No. 24A463

In the Supreme Court of the United States

EAST KENTUCKY POWER COOPERATIVE, INC.,
Applicant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

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

EAST KENTUCKY POWER COOPERATIVE, INC.'S, REPLY IN SUPPORT OF APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING APPELLATE REVIEW

S. Chad Meredith
Counsel of Record
G. Luke Burton
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth St., Suite 1900
Cincinnati, Ohio 45202
Telephone: +1 513 361 1200
Facsimile: +1 513 361 1201
E-mail:
chad.meredith@squirepb.com
luke.burton@squirepb.com

Attorneys for Applicant

CORPORATE DISCLOSURE STATEMENT

Applicant East Kentucky Power Cooperative, Inc. ("EKPC") incorporates by reference the Rule 29.6 Statement made in its application, which remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

RCRA authorizes EPA to regulate only those sites where solid waste "is disposed of." 42 U.S.C. §§ 6903(14), 6944(a). No one disputes this. Not EPA, and not the Respondent-Intervenors. That should be the beginning and the end of this case because EPA's new CCR Rule regulates far beyond that modest statutory limit on EPA's authority. Instead of regulating only those sites where solid waste "is disposed of," the Rule regulates sites—like the former impoundments at EKPC's Dale Station—where solid waste *was disposed of* as of October 2015, but no longer is. Ultimately, the primary dispute here boils down to what it means to be a site where solid waste "is disposed of"—a question of first impression before this Court, and one of nationwide significance.

EKPC takes the statutory language at face value. EKPC interprets RCRA to mean what it says—a site where solid waste "is disposed of" is a site where solid waste is disposed of. The D.C. Circuit agreed in its seminal *USWAG* decision, holding that "a garbage dump is a garbage dump *until the deposited garbage is gone*." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 441 (D.C. Cir. 2018) (emphasis added). But EPA and the Intervenors see it differently, arguing that a site where solid waste "is disposed of" is one not only where solid waste is actually disposed of, but also one where it *once was disposed of* if EPA speculates there *might* be residual leachate in the soil or groundwater. Their interpretation is self-refuting.

The entire argument advanced by EPA and the Intervenors is premised on mere speculation about what they think *might* exist in the soil and groundwater at long-closed former impoundments. In their view, EPA is authorized to hypothesize

about the presence of years-old leachate—which they artfully now equate to solid waste—and then require regulated entities to disprove the hypothesis. But this guilty-until-proven-innocent approach is not supported by RCRA's plain language.

Nor is the retroactive effect of the Rule. Of course, EPA and the Intervenors claim that the Rule is not retroactive. But no amount of spin or mental gymnastics can avoid the truth of the matter, which is that the Rule imposes new legal obligations on transactions that were completed years ago—like the closure of EKPC's former Dale Station impoundments, which was accomplished with State oversight and approval. This is the very definition of retroactivity. And it is fatal to the Rule because Congress provided no indication—much less a clear indication—that EPA can regulate retroactively under RCRA.

EPA and the Intervenors gloss over these flaws in the Rule—and the others raised in EKPC's application—and instead spill a lot of ink proclaiming the supposed dangers of legacy impoundments. But that only highlights another critical problem with the Rule. EPA's evidentiary basis for promulgating the Rule relies entirely on risk analyses that assume the continued presence of CCR and liquids. At no point in the rulemaking process did EPA ever point to any evidence showing what risks, if any, are posed by former impoundments like those at EKPC's Dale Station, which were dewatered and cleaned out of CCR years ago.

Perhaps recognizing the weakness of their contentions, EPA and the Intervenors resort to arguing that this is not the kind of case with which this Court should be concerned. They even criticize EKPC for seeking narrow relief. And the

Intervenors go so far as to belittle EKPC's concerns as "parochial." Intervenors' Resp. at 21. This matter might seem "parochial" to the Intervenors, who have no daily obligation to provide reliable and affordable energy to some of the most economically underprivileged communities in rural Appalachia, but to EKPC's employees and the Kentucky farms, businesses, and residents who depend on the power EKPC provides, it is seeking meaningful relief from government overreach. And, in any event, the narrow relief that EKPC seeks is far from a reason to discount its stay application. By its very nature, a stay—like any equitable relief—should be as narrow as possible. "Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay).

EPA and the Intervenors conflate narrow relief with insignificance. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (granting equitable relief as to a single church and its pastor). EKPC has raised issues of nationwide importance that have never been decided by this Court—issues like the scope of EPA's regulatory jurisdiction under RCRA and the extent to which the Commerce Clause allows Congress and federal agencies to regulate solid waste. These are weighty matters that deserve this Court's attention.[1] And these matters are likely to be resolved in EKPC's favor. Thus, to prevent EKPC from suffering irreparable harm by incurring wasted compliance costs that cannot be recovered from EPA, *see* App.407–431 (Purvis Decl.), the Court should grant EKPC's requested stay.

[1] To the extent certworthiness is a factor in obtaining a stay, the questions at issue satisfy it.

REASONS FOR GRANTING THE APPLICATION

I. EKPC is likely to succeed on the merits.

A. The Rule exceeds EPA's authority under RCRA.

Leachate. That one word is essentially the entire response to EKPC's argument that the Rule is outside EPA's authority. Even though EKPC removed all the CCR from the former impoundments at its Dale Station several years ago—and did so with State oversight and approval no less—EPA and the Intervenors contend that solid waste still "is disposed of" in those former impoundments because they speculate that leachate *might* be present in the soil or groundwater. Their arguments fail for four reasons.

First, it is puzzling for EPA and the Intervenors to focus their arguments on leachate. After all, EPA concedes in the preamble to the Rule that leachate *is not* CCR. *See* 89 Fed. Reg. at 38,999. This means that EPA is in the odd position of trying to use something that is admittedly *not* CCR to justify applying a CCR regulation to sites that do not contain CCR. On its face, this is nonsensical.

Second, EPA and the Intervenors never argue that leachate *actually is* present at the former impoundments at EKPC's Dale Station. Instead, a careful reading of their responses shows that they just *speculate* about its existence. EPA for example, goes no further than asserting that leachate will "typically" be present at the site of a legacy impoundment. EPA Resp. at 14. And EPA merely cites its 2014 risk assessment in support of that assertion. *Id.* Bear in mind, of course, that the 2014 risk assessment evaluated the risks of legacy impoundments that *still contained* both CCR and liquids. *See generally* 2014 Risk Assessment. It did not evaluate the risks

of former impoundments—like those at EKPC's Dale Station—that have not contained either for several years. Thus, there is no basis for EPA's speculation. But even if there were some basis, that still would not be enough. The statutory language is paramount. And it says EPA has authority to regulate only those sites where solid waste "is disposed of," 42 U.S.C. § 6903(14), not sites where solid waste "is or *might be* disposed of." Neither EPA nor the Intervenors have an answer for this.

The myopic focus on hypothetical leachate ignores another key statutory limit on EPA's power. RCRA limits EPA's regulatory jurisdiction not just to sites where solid waste "is disposed of," but also to sites that pose a "reasonable probability of adverse effects on health or the environment from disposal of solid waste." *Id.* § 6944(a). Just as there is no reason to believe that there is presently leachate at the former Dale Station impoundments—many years after all CCR and liquids were removed from them—there is likewise no reason to believe that they pose such a reasonable probability of adverse effects. EPA's only response to this is that it "had no basis to treat facilities like Dale Station as presenting 'no reasonable probability of adverse effects on health or the environment … .'" EPA Resp. at 15 (quoting 42 U.S.C. § 6944(a)). In other words, EPA contends that it is authorized to regulate sites like the former Dale Station impoundments because there is no evidence that those sites do not present a reasonable probability of adverse effects. But that turns the statute on its head. It is EPA's statutory obligation to show that a category of sites—here, former impoundments that no longer contain CCR or liquids—pose a reasonable probability of adverse effects, not a property owner's burden to prove otherwise. Until

EPA has met that obligation—which it has not done here—it has no jurisdiction to regulate such CCR-free sites.

Third, years-old leachate is not even solid waste. EPA and the Intervenors assume that it is, but they fail to show that their assumption is correct. EPA cites its own "longstanding interpretation of the relevant statutory term," EPA Resp. at 6, but that is irrelevant. An agency's interpretation of a statute is no longer entitled to deference. *See Loper Bright Enters. v. Raimondo*, 603 U.S. __, 144 S. Ct. 2244, 2273 (2024). Instead, courts must exercise their independent judgment about the best interpretation of the statutory language at issue. *See id.* And the best interpretation of RCRA is that years-old leachate—even if it were to exist, which is purely speculative—does not count as solid waste. RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material … ." 42 U.S.C. § 6903(27). Thus, the statute says that for liquid to count as "solid waste," it must be "discarded material." This is significant because even EPA appears to concede that if there were leachate at the former Dale Station impoundments, it would have been generated *after* CCR was discarded. *See* EPA Resp. at 5, 14. In other words, even EPA recognizes that EKPC did not "discard" leachate. The hypothetical presence of CCR leachate, therefore, does not give rise to rulemaking authority under RCRA.

To be sure, several parts of RCRA address leachate. But in those instances, the statute mentions leachate from the standpoint of establishing requirements to

ensure that leachate collection systems appropriately handle the leachate coming from existing solid waste. *See, e.g.*, 42 U.S.C. § 6936(a) (subjecting the "owner or operator of a waste pile … to the same requirements for liners and leachate collection systems or equivalent protection provided in regulations promulgated … under section 6924"). The statute does not provide that lingering leachate from long-removed solid waste is within the bounds of what EPA can regulate under RCRA.

Fourth, EPA and the Intervenors ignore that Congress gave EPA one narrow avenue through which to address contamination from *past* disposal, and that avenue does not involve rulemaking. As explained in EKPC's stay application, RCRA allows EPA to "bring suit" for injunctive relief "upon receipt of evidence that the *past* or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a). This is the only backward-looking provision in RCRA that provides a remedy for contamination from *past* disposal. EPA asserts that this is wrong, but it provides no meaningful explanation of *why* it is wrong except to say that the D.C. Circuit held in *USWAG* that EPA can regulate inactive sites. EPA Resp. at 17. That is a red herring as no one contests that EPA can regulate inactive sites that still contain CCR.

The existence of CERCLA also belies the suggestion that RCRA provides EPA with backward-looking rulemaking authority. CERCLA and RCRA complement each other. "RCRA is preventative in nature," while "CERCLA, on the other hand, serves goals that are remedial and curative rather than preventative." *S.C. Dep't of Health*

& Env't Control v. Com. & Indus. Ins. Co., 372 F.3d 245, 256 (4th Cir. 2004) (citing *Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 679 (4th Cir. 1995)); *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (holding that unlike CERCLA, "RCRA is not principally designed to effectuate the cleanup of toxic waste sites … ," but instead to "minimize the present and future threat to human health and the environment" (citations and quotations omitted)). In other words, CERCLA is a backward-looking statute, and RCRA is forward-looking. Thus, Congress knows how to draft a statute focused on contamination from past waste disposal when it wants to do so. CERCLA is such a statute; RCRA is not.

In short, EPA's only authority under RCRA for remedying contamination from *past* disposal is a suit for injunctive relief under § 6973(a). If EPA pursued that remedy, it would have the burden of marshaling evidence to prove that the past disposal of solid waste at sites like the former impoundments at Dale Station present a threat to health or the environment. But EPA seeks to turn that section—indeed all of RCRA—on its head by promulgating a broadly sweeping Rule that essentially requires owners and operators of long-closed impoundments to bear the burden of *disproving* the existence of a threat. This is contrary to the authority Congress gave EPA under RCRA.

B. The Rule is impermissibly retroactive.

To rebut EKPC's retroactivity argument, EPA and the Intervenors once again point to leachate. They claim that the Rule does not regulate retroactively because it merely regulates the current threat posed by leachate. The very premise is unsustainable. If EPA can regulate based on speculation about some present threat

stemming from past disposal, there is practically no end to how far EPA can reach back and impose present obligations based on past conduct.

EPA also ignores that EKPC closed its former impoundments with the supervision and approval of the Commonwealth of Kentucky, which was the only regulatory authority authorized to regulate those sites until promulgation of the Rule here. That Rule, in plain terms, says that the long-completed Kentucky-approved closure is not the final say because the Kentucky closure did not comply with the Rule's requirements, even though those requirements did not apply at the time of closure. Thus, the Rule imposes new duties and new legal consequences on past transactions, making it retroactive in the primary sense. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 280 (1994). Because Congress did not authorize retroactive rulemaking in RCRA, the Rule is therefore unlawful.

C. The Rule is inconsistent with the WIIN Act.

The plain import of the WIIN Act is to fundamentally change CCR regulation by requiring EPA to implement a site-specific permitting regime rather than one-size-fits-all regulations. In fact, EPA once recognized this. In *USWAG*, EPA argued that the WIIN Act "makes 'fundamental changes to RCRA Subtitle D as applied specifically to [Coal Residuals].'" *USWAG*, 901 F.3d at 426 (quoting EPA WIIN Br. at 4, 6, 8). EPA further recognized that the WIIN Act was designed to create "site-specific solutions to protecting the environment." EPA WIIN Br., No. 15-1219, 2017 WL 11534804, at *10 (Oct. 11, 2017). Now, however, EPA disclaims any fundamental changes to RCRA and proceeds as if the permitting regime mandated by the WIIN Act is merely an option that EPA can take or leave at its discretion. But that is not

what the WIIN Act says. The statutory language is mandatory, stating that EPA "*shall* implement a permit program …" for CCR disposal. 42 U.S.C. § 6945(d)(2)(B) (emphasis added). That EPA continues to issue regulations rather than implement a permitting program is inconsistent with that command. Congress plainly directed EPA to move away from such a regulatory regime in favor of a site-specific permitting process. EPA was right the first time.

To be sure, the WIIN Act allows EPA to continue to set CCR standards through the 2015 CCR Rule and its "successor regulations," *see id.* § 6945(d)(3), but this Rule is not a successor regulation. EPA argues that the present Rule is a "successor" to the 2015 Rule because it "succeeds, or follows," that rule. EPA Resp. at 21 (citing *Webster's New World College Dictionary* 1429 (4th ed. 2009). But being a successor regulation has less to do with chronology and more to do with the substance of the rule. That is, a rule is a "successor" when it builds upon or "replaces or follows a predecessor." *Successor*, Black's Law Dictionary (12th ed. 2024). But when a new rule plows new ground by regulating things that were not previously regulated—as the present Rule does with CCRMUs and legacy impoundments that have no CCR or liquids—one cannot say that it is replacing or following anything else. Accordingly, the Rule is not a successor rule, and therefore is not authorized by the WIIN Act.

D. The Rule violates the Commerce Clause of the United States Constitution.

The federal government is one of limited and enumerated powers. *See* U.S. Const. art. I; *see also United States v. Lopez*, 514 U.S. 549, 566 (1995). So its power must end somewhere. But if EPA can regulate any plot of land simply because it

thinks there *might* be solid waste disposed of there—no matter whether that solid waste has moved in interstate commerce or affects the channels or instrumentalities of interstate commerce—then there would effectively be no end to EPA's power. That cannot be true. *See Lopez*, 514 U.S. at 566.

Moreover, the Commerce Clause does not reach inactivity. *See NFIB v. Sebelius*, 567 U.S. 519, 550–57 (2012) (Roberts, C.J., op.). This point alone makes the Rule unconstitutional as applied to the former impoundments at EKPC's Dale Station. There is no CCR management or disposal occurring there. Indeed, there is no activity of any kind going on at those former impoundments. They are simply vacant parcels of land that contain neither CCR nor liquids. EPA contests this, pointing once again to hypothetical leachate. *See* EPA Resp. at 23. But that is not an answer. Even if leachate were present, its passive existence in the soil or groundwater does not constitute *activity*. And the Commerce Clause only allows for the regulation of activity. *See NFIB*, 567 U.S. at 550–57 (Roberts, C.J., op.).

Even setting aside the issue of inactivity, the Rule satisfies none of the hallmarks of a valid exercise of the Commerce Clause. Of course, EPA suggests that the Rule satisfies the "substantial effects" test, but it makes no effort to demonstrate how. There is good reason for that lack of effort—there is not much EPA can say as the Rule fails even under that dubiously broad test. For example, the Rule is not restricted to addressing economic activity. *See Gonzales v. Raich*, 545 U.S. 1, 23–26 (2005); *United States v. Morrison*, 529 U.S. 598, 610 (2000); *Lopez*, 514 U.S. at 559–61. Nor does it have any "express jurisdictional element" limiting its reach to activity

with "an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611–12 (quoting *Lopez*, 514 U.S. at 562). And there is an attenuated link between the activity in question and the purported substantial effect on interstate commerce—especially when it comes to the *inactivity* at the former Dale Station impoundments. These are all key elements of the "substantial effects" test, and none of them is satisfied here. This clearly points to one conclusion: At least as applied to former impoundments like those at EKPC's Dale Station, the Rule is not authorized by the Commerce Clause.

E. The Rule is arbitrary and capricious.

EKPC's stay application points out four different ways in which the Rule is arbitrary and capricious. The EPA and Intervenors refute none of those four.

1. The APA requires that the Rule be supported by substantial evidence. *See* 5 U.S.C. § 706(2)(E). To satisfy this requirement, EPA points to its 2014 and 2024 risk analyses. But those analyses assume the presence of both CCR *and* liquids, specifically a hydraulic head. *See generally* App.440 (2024 Risk Assessment); 2014 Risk Assessment. Thus, they do not assess the risks of former impoundments—like those at the Dale Station—that no longer contain CCR or liquids, let alone a hydraulic head. There is thus no evidence supporting the Rule's regulation of sites like the former Dale Station impoundments, and that makes the Rule arbitrary and capricious. *See Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) (quoting *Ctr. For Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 312 (D.C. Cir. 1992)).

2. Additionally, the Rule will "make worthless" substantial parts of the past investment that EKPC incurred when it clean-closed the Dale Station

impoundments in reliance on the prior state of the law. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring). It will do so by forcing EKPC to undo, and then redo, much of the work that it completed when it initially closed those impoundments. For example, grading and earthworks will have to be reconfigured at great cost. EPA has no answer for this. In fact, its response does not even acknowledge this issue. Instead, it provides perfunctory assurances that it did, in fact, consider the reliance interests of regulated entities like EKPC. That *ipse dixit*, however, does not solve the problem. Nor does it offer a satisfactory, reasoned explanation for why EKPC should have its prior investment negated. *See Ohio v. EPA*, 603 U.S. 279, 295 (2024) (holding that EPA's stated "awareness" of a regulated entity's concerns "is not itself an explanation").

3. EPA has made no attempt to explain why it proceeded with the one-size-fits-all Rule rather than creating the site-specific permitting program required by the WIIN Act. Its failure in this regard is arbitrary and capricious.

4. Neither EPA nor the Intervenors explain why the Rule imposes fewer burdens on owners and operators who failed to maintain adequate records. Nor could they since there is no good reason why all owners and operators should not be evaluated based on the *current* state of their impoundments.

II. EKPC will be irreparably harmed absent a stay.

Without a stay, EKPC will likely incur $16.5 million in compliance costs. These costs will be unrecoverable from EPA, and therefore constitute irreparable

harm. *See Ohio*, 603 U.S. at 292 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and concurring in the judgment)).

EPA criticizes EKPC's increased estimates of the cost of complying with the Rule, but EPA offers no countervailing evidence. The only evidence in the record is the evidence provided by EKPC, and EPA's effort to ridicule that evidence rather than rebut it is telling. EPA might know something about environmental science, but no one knows more about how much it will cost to comply with the Rule than the actual people who will have to do the hard work of complying with it. EKPC acknowledges that its estimates of compliance costs have risen over time, but that is because EKPC put forth only those estimates that it had evidence for, rather than inflating its costs without basis. As more evidence came in, and as EKPC delved further into the complexities of the Rule, EKPC became more aware of anticipated compliance costs.

If the Rule is not stayed, then EKPC will have to start construction activities by next March. And once that happens, compliance costs will skyrocket. A stay is necessary to avoid that because there is no chance that the D.C. Circuit will have ruled on the merits of the case by then. There is not even a briefing schedule yet.

III. The balance of harms and the public interest favor a stay.

A rural electric cooperative serving some of the most economically underprivileged areas in the nation should not have to spend millions of dollars ensuring that sites that the State government has already affirmed contain no CCR are in compliance with a Rule regulating CCR. Forcing EKPC to incur those costs will not only harm EKPC, but ultimately the many farms, businesses, and individuals who depend on the electricity EKPC generates.

On the other hand, no one will be harmed by a stay. Of course, EPA and the Intervenors make grandiose blanket statements about the dangers of coal-ash sludge and dramatic visions of "looking out over thousands of tons of wet CCR." EPA Resp. at 9. But they conspicuously ignore the most salient point in the stay application, which is that none of that exists at EKPC's Dale Station, where the former impoundments were cleaned out years ago of both CCR and liquids—under State oversight and approval no less. In ignoring this critical point, they fail to explain how the former impoundments at the Dale Station pose a risk to anyone. A stay will do nothing more than spare EKPC from having to spend millions of dollars on potentially pointless compliance costs that can never be recovered from EPA. And for that reason, a stay is appropriate. *See NFIB v. OSHA*, 595 U.S. 109, 120 (2022).

The absence of harm is underscored by the time it took EPA to regulate CCR. EPA waited nearly 40 years after the enactment of RCRA to promulgate the first CCR regulations in 2015. And then, after the D.C. Circuit vacated portions of that rule in 2018, EPA waited another six years to promulgate the present Rule. If it were so critically important to regulate legacy impoundments immediately, there is no reason why EPA would have waited nearly five decades. EPA's delay belies any sense of urgency. There will be no harm from allowing EKPC to halt its compliance efforts as to the former Dale Station impoundments during the pendency of this litigation.

CONCLUSION

The Rule is unlawful. To ensure that EKPC does not have to spend millions of dollars complying with it while litigation is pending, EKPC respectfully asks the Court to stay the Rule—at least as to its former Dale Station impoundments.

Dated: December 2, 2024

Respectfully submitted,

/s/ S. Chad Meredith

S. Chad Meredith
Counsel of Record
G. Luke Burton
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth St., Suite 1900
Cincinnati, Ohio 45202
Telephone: +1 513 361 1200
Facsimile: +1 513 361 1201
E-mail: chad.meredith@squirepb.com
luke.burton@squirepb.com

Attorneys for Petitioner