No. 24A433

In the Supreme Court of the United States

PANOCHE ENERGY CENTER, LLC

APPLICANT,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MARTHA GUZMAN ACEVES, REGIONAL ADMINISTRATOR OF REGION 9 OF U.S.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPLICATION FOR FURTHER EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant Panoche Energy Center, LLC certifies that it is wholly owned by Ares Energy Investors Fund V, L.P. No individual investor owns more than 10% of the stock of Panoche Energy Center, LLC or the Ares Energy Investors Fund.

APPLICATION FOR FURTHER EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Elena Kagan, as Circuit Justice for the Ninth Circuit:

Under this Court's Rules 13.5 and 22, Applicant Panoche Energy Center, LLC respectfully requests a second extension of thirty (30) days, to Monday, January 6, 2025, to file a petition for a writ of certiorari in this case. Panoche Energy's petition will seek review of the U.S. Court of Appeals for the Ninth Circuit's decision in *Panoche Energy Center, LLC v. U.S. Environmental Protection Agency*, No. 23-1268, 2024 WL 3043005 (9th Cir. June 18, 2024) (unpublished), which denied Panoche Energy's petition for review of an underground injection control permit issued by the Environmental Protection Agency (EPA). A copy of the decision is attached. App. A. In support of this application, Applicant states:

1. The Court of Appeals issued its opinion on June 18, 2024. App. A. Panoche Energy filed a petition for panel rehearing, which the Court of Appeals denied on August 8, 2024. App. B. On October 31, 2024, this Court granted a thirty-day extension of time within which to file a petition for certiorari until December 6, 2024. This application is being filed at least 10 days before that date. Granting this additional thirty-day extension would make the petition due on January 6, 2025.

2. As noted in the first application, this case involves an underground injection control permit that was issued to Panoche Energy by the EPA. Panoche argued to the Ninth Circuit

that the EPA improperly imposed a monitoring condition as part of its renewed permit. Specifically, when Panoche's permit came up for renewal, the EPA took the unprecedented step of ordering Panoche to drill and maintain an off-site monitoring well in the middle of a third party's almond orchard—land which is over a mile away from Panoche's facility and which Panoche does not own or have the right to access, control, or use. (Indeed, the owner of the almond orchard has refused to allow Panoche to construct the monitoring well for any price.) The EPA imposed this monitoring condition without considering cost, access, or property rights. The Ninth Circuit sanctioned the EPA's approach.

3. This matter raises an important question for review. In denying Panoche's arguments, the Ninth Circuit read statutory silence in the Safe Drinking Water Act as a presumption of expansive and unqualified authority for the EPA to impose the monitoring condition here. The Ninth Circuit's analysis cannot be reconciled with this Court's subsequent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Moreover, the Court of Appeals' construction of the Safe Drinking Water Act is itself at odds with the text of the statute and implicates issues of fundamental procedural fairness. The decision below is wrong and warrants plenary review, as it will improperly allow the EPA to impose extraordinary monitoring requirements that could be cost-prohibitive or simply impossible to achieve, without regard to statutory authority.

4. This second application for a 30-day extension seeks to accommodate Applicant's legitimate needs. Since the Ninth Circuit's decision, the parties have been negotiating a potential modification of the permit condition at issue in this case that could moot issues on appeal. Those negotiations have been productive and have continued since this Court granted the initial 30-day extension, but they have not yet concluded. In particular, on November 21, 2024, the EPA provided Panoche a temporary stay of the permit condition at issue to facilitate pending discussions and details that may result in amended permit conditions. A further extension of time to file a petition for a writ of certiorari would allow for continued negotiation and a potential resolution that could make the filing of a petition unnecessary.

5. However, if the filing of a petition for a writ of certiorari becomes necessary, an additional thirty days is needed for undersigned counsel and her colleagues to have adequate time to devote to completing Panoche Energy's petition. Although counsel have been diligently working on the petition, they have had several other deadlines, including: preparing and arguing a motion to dismiss on November 15, 2024 in *Quinault Indian Nation v. Washington State Department of Fish and Wildlife, et al.*, No. 24-2-02825-34 (Thurston Co. Superior Ct.); preparing a petition for review in a forthcoming federal rule challenge in the United States Court of Appeals for the D.C. Circuit that will likely be filed within the next 15 days; and preparing a motion for a stay in the D.C. Circuit in *City of Port Isabel v. Federal Energy Regulatory Commission*, No. 23-1175 to be filed within the next few weeks.

In addition to these deadlines, the undersigned counsel was brought on to assist in this matter after the Ninth Circuit's ruling below and continues to require additional time to familiarize herself with the appellate record and relevant case law. Undersigned counsel also has pre-existing plans to travel with family from November 27 through December 2, 2024, for the Thanksgiving holiday.

A further thirty-day extension is thus necessary to enable counsel to balance the press of other business and deadlines with their obligations in this case, and to provide them adequate time to complete work on the Applicant's petition.

6. For these reasons, Applicant respectfully requests that the due date for its petition for a writ of certiorari be further extended to January 6, 2025.

DATED: NOVEMBER 26, 2024

Respectfully submitted,

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Appendix A

NOT FOR PUBLICATION

FILED

JUN 18 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PANOCHE ENERGY CENTER, LLC, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, Administrator of the United States Environmental Protection Agency; MARTHA GUZMAN ACEVES, Regional Administrator of Region 9 of U.S., Respondents.	No. 23-1268 MEMORANDUM*

On Petition for Review of an Order of the
Environmental Protection Agency

Argued and Submitted May 22, 2024
Anchorage, Alaska

Before: BYBEE, FRIEDLAND, and MILLER, Circuit Judges.

Panoche Energy Center petitions for review of an underground injection control permit issued by the Environmental Protection Agency. We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

jurisdiction under 42 U.S.C. § 300j-7(a)(2), and we deny the petition.

Under the Administrative Procedure Act, we "set aside" agency action that is "arbitrary, capricious," "not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). Agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Food & Water Watch v. EPA*, 20 F.4th 506, 514 (9th Cir. 2021) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

1. Panoche argues that the EPA violated the Safe Drinking Water Act by requiring ambient monitoring on property Panoche does not own. But the monitoring condition was within the EPA's broad statutory discretion to prevent the potential endangerment of drinking water by underground injection. The statute mandates that the EPA require monitoring "wherever appropriate, at locations and in such a manner as to provide the earliest possible detection of fluid migration" that could adversely affect human health. 42 U.S.C. § 300h-5; *see also* 42 U.S.C. § 300h(b)(1), (d)(2). It does not require the EPA to consider property ownership before determining where to require monitoring.

Panoche argues that because the Act does not expressly authorize offsite monitoring, the EPA must lack the authority to require it. However, Panoche identifies nothing in the language or structure of the statute limiting the broad grant of authority to the EPA. Nor does the offsite monitoring condition implicate federalism concerns. The permit does not interfere with state regulation of private property; it merely requires Panoche to contract for access to the necessary land. Whether the EPA may require offsite monitoring is also not a "major question": The EPA is not asserting the power to regulate "a significant portion of the American economy," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), and it is far from "implausible" that Congress contemplated offsite monitoring as a means of achieving its clear directive, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Finally, the EPA's reading of the statute does not implicate the eminent domain power or otherwise interfere with property rights. By its terms, the permit "does not convey property rights of any sort or any exclusive privilege" or "authorize . . . any invasion of other private rights." And the EPA has consistently maintained that ensuring "access to private property to meet the requirements of the permit conditions" is "outside the scope of [underground injection control] permitting authority."

2. Panoche also argues that the EPA failed to consider the cost of monitoring

on property it does not own, in contravention of the Safe Drinking Water Act, the agency's implementing regulations, and agency precedent. Assuming without deciding that some degree of cost consideration is appropriate, we conclude that the EPA's consideration of costs was adequate. The EPA determined that "monitoring is not particularly expensive when compared to the information received," and it responded to Panoche's cost concerns by reducing the number of locations and the depth at which the permit required monitoring. The EPA explained that the permit's monitoring requirement "would provide the empirical data needed about subsurface pressures, while limiting the burden and cost" of monitoring. Panoche also appears to have made no effort to determine the cost of accessing the relevant land. If, after negotiating with the neighboring landowner, Panoche is unable to secure access to the necessary land, the permit allows Panoche to request changes to the monitoring condition. *See* 40 C.F.R. § 144.39(a)(2).

3. The EPA's decision to require an ambient monitoring well near abandoned well Silver Creek #18 was not arbitrary and capricious. The EPA did not "entirely fail[] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, by rejecting Panoche's concerns about its property rights. As noted above, the EPA adequately considered the costs associated with offsite monitoring. Nor did the EPA treat Panoche differently from similarly situated permittees by

requiring offsite monitoring in this case. Panoche identifies no case in which the agency declined to require offsite monitoring when the area of review contained several abandoned wells penetrating the injection zone and the permittee had not yet attempted to access the necessary property.

The EPA's decision to require ambient monitoring near Silver Creek #18 also evinced a rational connection between the facts found and the choice made. Panoche bears the burden of showing that its injection activities pose no risk of endangerment. *See* 40 C.F.R. § 144.12(a). The EPA conducted a site-specific analysis—considering, for example, the fact that the abandoned wells penetrate an over-pressurized injection zone and lack adequate long-string casing and cement plugs—to determine that the abandoned wells pose a risk of endangerment necessitating monitoring. The EPA reasonably refused to credit Panoche's argument that there is no current risk of endangerment because the mud used to plug Silver Creek #18 was legally adequate under state law in 1974.

Contrary to Panoche's representation, the EPA's decision to require ambient monitoring did not depend on an irrational assumption that Panoche would operate at maximum capacity. Instead, the agency reasoned that because the Panoche Formation is already over-pressurized, *any* additional fluids injected could result in pressure or water quality changes in the underground source of drinking water, which monitoring could help detect.

The EPA also did not irrationally fail to consider how the region's sandstone and natural confining layers could reduce fluid migration from the injection zone. The monitoring requirement was based on the EPA's concern regarding fluids migrating through abandoned wells that pierce those layers.

Finally, it was not irrational for the EPA to require ambient monitoring even though fluid migration from the injection zone might not worsen water quality. The EPA's observation that the effect of fluid migration on water quality depends on the concentration of contaminants in the fluid is consistent with its statutory and regulatory authority to require monitoring to prevent potential endangerment. *See* 42 U.S.C. §§ 300h(d)(2), 300h-5; 40 C.F.R. § 146.13(d)(1).

PETITION DENIED.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 8 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PANOCHE ENERGY CENTER, LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; et al.,

Respondents.

No. 23-1268

Agency No. Environmental Protection Agency

ORDER

Before: BYBEE, FRIEDLAND, and MILLER, Circuit Judges.

The Petition for Panel Rehearing is DENIED.