper question EPA should have been answering is whether any regional grid would be threatened by

the Final Rule, and if so, engaging in a careful assessment in conjunction with the relevant energy authorities to ensure grid stability. This did not happen.

And when Montana (or at least Colstrip's service area) is the proper unit of inquiry, EPA's broad assertions turn indefensible. For example, NorthWestern commented that no matter how orderly that process may be, (1) closing Colstrip before the mid-2030s, and (2) the diversion of funds alone, each independently trigger a grid crisis. App. 160a–161a, 171a–177a, (NorthWestern Cmts. 2–3, 13–19). EPA's "[c]onclusory explanations" notwithstanding "considerable evidence" alone constitutes arbitrary and capricious agency action. *AT&T Wireless Servs., Inc.* v. *FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001).

EPA's posture is especially concerning because the Agency is aware that the facility most affected by this rule will be Colstrip. Thus, when the Final Rule dismisses reliability issues because the plants implicated only "generate less than 1.5 percent of total generation in 2028," 89 Fed. Reg. at 38526, it omits a key detail, which is that such generation is concentrated in Montana. At any given time, Colstrip supplies up to 1,480 MW of net generating capacity. App. 733a (Lebsack Decl. ¶ 8). Much of that capacity supplies Montana customers, through NorthWestern's owned share and market purchases when needed. App. 830a (Hines Decl. ¶ 21). That increment is especially important because much of the remainder of Montana's demand (and regional demand) is supplied by renewable sources that are vulnerable to seasonal and weather variability.

As this Court stated recently, "awareness is not itself an explanation." *Ohio*, 144 S. Ct. at 2054. And to the extent "EPA's response did not address the applicant's concern

so much as sidestep it," such measures would be arbitrary and capricious. See *id.* at 2055. This Court's instruction to EPA follows bedrock administrative law. See, *e.g.*, *Int'l Union, United Mine Workers of Am.* v. *Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) (discussing how "[agency']s failure to address these comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense of the training provision").

7. Finally, EPA's refusal to consider retirement subcategories as suggested by the Applicants further shows EPA's contortions to avoid considering the two regulations together. As mentioned *supra*, p. 13, Applicants requested an alternative form of relief which was that, if EPA were to finalize the fPM emission standards as proposed, EPA should create a subcategory of sources for coal-fired plants that could choose to retire instead by a date certain, as the Agency had for the Greenhouse Gas Rule. Applicants made clear that such request was to harmonize the compliance timeframe that coal-fired power plants like Colstrip would be facing. App. 139a (Talen Mont. Cmts. 21). It was an offramp strategy aligned with the Greenhouse Gas Rule that would permit the orderly retirement EPA so wishes, see 89 Fed. Reg. at 38526; App. 369a–370a (EPA's Resource Adequacy Analysis 8–9), with more time for replacement resources, App. 139a (Talen Mont. Cmts. 21).

EPA ignored Applicants' request by presenting two strawmen and then erring further. First, EPA assumed that subcategorization should be relevant only to facilities that have *already announced* retirement. And according to EPA, since all but three of those could comply with the Final Rule, the retirement subcategory "would not change

the costs of the rule in a meaningful way." 89 Fed. Reg. at 38527. Yet the point of Applicants' request was that more facilities *could decide to retire* if given the opportunity. Critically, if EPA established the retirement subcategory that Applicants requested and Colstrip could choose to retire by 2032 instead of 2027, EPA would slash nearly half ("42 percent") of the Final Rule's costs. See *id.* at 38533. Thus, EPA's assertion that the subcategory "would not change the costs of the rule in a meaningful way," *id.* at 38527, lacks any rational foundation.

Second, in briefing EPA raised for the first time in the D.C. Circuit that, had EPA done that, "then every coal-fired unit would be exempted, for they will all retire at some point." App. 676a (EPA Stay Opp'n 41). Post hoc reasoning aside, see *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), EPA's position is not the one Applicants ever argued. The comments requested a date certain deadline by which to commit to retirement, consistent with the timelines set in the (proposed) Greenhouse Gas Rule. App. 139a (Talen Mont. Cmts. 21).

The closest thing that EPA came to address an actual downside of allowing Colstrip to retire by 2032 instead of 2027 was its one-sentence assertion that letting units operate longer without additional controls would lead to "continued exposure to those emissions in the communities around these units during that timeframe." 89 Fed. Reg. 38527. That one-sentence assertion was then backed by a one-paragraph reference to the Northern Cheyenne Tribe with no discussions on how exactly the tribal members have been, or could be, harmed. *Id.* at 38531. As discussed throughout this Application, those "continued exposures to those emissions" impose no meaningful health risks. See

discussion *supra*, pp. 9–12, and *infra*, pp. 36–37. If anything, EPA ignored the benefits of early retirement, i.e., the benefit of a coal-fired power plant retiring early rather than just decreasing emissions over a longer period of time.

EPA's rejection of this approach is the only instance where the Final Rule expressly references the Greenhouse Gas Rule. 89 Fed. Reg. at 38527, 38533. As such, the Final Rule's flagrant dismissal of this compliance path shows a visible commitment that EPA would not consider the two rules together. Setting aside the illogical nature of EPA's responses, the Agency's refusal is particularly ironic because EPA is effectively belittling the same relief advanced by EPA in the Greenhouse Gas Rule. 89 Fed. Reg. at 39841–39842 (wholly exempting units retiring before 2032 regardless of whether the units had already announced plans to retire).

8. In closing, EPA has failed to account for the different interactions between the two rules. ***First,*** EPA ignored that the rules together allow just four and a half years to recoup costs of compliance with the Final Rule before Colstrip's retirement would be forced by the Greenhouse Gas Rule (and the concomitant risk that Colstrip would thus retire by mid-2027 without installing any additional controls under the Final Rule). ***Second,*** as a result, if Colstrip does install the controls, EPA's cost-effectiveness calculation is off by at least 400 percent, because the amortization period for any installation cost would be four and a half years, not fifteen to eighteen years as assumed by EPA. ***Third,*** the probability of an even more accelerated retirement in 2027 presents serious grid reliability impacts in the region that Colstrip services. ***Fourth,*** Applicants' request for a retirement subcategory would have mitigated all of the concerns raised

above, which EPA dismissed with no serious answers as to the merits. Any one of these failures is a breach of EPA's duty to "consider an important aspect of the problem" and "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *State Farm*, 463 U.S. at 43 (citation omitted).

II. Applicants Will Likely Suffer Irreparable Harm Without a Stay.

Absent a stay, Colstrip's fate will already be sealed by the time that this litigation runs its ordinary course. Opponents trivialize the three-year compliance timeframe by saying that technology installment will be swift and doable after the D.C. Circuit reaches its merits decision. Such characterization is naïve at best, blatantly false at worst—consultants have already briefed Colstrip's leadership that "this project will take 36-42 months." App. 746a, 761a (Lebsack Decl. ¶ 35 and Attachment A at 1-3). According to EPA, Colstrip is the only facility that must install a new baghouse, which intrinsically takes longer than the other control technology opponents assume would be sufficient. App. 746a (Lebsack Decl. ¶ 35). If this Court so wishes, it need not even review Colstrip-specific declarations and materials; *Michigan* v. *EPA* took more than three years (February 2012 to June 2015), the same timeframe EPA demands Colstrip to install its controls.

Either Applicants must commit to install controls costing over $350M and begin that process immediately, or set a course for Colstrip's (premature) retirement. See, *e.g.*, App. 829a–831a (Hines Decl. ¶ 18–24). Either path poses irreversible and severe consequences to Applicants and Montana as a whole. App. 751a–755a (Lebsack Decl.

¶¶ 51–62) (explaining financial, consumer, and reliability impacts). Worse, these immediate and highly consequential decisions on Colstrip's future must be made in consultation with four other Colstrip owners with divergent interests and regulatory mandates. See, *e.g.*, App. 736a–744a (Lebsack Decl. ¶¶ 13–31). These harms are particularly stark for Colstrip.[14]

A. Ongoing Expenses of Compliance Costs

The Final Rule imposes significant costs on Colstrip over a concentrated period. As this Court has recently recognized, these harms are irreparable because the expenditures occur "during the pendency of this litigation" and are "nonrecoverable." See *Ohio*, 144 S. Ct. at 2053.

Compelling Colstrip to install control technology that would otherwise be unnecessary is a prime example of irreparable financial injury. "[N]o 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.'" *In re NTE Connecticut, LLC*, 26 F.4th 980, 990 (D.C. Cir. 2022) (quoting *Mexichem Specialty Resins, Inc.* v. *EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015)). After all, the Administrative Procedure Act bars recovery of money damages against an offending agency. 5 U.S.C. § 702. Therefore, there is "no guarantee of eventual recovery" of losses resulting from EPA's Final Rule. *See Ala. Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, 594 U.S. 758, 765 (2021) (per curiam); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 220–221 (1994) (Scalia J., concurring) ("[C]omplying with a regulation later

[14] EPA recognizes that Colstrip's situation is unique among regulated parties. See App. 685a (EPA Stay Opp'n 50).

held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.").

The costs associated with the irreversible decision to attempt to install controls will be steep and immediate. See App. 746a (Lebsack Decl. ¶ 36). It will cost "over $350 million" over the course of the project, and an additional $15 million in annual operating cost. App. 745a–746a (Lebsack Decl. ¶¶ 34–36). Colstrip can only comply with the Final Rule's tight compliance schedule if it starts engineering and construction activities "immediately." See App. 746a–747a (Lebsack Decl. ¶¶ 35–38). In fact, Applicants have already expended significant funds to "study the compliance options and timelines, and millions of dollars will be required to continue engineering and design efforts later this year." App. 735a–736a (Lebsack Decl. ¶ 8.h). Also, "major construction activities begin[] by Spring of 2025." App. 751a (Lebsack Decl. ¶ 51). Material purchasing will begin on a $350 million dollar project by the first quarter of 2025. App. 746a (Lebsack Decl. ¶ 36).

Even if NorthWestern could successfully recover those rates after an unpredictable rate recovery hearing, those costs will then fall on Montana's electricity customers. Opponents may trivialize $350 million as miniscule for a national rule. But these costs impose real consequences when concentrated on a sparsely populated state.

B. Business and Regulatory Decisions That Cannot Be Undone

Beyond financial harm, the Final Rule, compounded with the Greenhouse Gas Rule, forces Colstrip's diverse owners to make key irreversible business and regulatory decisions imminently. App. 751a–754a (Lebsack Decl. ¶¶ 51–54). This decisional uncertainty counsels in favor of a stay. See *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015)

(staying EPA water rule to "temporarily silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing").

The whole point of a stay is to preserve the parties' "relative positions." See *Starbucks Corp.* v. *McKinney*, 144 S. Ct. 1570, 1576 (2024) (citation omitted). Such balance is ever more precarious for Colstrip, where divergent ownership interests (driven by the respective jurisdictions' call to decarbonize at varying paces) magnify the gravity of business decisions and disagreements. And just like how some of these inter-owner disputes led to lawsuits before, the possibility that Colstrip's commitment to a compliance path one way or another consumes further time and resources is real.

C. Montana's Grid Reliability

Should Colstrip choose the accelerated retirement path, it would surely destabilize Montana's grid and drive major rate hikes. App. 839a–840a (Hines Decl. ¶¶ 44–47, 52); App. 842a (Lebsack Decl. ¶¶ 56–57) (discussing higher electricity prices and "reliability at risk"). Colstrip currently plays an essential role in providing baseload capacity for NorthWestern. See App. 831a, 838a, 846a (Hines Decl. ¶¶ 27, 41–42, 64). There are no near-term feasible means to replace Colstrip's capacity with other existing NorthWestern capacity or market purchases from other sources. App. 840a–841a, 847a (Hines Decl. ¶¶ 45–53, 69) (discussing insufficient transmission capacity, especially due to multiple EGU closures, and the length it would take to build new generation). Imported power is further constrained by transmission limitations. App. 840a (Hines Decl. ¶¶ 45–47). The Final Rule's mandatory closures will also force consumers to pay

more for power—particularly during extreme weather events—and as skyrocketing electricity demand strains an already-vulnerable system transition. App. 842a, 843a–845a, 846a (Hines Decl. ¶¶ 55, 59–62, 64–66).

Also, grid reliability remains an irreparable harm even if Colstrip does not retire. That is because Colstrip must incur costs in 2024 and early 2025, and there is no guarantee that NorthWestern, the regulated utility that must service its customers, could recover its costs in time. During the time NorthWestern must go through its rate recovery hearing in front of its public service commission, it must fill the financial gap by pulling from elsewhere. That diversion of funds alone complicates meeting generation demand. For example, NorthWestern commented that expending the resources needed to comply with the Final Rule would create competing demand with other essential capital projects with clear environmental benefits, such as upgrading existing renewables and mitigating wildfire risks. App. 179a (NorthWestern Cmts. 21).

III. The Equities and Relative Harms Favor a Stay.

A stay preserves the status quo during judicial review. The status quo here provides more than an "ample margin of safety to protect public health" from power plant HAP emissions across the nation—a record admission by EPA. 89 Fed. Reg. at 38518. It is an infinitesimally small level of risk: a cancer risk of 0.147-in-1 million, almost seven times lower than the 1-in-1 million risk that EPA itself has considered scientifically insignificant. App. 468a–469a (EPA's Residual Risk Assessment, *supra* note 4, at Tables 1 and 2a of Appendix 10); *see also* App. 717a–721a (America's Power and Electric

Generators MATS Coalition Stay Mot. 5–9). A stay truly causes no measurable harm to anyone.

There is no public interest in an acontextual "[l]ess is better," see App. 636a (EPA Opp'n 1), especially for a rule that EPA admits there is a "negative net monetized benefit[]" tacked with amorphous, unquantified benefits, see 89 Fed. Reg. at 38511. See generally *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part) ("[T]oo much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems."). Here, devoting resources to comply with the Final Rule for no discernible benefit means fewer resources to spend on both power sector rules and other emission reducing projects.

The Final Rule actively harms the public interest by (1) raising electricity prices (itself an essential public good), (2) threatening grid reliability, and (3) disrupting the local economy dependent on Colstrip's operations, Montana's economy, and beyond. To top it all off—even if one concedes that EPA's policy goals trump all other values (it should not), "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 594 U.S. at 766.

CONCLUSION

This Court should stay the Final Rule pending judicial review.

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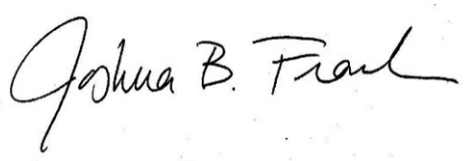
Respectfully submitted,



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