No. _____

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

APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING APPELLATE REVIEW

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IDENTITY OF PARTIES, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

Applicant in this Court and Petitioner below is East Kentucky Power Cooperative, Inc. ("EKPC"). Pursuant to Rule 29.6, Applicant EKPC states that it is a corporation organized under the laws of the Commonwealth of Kentucky, and its corporate headquarters are located at 4775 Lexington Road, Winchester, Kentucky 40392. EKPC is owned by 16 rural electric cooperatives: Big Sandy Rural Electric Cooperative, Blue Grass Energy Cooperative, Clark Energy Cooperative, Cumberland Valley Electric, Farmers Rural Electric Cooperative, Fleming-Mason Energy Cooperative, Grayson Rural Electric Cooperative, Inter-County Energy, Jackson Energy Cooperative, Licking Valley Rural Electric Cooperative, Nolin Rural Electric Cooperative, Owen Rural Electric Cooperative, Salt River Electric Cooperative, Shelby Energy Cooperative, South Kentucky Rural Electric Cooperative, and Taylor County Rural Electric Cooperative. No publicly held corporation owns 10% or more of EKPC's stock.

Respondents in this Court and Respondents below are the United States Environmental Protection Agency (EPA) and Michael Regan, in his official capacity as Administrator of the EPA.

The other parties to the consolidated proceedings below are:

Petitioners: City Utilities of Springfield, Missouri, by and through the Board of Public Utilities; Utility Solid Waste Activities Group; National Rural Electric Cooperative Association; American Public Power Association; State of Texas; State of North Dakota; State of Wyoming; State of Alabama; State of Indiana; State of Iowa;

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 Utah; Commonwealth of Virginia; State of West Virginia; AEP Generation Resources, Inc.; Appalachian Power Company; Indiana Michigan Power Company; Kentucky Power Company; Ohio Power Company; Public Service Company of Oklahoma; Southwestern Electric Power Company; Wheeling Power Company; Coleto Creek Power, LLC; Dynegy Midwest Generation, LLC; Electric Energy, Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; Kincaid Generation, L.L.C.; Luminant Generation Company LLC; Miami Fort Power Company LLC; Zimmer Power Company LLC; Duke Energy Carolinas, Inc.; Duke Energy Progress, Inc.; Duke Energy Indiana, LLC; Lower Colorado River Authority; Talen Energy Supply, LLC; and Electric Generators for Sensible CCR Regulation.

Intervenors: Coosa River Basin Initiative; Hoosier Environmental Council; Sierra Club; Waterkeeper Alliance; Chattahoochee Riverkeeper; Altamaha Riverkeeper; Clean Power Lake County; and Just Transition Northwest Indiana.

The related proceedings below, all of which are consolidated, are:

City Utilities of Springfield, Missouri by and through the Board of Public Utilities v. EPA, et al, No., 24-1200 (D.C. Cir.) (lead case)

East Kentucky Power Cooperative, Inc. v. EPA, et al., No. 24-1267 (D.C. Cir.)

24-1269 - *Utility Solid Waste Activities Group, et al. v. EPA, et al.*, No. 24-1269 (D.C. Cir.)

State of Texas, et al. v. EPA, et al., No. 24-1274 (D.C. Cir.)

AEP Generation Resources, Inc., et al. v. EPA, et al., No. 24-1275 (D.C. Cir.)

Electric Generators for Sensible CCR Regulation v. EPA, et al., No. 24-1276 (D.C. Cir.)

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GLOSSARY

CCR	Coal combustion residuals
Rule	Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024)
2015 Rule	Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015)
EPA	United States Environmental Protection Agency
EKPC	East Kentucky Power Cooperative
RCRA	Resource Conservation and Recovery Act
WIIN Act	Water Infrastructure Improvements for the Nation Act
USWAG	*Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018)
CCRMU	Coal combustion residual management unit
Purvis Decl.	Declaration of Jerry Purvis
2024 Risk Assessment	EPA, *Risk Assessment of Coal Combustion Residuals: Legacy Impoundments and CCR Management Units*, EPA-HQ-OLEM-2020-0107-1065 (Apr. 2024), *available at* https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0107-1065, reproduced in the Appendix at App.440
2014 Risk Assessment	EPA, *Human and Ecological Risk Assessment of Coal Combustion Residuals*, RIN 2050-AE81 (Dec. 2014), *available at* https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0107-0126

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 respectfully requests an immediate stay of the United States Environmental Protection Agency's final rule entitled "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments," 89 Fed. Reg. 38,950 (May 8, 2024). EKPC has a petition for review of the Rule pending before the United States Court of Appeals for the District of Columbia Circuit, and it sought a stay of the Rule from that court pending its review. Because the D.C. Circuit denied EKPC's motion for a stay, EKPC now applies for a stay from this Court.

INTRODUCTION

EPA's new Rule regarding the disposal of coal combustion residuals—CCR for short—is unlawful and will cause irreparable injuries to Applicant EKPC if not stayed. The Rule is yet another aggressive attempt by EPA to push the envelope of its regulatory authority. And like many other recent attempts, this one goes too far. *See, e.g.*, *Ohio v. EPA*, 603 U.S. 279 (2024); *Sackett v. EPA*, 598 U.S. 651 (2023); *West Virginia v. EPA*, 597 U.S. 697 (2022).

At the heart of this matter are two fundamental tenets of American law. First is that federal administrative agencies can exercise only the authority given to them by Congress. *See, e.g.*, *NFIB v. Dep't of Labor, Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022). And the second is that the federal government is one of

limited powers. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 552 (1995). The Rule contravenes both these principles.

Start with the authority Congress has given EPA—or not given, in this case. EPA promulgated the Rule under RCRA, which authorizes EPA to regulate solid-waste disposal. The Rule addresses a particular type of solid waste—CCR. So far so good. The problem, however, is that RCRA does not give EPA a blank check to do whatever it desires regarding solid waste. Instead, it only authorizes EPA to regulate sites where solid waste "is disposed of." 42 U.S.C. §§ 6903(14), 6944(a). This is but a modest limit on EPA's authority, but the Rule goes far beyond it. Rather than sticking to sites where CCR *is* disposed of, it reaches back to regulate sites where CCR *was disposed of as of October 19, 2015*. As a result, it regulates sites where CCR *is not* disposed of—sites like the former impoundments at EKPC's Dale Station, from which all CCR was removed years ago under State-government oversight. This exceeds the authority Congress gave EPA under RCRA.

In like manner, the Rule's retroactivity also exceeds EPA's congressionally delegated authority. The Rule imposes new obligations on long-completed transactions. That is, it will force EKPC to re-open long-closed sites—sites that were closed with the Commonwealth of Kentucky's oversight and approval—only to re-close them under burdensome new requirements. Had Congress intended EPA to exercise such sweeping retroactive power, it would have said so clearly. It has not.

Indeed, what Congress *has* said about RCRA shows that the Rule is beyond EPA's authority. In the WIIN Act's 2016 amendments to RCRA, Congress required

EPA to move from one-size-fits-all, self-implementing rules governing CCR to a permitting regime that accounts for each CCR site's particular circumstances. The Rule flouts that command. Thus, not only is EPA attempting to exercise authority that Congress has not affirmatively given it, but to make matters worse, it is exercising authority that is inconsistent with Congress's affirmative directions.

Aside from the lack of statutory authority, there is an even deeper problem with the Rule: It is outside the federal government's enumerated powers in the Constitution. The problem here is that Article I does not give Congress a general power to regulate sites where solid waste is disposed of, much less sites—like EKPC's Dale Station—where solid waste was once disposed of, but no longer is. Accordingly, EPA cannot exercise such power either.

The Rule's legal deficiencies do not stop there. In addition to being outside EPA's statutory and constitutional authority, the Rule also violates the Administrative Procedure Act's prohibition on arbitrary-and-capricious rulemaking.

The Rule is fatally flawed. But even worse, it will force EKPC to permanently alter its real property and spend millions of dollars on unrecoverable compliance costs. And without a stay, EKPC's compliance efforts will have to ramp up in the coming weeks, culminating in the commencement of construction activities in March 2025. This is no small matter for a rural electric cooperative, especially one that supplies energy to some of the most economically underprivileged areas in the nation. This Court should stay the Rule.

OPINION BELOW

The D.C. Circuit's unpublished order denying EKPC's motion for a stay pending judicial review is reproduced at App.174. The Rule is published at 89 Fed. Reg. 38,950 (May 8, 2024) and is reproduced at App.1.

JURISDICTION

This Court has jurisdiction over this stay application under 28 U.S.C. § 1254(1) and has authority to grant 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 relevant provisions of RCRA, as amended by the WIIN Act, are 42 U.S.C. §§ 6903(14), 6944, 6945, all of which are reproduced in the Appendix at App.432, App.435, and App.436.

STATEMENT

I. Statutory and regulatory background

RCRA is a federal statute that regulates the disposal of solid waste. Subtitle C of RCRA governs hazardous solid waste. *See* 42 U.S.C. §§ 6921–6939g. And Subtitle D governs non-hazardous solid waste. *Id.* §§ 6941–6949a. The particular solid waste at issue here, CCR, is regulated under Subtitle D. *Id.* § 6945(d).

Under Subtitle D, EPA is authorized to regulate sites "where solid waste is disposed of[.]" 42 U.S.C. § 6903(14). "Disposal" "means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste … into or on any

land or water so that such solid waste … may enter the environment or be emitted into the air or discharged into any waters, including ground waters." *Id.* § 6903(3).

A site where solid waste is disposed of must meet certain criteria—established in EPA regulations—that ensure the site poses "no reasonable probability of adverse effects on health or the environment from disposal of solid waste." *Id.* § 6944(a). If there is no such reasonable probability, the solid-waste disposal site is a permissible "sanitary landfill." If there is such a probability, then the site is an open dump, which RCRA prohibits.

But antecedent to whether a site is an open dump or sanitary landfill is the RCRA-triggering question of whether solid waste "is disposed of" at the site in the first place. If not, RCRA gives EPA no rulemaking authority over that site.

Against this statutory backdrop, EPA embarked on a lengthy and comprehensive risk assessment to evaluate the risk of active CCR surface impoundments and landfills, known as the 2014 Risk Assessment. *See* 2014 Risk Assessment, *available at* https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0107-0126. It concluded that CCR surface impoundments with a "hydraulic head" exceed the regulatory risk threshold.

Using the 2014 Risk Assessment as its basis, EPA first promulgated regulations governing CCR disposal in 2015. *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015). The 2015 Rule set the minimum criteria for CCR disposal in landfills and surface impoundments (*i.e.*, depressed, excavated, or diked sites where CCR is disposed of with liquids). It classified surface impoundments as "active" or "inactive." Active

surface impoundments were those that, as of October 19, 2015 (the effective date of the rule), were still receiving CCR. *See* 40 C.F.R. §§ 257.50, 257.53. Inactive surface impoundments were those that no longer received CCR, but still contained both CCR and liquids as of October 19, 2015. *See id.* § 257.53.[1] The 2015 Rule regulated all active impoundments, as well as inactive impoundments at active power plants. *See id.* § 257.50. It did not regulate inactive impoundments at inactive power plants. *See id.*

The 2015 Rule was "self-implementing," meaning that owners and operators of CCR units had to comply with the requirements of the rule but were not subject to direct regulatory oversight through Federal or delegated State permitting and enforcement under RCRA. Rather, the 2015 Rule required owners and operators to comply with the rule's standards and to prepare a variety of compliance documents to be placed in the facility's "operating record" or posted on a publicly available website.

In 2016, Congress amended RCRA Subtitle D via the WIIN Act. The WIIN Act requires EPA to create a federal permitting program to replace its existing regime of one-size-fits-all, self-implementing rules governing the disposal of CCR. 42 U.S.C. § 6945(d)(2)(B) (EPA "shall implement a permit program"). It also allows EPA to approve State permitting programs to operate in lieu of direct federal regulation. *Id.* § 6945(d)(1). The WIIN Act expressly incorporates the 2015 Rule,

[1] In a few places, the version of the 2015 Rule published in the Federal Register mistakenly used "October 14, 2015," as the operative date rather than October 19, 2015. This was corrected when the 2015 Rule was codified in the Code of Federal Regulations. *Compare* 80 Fed. Reg. 21,469–71 *with* 40 C.F.R. § 257.53.

using it and any "successor regulations" as a gap-filler until State or federal permitting programs can be implemented. *Id.* But nearly a decade after the WIIN Act was enacted, EPA still has not created the federal permitting program, and it has approved only three State permitting programs—in Oklahoma, Georgia, and Texas.[2]

II. The *USWAG* case

Industry and environmental groups alike challenged the 2015 Rule, albeit for very different reasons. In *Utility Solid Waste Activities Group v. EPA*, the D.C. Circuit largely held in favor of the environmental petitioners and rejected most of the claims made by the industry petitioners. 901 F.3d 414 (D.C. Cir. 2018). Relevant here, the court found the 2015 Rule's exemption of inactive surface impoundments at inactive facilities to be arbitrary and capricious.

In reaching that holding, the court rejected the industry petitioners' argument that inactive impoundments that contain solid waste, but no longer receive new solid waste, cannot be considered "open dumps." *Id.* at 439. The industry petitioners asserted that RCRA's authorization to regulate sites where waste "is disposed of" means that EPA can regulate only those sites where solid waste is *actively* disposed of. *Id.* The court disagreed. It interpreted the active "is" and past participle "disposed" to mean that "an open dump includes any facility (other than a sanitary landfill or hazardous waste disposal facility), where solid waste still 'is deposited,' 'is dumped,' 'is spilled,' 'is leaked,' or 'is placed,' regardless of when it might have

[2] EPA recently rejected Alabama's proposed permitting program. *See* 89 Fed. Reg. 48,774 (June 7, 2024).

originally been dropped off." *Id.* In other words, the court held that a "garbage dump is a garbage dump *until the deposited garbage is gone*." *Id.* at 441 (emphasis added).

Significantly, the court acknowledged that the WIIN Act had changed CCR regulation under Subtitle D. But the court did not address the impact of that change. Instead, the Court "le[ft] it open for the EPA to address on remand the relevance of the WIIN Act[.]" *Id.* at 426.

III. The Rule

Roughly six years after the remand in *USWAG*, and eight years after the WIIN Act, EPA issued the Rule that EKPC now challenges. The Rule was promulgated on May 8, 2024, and will take effect on November 8, 2024.

Among other things, the Rule addresses the holding in *USWAG* by regulating inactive surface impoundments at inactive facilities—so-called "legacy impoundments." *See* 89 Fed. Reg. at 39,100, 39,105. But unlike the 2015 Rule, the present Rule disregards whether the surface impoundment at issue *currently* contains CCR and liquids. Instead, it asks whether the site did so as of October 19, 2015—the effective date of the *2015* Rule. *See id.* If so, then the Rule sweeps such sites into its purview and classifies them as legacy CCR surface impoundments even if they no longer contain any CCR at all.

For these legacy impoundments, the Rule provides multiple alternative pathways for compliance—found in the new subsections (f)–(i) of 40 C.F.R. § 257.100. *See* 89 Fed. Reg. at 39,105–08. The least burdensome compliance pathway is found in § 257.100(g). It allows an owner or operator of a legacy impoundment to avoid all other requirements of the Rule if it can: (1) show that all CCR was removed from the

unit before November 8, 2024; (2) provide specified documentation regarding the removal of the CCR and other closure and post-closure activities; and (3) demonstrate that there is a groundwater monitoring system in place at the legacy impoundment that meets certain criteria and that groundwater monitoring conducted no more than one year before the initiation of closure shows that the site does not exceed the groundwater protection standards set forth in 40 C.F.R. § 257.95(h). *See* 89 Fed. Reg. 39,107. The timing for this pathway is realistically impossible to meet unless the impoundment already had a groundwater monitoring system in place at the time of the Rule's promulgation.[3]

For owners or operators of legacy impoundments that cannot meet those requirements, the next least burdensome pathway is found in the new § 257.100(h)(1). It first requires the preparation—by November 8, 2024—of a notification of intent to certify closure. *See* 89 Fed. Reg. at 39,108. And then it requires the satisfaction by May 8, 2028, of all the groundwater monitoring standards in § 257.90–95. *See* 89 Fed. Reg. at 39,107–08. This pathway generally compels the same measures as § 257.100(g) plus "at least two consecutive sampling events to demonstrate" that the groundwater protection standards in § 257.95(h) are met. *See* 89 Fed. Reg. at 39,107–08.

If the requirements of § 257.100(h)(1) cannot be met by May 8, 2028, the next least burdensome pathway is found in the new § 257.100(h)(2). *See* 89 Fed. Reg. at

[3] Background groundwater quality must be established before determining whether groundwater protection standards are exceeded. Multiple sampling rounds are necessary over a lengthy period to comply with the CCR groundwater monitoring requirements. *See* 40 CFR § 257.93(d)–(e).

39,108. Among other things, it requires preparing an applicability report, placing a permanent marker identifying the CCR unit and its owner or operator, performing groundwater monitoring, and—if statistically significant levels of "constituents listed in appendix IV" are detected—performing corrective action under § 257.102(c)(2). 89 Fed. Reg. at 39,108. By cross-referencing § 257.102(c)(2), this pathway potentially obligates compliance with the post-closure care requirements found in § 257.104. *See* 89 Fed. Reg. at 39,114. Those requirements entail *30 years* of groundwater-monitoring obligations. *See* 40 C.F.R. § 257.104(c). Other compliance pathways that impose similar or greater burdens are found in the new subsections (f) and (i) to § 257.100. *See* 89 Fed. Reg. at 39,105–08.

No matter which compliance pathway an owner or operator is forced down, they *all* require the installation of one or more groundwater-monitoring systems. *See id.* This is no small matter as those systems are expensive to install and involve extensive sampling, laboratory evaluation, statistical analysis, and other accompanying requirements.

Significantly, such burdens are not on a distant time horizon. Instead, EKPC will have to begin working immediately to meet them. While it is true that the Rule does not require closure of legacy impoundments until 2028, the timeline is not as generous as it appears. EKPC has already begun preparations for meeting that deadline, and—in the absence of a stay—those preparations will have to intensify in the coming weeks and months. *See* App.422 *(*Purvis ¶ 30). Specifically, EKPC will

have to begin construction activities no later than March of 2025 to meet the 2028 deadline for its legacy impoundments. App.423 (Purvis ¶ 30).

As the evidentiary basis for the legacy-impoundment provisions in the Rule, EPA initially reverted back to the 2014 Risk Assessment. Yet that Assessment only considered impoundments that contained CCR and liquids, unlike sites—like those at the Dale Station—from which CCR and liquids have been removed. Recognizing this was a problem, EPA made a belated effort to bolster its evidentiary support for the Rule by preparing a 2024 Risk Assessment, which was released at the same time as the Rule. But the 2024 Risk Assessment also did not consider CCR surface impoundments that were devoid of CCR and liquids. *See* App.454 (2024 Risk Assessment at 2-4). Thus, neither Risk Assessment evaluates the risk of impoundments that have already been closed by removal of all CCR.

Two other points about the Rule bear mentioning. First, in addition to regulating landfills and impoundments, the Rule also creates and regulates an entirely new class of CCR unit, known as a CCRMU. CCRMUs are "area[s] of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit." 89 Fed. Reg. 39,100. Second—and contrary to the WIIN Act—the Rule does not create a permitting process. Rather, it continues the pre-WIIN-Act practice of providing one-size-fits-all, nationwide self-implementing requirements.

IV. Applicant EKPC

Headquartered in Winchester, Kentucky, EKPC is a not-for-profit rural electric generation and transmission cooperative that supplies energy to 520,000

homes, farms, and businesses across 87 counties in the Commonwealth of Kentucky. App.409–10, (Purvis ¶ 4). EKPC's owners are 16 member cooperatives that supply electricity to end-users—EKPC is the wholesaler; its owner-members are the retailers. *Id.* The end-users of the energy produced by EKPC predominantly live in Appalachia and other rural areas of Kentucky. Many of these individuals are among the nation's most impoverished, economically vulnerable citizens. *Id.* App.411 (Purvis ¶ 5. They are an aging population that relies on EKPC for electricity to heat their water and homes.

EKPC is committed to serving Kentuckians in an environmentally responsible manner. EKPC boasts a record of environmental over-compliance, investments in air-quality-control and wastewater-treatment technologies, closure of ash ponds by removal, management of waste, and renewable-energy diversification. App.412–13 (Purvis ¶ 7) (noting that the Commonwealth of Kentucky awarded EKPC its "highest Environmental Stewardship award" in 2023)). EKPC has invested nearly $2 billion to reduce environmental impacts of fossil fuels. App.413–14 (Purvis ¶ 8).

EKPC uses coal to produce power at two power plants—its H.L. Spurlock and John Sherman Cooper Stations. Naturally, CCR is a byproduct of the energy production at those facilities. EKPC stores CCR at four landfills—two at the Spurlock Station, one at the Cooper Station, and one at its J.K. Smith Station, which produces energy using gas-fired turbines. App.415 (Purvis¶¶ 12–13). All four are in Kentucky.

EKPC also previously produced power at another coal-fired power plant located at its William C. Dale Station, which is also in Kentucky. CCR from that

plant was stored in three on-site surface impoundments. App.416 (Purvis ¶ 16). EKPC stopped producing energy at the Dale Station prior to the 2015 Rule, which meant that the Dale Station impoundments were not regulated by that rule because they were inactive impoundments at an inactive facility. App.418–19 (Purvis ¶ 20).

Exemplary of its proactive environmental efforts, EKPC removed all CCR from the impoundments at the Dale Station beginning in 2014 even though it had no legal obligation to do so. App.416 (Purvis ¶¶ 16–17). It did so in cooperation with the Kentucky Division of Waste Management, which approved and certified the closure of those impoundments. App.417–19 (Purvis. ¶¶ 18, 23). The process of clean-closing the Dale Station impoundments involved dewatering and removing all CCR from them, including certification from an independent engineer that all CCR was removed. Altogether, EKPC spent approximately $27 million clean-closing those impoundments. App.420 (Purvis ¶ 25).

Today, the former Dale Station impoundments no longer exist. That is, those former impoundments no longer contain any CCR or liquids. Nor have they for many years. They were fully dewatered shortly after the 2015 Rule took effect and have been completely empty of CCR for several years. Nevertheless, the Rule classifies them as legacy CCR surface impoundments because they were not completely devoid of liquids and CCR on the effective date of the *2015* Rule. Now, nearly a decade later, the Rule will force EKPC to re-open its long-completed closure process for those former impoundments and then re-close them under new requirements. Among other things, this will require EKPC to install costly groundwater monitoring systems.

EKPC estimates that compliance with the Rule will cost in excess of $16.5 million for the former Dale Station impoundments alone. This is on top of the $27 million that it already spent to clean-close them under State oversight.

V. Procedural history

EKPC filed its petition for review in the D.C. Circuit on August 2, 2024. On August 7, EKPC petitioned EPA for a stay of the Rule pending litigation. EKPC submitted an amended stay petition to EPA on August 16. Having received no response from EPA, EKPC then filed a motion in the D.C. Circuit seeking a stay on August 19. The D.C. Circuit denied that motion in an order dated November 1, 2024.

REASONS FOR GRANTING THE APPLICATION

"In deciding whether to issue a stay, [this Court applies] the same 'sound … principles' as other federal courts." *Ohio*, 603 U.S. at 291 (2024) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Thus, the Court considers: "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Id.* (citing *Nken*, 556 U.S. at 434). All four factors weigh in favor of a stay here.

I. EKPC is likely to succeed on the merits.

EKPC is likely to prevail in its challenge to the Rule for at least five reasons: (1) the Rule is beyond EPA's RCRA authority; (2) it is impermissibly retroactive; (3) it is inconsistent with the WIIN Act; (4) it exceeds the federal government's power under the Commerce Clause; and (5) it is arbitrary and capricious.

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

RCRA Subtitle D allows EPA to regulate sites where solid waste "is disposed of." 42 U.S.C. §§ 6903(14), 6944, 6945. But the Rule far exceeds what Congress authorized EPA to regulate because it applies to sites where solid waste is *not* disposed of.

The D.C. Circuit carefully considered RCRA's scope in *USWAG*. It held that the phrase "is disposed of" covers all sites that contain solid waste, including sites that no longer actively receive it. Stated more plainly, *USWAG* held that "[a] garbage dump is a garbage dump *until the deposited garbage is gone*." 901 F.3d at 441 (emphasis added). But the Rule plows through this limit on RCRA's scope by regulating sites where the deposited garbage is long gone.

The former impoundments at EKPC's Dale Station are a perfect example. EKPC removed the deposited "garbage" (here, CCR) from the former impoundments at the Dale Station nearly a decade ago. With the CCR having been removed years ago, those former impoundments are not sites where solid waste "is disposed of." RCRA therefore gives EPA no rulemaking authority over those sites.

More importantly, while *USWAG* supports this conclusion, RCRA's text *compels* it. Start with verb tense. A site free of solid waste is not a place where solid waste "*is* disposed of." 42 U.S.C. § 6903(14) (emphasis added). Just as the present tense "is" drove the analysis in *USWAG*, so too must it here. *See* 901 F.3d at 440. The present tense communicates that a site cannot fall within RCRA's purview unless solid waste "is still *currently* 'placed' or 'deposited' there." *Id.* (emphasis added) (quoting 42 U.S.C. § 6903(3), (14)). In other words, "[a] site where garbage 'is disposed

of' is the place where garbage is dumped and left." *Id.* at 441. But once "the deposited garbage is gone," *id.*, no longer "is" it disposed of there.

The statutory definition of "disposal" also requires present solid waste. RCRA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste … into or on any land or water so that such solid waste … may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). Under this definition, there can be no "disposal" of solid waste at a *former* CCR impoundment site because solid waste—like CCR—cannot "enter the environment or be emitted into the air or discharged into any waters" from a site where it does not exist. Thus, in *In re Consolidated Land Disposal Regulation Litigation*, the D.C. Circuit held that "disposal" encompasses "the continuing presence of waste." 938 F.2d 1386, 1389 (D.C. Cir. 1991).

Another important statutory restraint on EPA's rulemaking authority is 42 U.S.C. § 6944(a), which limits EPA to regulating sites that impose a "reasonable probability of adverse effects on health or the environment from disposal of solid waste." 42 U.S.C. § 6944(a). Thus, even if a site contains solid waste, RCRA does not allow EPA to regulate it unless the site creates a "probability of adverse effects on health or the environment." *Id.* But there is no reason to believe that sites like the former impoundments at the Dale Station pose any such risk. Neither the 2024 nor the 2014 Risk Assessment provides any such basis. To the contrary, those Risk Assessments model risk based on impoundments that *still contain* CCR, liquids, and a hydraulic head. App.454 (2024 Risk Assessment at 2-4); 2014 Risk Assessment at

ES-5. Thus, they are irrelevant when it comes to establishing EPA's authority over former impoundments that do not have a "hydraulic head," let alone those that no longer contain CCR or liquids. And in the absence of any evidence that there is a "reasonable probability of adverse effects on health or the environment" from former impoundments that no longer contain CCR or liquid, EPA has no statutory authority to regulate such sites. 42 U.S.C. § 6944(a).

Consider also the objectives that Congress articulated when it enacted RCRA. Most relevant here, Congress expressed a desire to "promote the protection of health and the environment and to conserve valuable material and energy resources by … prohibiting *future* open dumping on the land and requiring the conversion of *existing* open dumps to facilities which do not pose a danger to the environment or to health." 42 U.S.C. § 6902(a)(3) (emphases added). Congress plainly meant for RCRA to be a forward-looking statute that addresses present and future solid waste, not solid waste that existed in the past but has since been removed. *Cf. Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484–86 (1996) (holding that RCRA does not provide a remedy for past cleanup costs because, among other things, already-removed waste does not present an imminent threat to health or the environment).

Finally, EPA's attempt to stretch its regulatory jurisdiction ignores another important aspect of RCRA's text—namely, that Congress provided one narrow avenue under RCRA for addressing "past" disposal, and that avenue is different in kind from EPA's rulemaking authority over "present" disposal. Specifically, while RCRA is generally a forward-looking statute and EPA's authority to impose *rules*

extends to only those sites where solid waste "is disposed of," 42 U.S.C. § 6903(14), RCRA separately authorizes 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," *id.* § 6973(a) (emphasis added). Thus, if EPA has *evidence* showing that any particular site that no longer contains CCR still poses a threat to health or the environment, RCRA provides EPA with a separate remedial path for that situation. And that remedy is to file suit as to that site based on site-specific evidence, not to include such a site within the purview of a generally applicable rule. Indeed, EPA has previously indicated that the litigation remedy provided by § 6973 is the exclusive remedy to address legacy sites: "RCRA already provides *one tool* which can be used to deal with the problem of inactive and abandoned sites—the imminent hazard provision of Section [6973]." *Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities*, 45 Fed. Reg. 33154, 33170 (May 19, 1980) (emphasis added).

It is understandable why EPA would want to promulgate a rule rather than pursue the remedy provided by § 6973. After all, it takes a lot of effort to investigate and prepare a lawsuit, to marshal one's evidence, and to prove that past disposal does, in fact, endanger health or the environment. But inconvenient though it may be, that is the route Congress prescribed for these situations.

Adopting EPA's view of the scope of its rulemaking authority under RCRA would work a "fundamental revision of the statute, changing it from [one sort of] scheme of … regulation"—*i.e.*, one that permits regulation of sites where solid waste "is disposed of"—"into an entirely different kind" that invites regulation of *any* site where solid waste *once was* disposed of. *West Virginia*, 597 U.S. at 728 (citing *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)). It should go without saying that EPA cannot do that. *See id.* Congress chose not to write RCRA in such a manner, and EPA must respect that choice. *Cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."). "The more an agency asks of a statute, in short, the more it must show in the statute to support its rule." *In re: MCP No. 185 Open Internet Rule*, No. 24-7000, 2024 WL 3650468, at *3 (6th Cir. Aug. 1, 2024) (per curiam). EPA cannot make the necessary showing here. The Rule regulates far beyond EPA's authority under RCRA.

B. The Rule is impermissibly retroactive.

The Rule is also impermissibly retroactive. "Retroactivity is not favored in the law," and an "agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Together, these two long-standing principles bar retroactive rulemaking absent a clear statement from Congress indicating otherwise. *Id.* at 208–09.[4]

[4] The same is true under the Administrative Procedure Act, which defines a "rule" as an "agency statement of general or particular applicability and *future effect*." 5 U.S.C. § 551(4) (emphasis added). Like the general rule against retroactivity, this statutory rule cannot be overcome absent express congressional authorization to the contrary. *Bowen*, 488 U.S. at 216 (Scalia, J., concurring).

Here, EPA does not claim that RCRA authorizes retroactive rulemaking. Instead, EPA contends that the Rule is not actually retroactive. So this issue boils down to whether the Rule is retroactive. If it is, then it is invalid. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). And it is.

A rule is retroactive where "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* The Rule is retroactive in exactly these ways.

First, by its plain terms, it "increase[s] a party's liability for past conduct." *Id.* It does this by setting a triggering event—presence of CCR and liquids in an impoundment—that predates the Rule by more than nine years. *Compare* 89 Fed. Reg. at 38,982 (setting October 19, 2015, as the triggering date for legacy impoundment regulation) *with id.* at 39,015 (explaining that the effective date of the Rule is November 8, 2024). The previously unregulated legacy impoundments are thus subject to new rules not based on the *current* presence of CCR and liquids, but based on its presence nearly a decade ago. In this way, the Rule subjects owners and operators of legacy impoundments to *new* liability for past conduct.

This issue is most starkly presented by Petitioners like EKPC, which clean-closed its legacy impoundments by removing all CCR and liquids shortly after the 2015 Rule was promulgated. At that time, there were no EPA-imposed liabilities for owning or operating legacy impoundments. But now the Rule will impose new liabilities for that conduct. And it will reach back and impose that new liability even

though—in the case of EKPC, for instance—the conduct is not presently occurring. In any commonsense understanding of the term, that makes the Rule retroactive.

Second, the Rule attaches "new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. Specifically, it imposes new EPA requirements for past closures of legacy surface impoundments that were completed under State oversight. Until the Rule's promulgation, legacy impoundments like the former impoundments at EKPC's Dale Station were not subject to EPA regulation. Thus, when EKPC undertook closure of the former Dale Station impoundments under State oversight, the only legal obligations imposed on that closure were those made by the Commonwealth of Kentucky.

EKPC completed closure of the former Dale Station impoundments under State oversight on January 17, 2019, more than five years before EPA's promulgation of the Rule. App.416, 419 (Purvis ¶¶16, 23). At that point, the closure was a completed transaction. That is, EKPC had no further legal obligations as to those former impoundments. Despite this fact, EPA now says the closure was not good enough based on its *new* Rule that did not apply at the time of closure. And under that new Rule, EPA now wants to add *new* obligations to the already-completed closure. The Rule thus "impose[s] new duties with respect to transactions already completed," and tries to undo a completed closure by imposing new requirements on it. *Landgraf*, 511 U.S. at 280. Accordingly, the Rule is retroactive in the primary sense, thereby making it *per se* invalid as applied to legacy impoundments that have already been closed under State oversight. *Id.*; *see also Arkema v. EPA*, 618 F.3d 1,

10 (D.C. Cir. 2010) (finding agency rule impermissibly retroactive "because it attempted to undo" the petitioners' prior transfers "based on the EPA's new interpretation of Section 607").

In essence, EPA argues that EKPC's closures—and others like them—were not really completed "closures" because they did not comply with the then-non-existent requirements for legacy impoundments found in § 257.102(c). On its face, this demonstrates that the Rule suffers from primary retroactivity—not to mention the secondary, arbitrary-and-capricious kind too, as discussed further below—because it "attaches new legal consequences" and requirements "to events completed before its enactment." *Arkema*, 618 F.3d at 7.

It is important to remember too that Kentucky's requirements for closing those former impoundments were not operating "in lieu" of any federal requirements. Rather, Kentucky's requirements were *the only* requirements at the time of closure because the former Dale Station impoundments were not subject to federal regulation. EPA wants to now go back in time and say Kentucky's closure requirements were not good enough. But that is inconsistent with the cooperative federalism envisioned by RCRA, which gives States primary authority to regulate non-hazardous solid waste (like CCR) under subpart D. And it further evinces impermissible retroactivity by: (1) impairing EKPC's right to close the former Dale Station impoundments under State oversight; and (2) creating new liability due to those closures' failure to comport with the closure standards that EPA is retroactively imposing on EKPC under § 257.102(c).

C. The Rule is inconsistent with the WIIN Act.

Enacted in 2016, the WIIN Act directs EPA to move away from one-size-fits-all, self-implementing regulations in favor of addressing CCR through permitting processes that accommodate site-specific circumstances. As a gap-filler, the WIIN Act provides that the existing and successor CCR regulations will govern until a federal or State permitting program is established. *See* 42 U.S.C. § 6945.

The D.C. Circuit considered the WIIN Act in its 2018 *USWAG* decision, but ultimately "le[ft] it open for the EPA to address on remand the relevance of the WIIN Act." *USWAG*, 901 F.3d at 426. On remand, EPA appears to have found little relevance in the WIIN Act and the sea change Congress envisioned thereunder. Instead of heeding Congress's command to adopt a permitting program, EPA broadened its authority by issuing the Rule, which is precisely the kind of one-size-fits-all, self-implementing rule that Congress rejected.

Moreover, while the WIIN Act allows CCR regulation to continue under the existing CCR rules and their "successor regulations" on an interim basis, *see* 42 U.S.C. § 6945(d)(3), the Rule is neither of those. First, it obviously did not exist when the WIIN Act was enacted. Second, it is not a "successor" to the existing rule because it regulates wholly new categories of CCR disposal units. *See* 89 Fed. Reg. 39,100 (CCRMUs and legacy CCR surface impoundments). A "successor" is something that "replaces or follows a predecessor." *Successor*, Black's Law Dictionary (12th ed. 2024). And the Rule does not replace or follow any provisions in the 2015 Rule. The provisions pertaining to legacy impoundments and CCRMUs do not replace or build upon any provisions in the 2015 Rule, but instead expand into previously unregulated

territory. Accordingly, the Rule is not a "successor regulation," but something entirely new.

EPA has had eight years since the WIIN Act's enactment to create the mandatory federal permitting program. Instead, EPA has pushed ahead with this one-size-fits-all regulation. Because it is inconsistent with the WIIN Act, the Rule should not go into effect.

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

Even if one were to assume for the sake of argument that the Rule is within the statutory authority Congress has given EPA, an even bigger problem remains: The Rule is outside the federal government's enumerated powers under the Constitution. Specifically, the Rule is not authorized by the Commerce Clause.

It is elementary that the federal government does not possess unlimited lawmaking power. Instead, Article I of the Constitution permits Congress to make law on only limited and enumerated topics. *See* U.S. Const. art. I, § 8. Those same limitations apply to the rulemaking power exercised by federal administrative agencies. After all, Congress cannot authorize an administrative agency to exercise power that Congress does not possess in the first place. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

One searches Article I in vain for any enumerated power that would give Congress—and, by extension, EPA—general regulatory authority over solid waste. Like most other federal environmental regulations, RCRA and the Rule are ostensibly premised on the power in Article I to regulate interstate commerce. *See, e.g.*,

Williams v. Ala. Dep't of Transp., 119 F. Supp. 2d 1249, 1253 (M.D. Ala. 2000) ("Congress enacted RCRA pursuant to its Article I Commerce Clause powers."). But unlike other federal environmental regulations, RCRA and the Rule do not address conditions—like air or water pollution—that affect channels of interstate commerce and are inherently capable of moving across state lines and affecting interstate commerce on their own. Instead, RCRA and the Rule regulate land use—specifically, land that is used for solid-waste disposal. And land is inherently stationary. So if Congress can regulate land simply because solid waste is deposited there—or, in this case, was *previously* deposited there—it is hard to see what kind of land-use regulations Congress *cannot* enact under the Commerce Clause. EPA's view of the Commerce Clause essentially turns it into a federal police power, which unquestionably does not exist. *See Lopez*, 514 U.S. at 566.

Of course, the analysis is not quite so straightforward under the Court's existing Commerce Clause jurisprudence. As it stands, the Court has interpreted the Commerce Clause to allow Congress to regulate three categories of activities: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce—including persons or things in interstate commerce—and (3) those activities that substantially affect interstate commerce. *See United States v. Morrison*, 529 U.S. 598 (2000). The first two categories obviously do not apply here. Solid waste, on its own, does not involve any instrumentalities or channels of interstate commerce. *Cf. Lopez*, 514 U.S. at 559 (holding that 18 U.S.C. § 922(q) is not justifiable as a regulation of the channels or instrumentalities of interstate

commerce). Significantly, RCRA does not contain any jurisdictional hook that would limit its application solely to solid waste that is transported or sold in interstate commerce or conveyed through an instrumentality of interstate commerce. *See generally* 42 U.S.C. 6901, *et seq*. So if solid waste in general can be regulated by Congress—and, by extension, EPA—it must be done under the category of activities substantially affecting interstate commerce. But the "substantial effects" test cannot justify RCRA—or at least the portions of RCRA that are relevant here—nor can it justify the Rule. The disposal of solid waste—even CCR—is not the kind of activity that this Court's precedents have found to "substantially affect" interstate commerce.

This Court has identified a variety of factors that are critical to determining whether a given activity satisfies the "substantial effects" test. Most importantly, the Court has looked to whether the activity in question is *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.

As an initial matter, the Rule's regulation of the former impoundments at the Dale Station does not involve any *activity* at all, much less economic activity. Given that the impoundments were clean-closed years ago, there is no solid waste disposal or storage activity going on there. Thus, at least as applied to those former impoundments, the Rule is regulating *inactivity*. And it is well established that the Commerce Clause cannot reach inactivity. *See NFIB v. Sebelius*, 567 U.S. 519, 550–57 (2012) (Roberts, C.J., op.).

Even so, the disposal of solid waste, in and of itself, is not *economic* activity. After all, solid waste—including CCR—is typically disposed of precisely because it has no economic value. To be sure, the disposal of solid waste *can* be economic activity. There are situations where one pays to have another dispose of and store one's solid waste, and there are situations where one pays to acquire another's solid waste. But not all solid waste disposal is economic activity, and EKPC's past disposal of CCR in the former Dale Station impoundments certainly was not.

In addition to the economic nature of the activity in question, this Court also considers whether the law at issue contains an "express jurisdictional element which might limit its reach" to activity that has "an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611–12 (quoting *Lopez*, 514 U.S. at 562). Neither RCRA nor the Rule contains such a jurisdictional element.

The Court has also looked to whether the "legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of [the regulated activity]." *Id.* at 612 (quoting *Lopez*, 514 U.S. at 562). Once again, neither RCRA nor the Rule contains any such findings.

Also relevant to the analysis is whether there is an attenuated link between the activity in question and the purported substantial effect on interstate commerce. *See id.* at 612 (citing *Lopez*, at 563–67). A "but-for causal chain … to every attenuated effect upon interstate commerce" is insufficient to satisfy the "substantial effects" test because it would lead to essentially unlimited federal power. *Id.*

The connection here is even more attenuated than in *Lopez* and *Morrison* because neither RCRA nor the Rule articulates *any* link between CCR disposal and a substantial effect on interstate commerce.

Finally, even if the Rule and the relevant portions of RCRA could satisfy the "substantial effects" test, there would remain a more fundamental problem—the very existence of the "substantial effects" test itself. At least as it is presently applied, the "substantial effects" test "is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *Sebelius*, 567 U.S. at 708 (Thomas, J., dissenting); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 146 (2001) ("The most persuasive evidence of original meaning … strongly supports Justice Thomas's and the Progressive Era Supreme Court's narrow interpretation of Congress's power [under the Commerce Clause]."); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1388 (1987) (concluding that "the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government"). The Court should either abandon it altogether or replace it with a version of the test that better reflects the text and history of the Commerce Clause. *See Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

Either way, the Rule is likely to be struck down. If the "substantial effects" test is eliminated altogether, the Rule will only be able to pass constitutional muster if it is a regulation of the channels or instrumentalities of interstate commerce—

which it plainly is not. And if the test is replaced with a version that is more consistent with the text and history of the Commerce Clause, the Rule is still unlikely to survive because nothing in the text or history suggests that the federal government was originally understood to have general authority to regulate solid-waste disposal, a quintessential State matter.

For all these reasons, the Rule is likely unconstitutional.

E. The Rule is arbitrary and capricious.

In a challenge to an agency rule, the reviewing court must "hold unlawful and set aside agency action … found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). The Rule fails to meet this standard in at least four ways.

1. A rule is arbitrary and capricious if it "makes worthless substantial past investment incurred in reliance upon the prior rule." *Bowen*, 488 U.S. at 220 (Scalia, J., concurring) ("a rule is an agency statement 'of future effect,' not 'of future effect and/or reasonable past effect.'"); *see also Dep't of Homeland Sec. v. Regents of the U. of Cal.*, 591 U.S. 1, 30 (2020) (holding that it is arbitrary and capricious for an agency to ignore the reliance interests that are impacted when an agency changes course (citations and quotations omitted)). Such is the case here.

The Rule will "make[] worthless" EKPC's past investment incurred in reliance on the prior state of the law because it will force EKPC to undo, and then redo, much of the work that it has already completed in closing its former Dale Station

impoundments years ago. *Bowen*, 488 U.S. at 220 (Scalia, J., concurring). In that way, it will force EKPC to incur duplicative costs.

Had EKPC known in 2015 what would ultimately happen nearly a decade later with the present Rule, it would have closed the impoundments according to those latter requirements the first time around instead of following the closure plan that it established in conjunction with Kentucky. App.424 (Purvis ¶ 33). In particular, EKPC's engineering practices would have deployed a substantially different approach to the final grading plan by—for example—providing a path to install groundwater monitoring wells. App.424 (Purvis¶ 33). To go back and re-do this now will require much greater cost than if EKPC had done this work while initially closing the former impoundments. And it will force EKPC to undo, and then redo, its prior earth-grading work. Thus, the Final Rule threatens to "make[] worthless" much of the prior investments that were made in reliance on the prior regulatory status of these impoundments. *Bowen*, 488 U.S. at 220 (Scalia, J., concurring).

To make matters worse, EPA has provided scant explanation for its disruption of EKPC's reliance interests. *See Ohio*, 603 U.S. at 292 (holding that an agency's action is arbitrary and capricious if the agency failed to supply "'a satisfactory explanation for its action'" (citation omitted)); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) ("in explaining its changed position, an agency must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))). In response to comments pointing out the reliance

interests that would be upended by using a 2015 applicability date, EPA merely offered perfunctory assurances that it had, in fact, considered those reliance interests. *See* 89 Fed. Reg. at 38,985. But EPA's *ipse dixit* is not a sufficient explanation. *See Ohio*, 603 U.S. 295 (explaining that EPA's stated "awareness" of a regulated entity's concerns "is not itself an explanation."). Ultimately, no amount of explanation can overcome the fact that EPA has rendered EKPC's decade-old investment worthless. *See Bowen*, 488 U.S. at 220 (Scalia, J., concurring). But EPA's failure to offer any substantive explanation pointedly underscores the arbitrariness of the Rule.

2. The Rule is also arbitrary and capricious because "it rests upon a factual premise that is unsupported by substantial evidence." *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)). In applying the "substantial evidence" standard, the court "must consider the whole record upon which an agency's factual findings are based, including" evidence that "'fairly detracts' from the evidence supporting the agency's decision." *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951)). Here, one can search the entire record and find no support for EPA's decision to regulate impoundments that have been empty of CCR and liquids for years, like the former impoundments at EKPC's Dale Station.

Recall that RCRA authorizes EPA to regulate sites where solid waste is disposed of if there is a "reasonable probability of adverse effects on health or the environment …." § 6944(a). It is clear from the record, however, that EPA has not provided any evidence that legacy CCR surface impoundments that have already been

clean-closed—like those at EKPC's Dale Station—pose any "reasonable probability" of harm. *See* 89 Fed. Reg. 38,984. The evidence that EPA relies on—the 2014 and 2024 Risk Assessments—evaluates the risks of impoundments that *still contain* both CCR *and* a hydraulic head. *See generally* App.440 (2024 Risk Assessment); 2014 Risk Assessment. Such risk assessments obviously have no bearing on whether clean-closed impoundments—which lack both CCR and a hydraulic head—pose any "reasonable probability" of harm. Thus, EPA has manifestly acted without substantial evidence.

3. EPA further failed to sufficiently explain its reasons for creating nationwide, one-size-fits-all criteria for CCRMUs and legacy impoundments and declining to use the site-specific approach of the WIIN Act's design. *See Ohio*, 603 U.S. 292 (citation omitted). As explained above, the WIIN Act plainly directs EPA to approve site-specific CCR permitting programs created by the States, or else create its own federal permitting program. But rather than comply with that directive, EPA has plowed ahead with the nationwide one-size-fits-all requirements of the Rule. And it has failed to offer a reasonable explanation for doing so. That failure is arbitrary and capricious. *See id.*; *see also Michigan v. EPA.*, 576 U.S. 743, 750 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998))).

EPA's half-hearted attempts to explain its action in the preamble to the Rule are not reasonable. For example, EPA argued that the D.C. Circuit's *USWAG* opinion

supported the decision to eschew the WIIN Act's directive for site-specific permitting programs. It asserted that:

> The D.C. Circuit has also effectively confirmed the continued necessity of national criteria; if the Court believed that the WIIN Act obviated the need to comply with RCRA section 4004(a) it would have granted EPA's request for an abeyance or dismissed the case as moot. That it did neither demonstrates that the Court believed that its opinion would remain relevant.

89 Fed. Reg. at 39,027 (citing *USWAG*, 901 F.3d at 436–37). There are two problems with this reasoning. The first is that no one is arguing that nationwide criteria are no longer relevant. They are. But the point is that the WIIN Act limited EPA's authority to create national criteria to the 2015 Rule and its "successor regulations." And the Rule goes beyond that limit.

The second problem with EPA's reasoning is that it mischaracterizes what the D.C. Circuit did in *USWAG*. The court did not endorse the view that EPA now ascribes to it. To the contrary, it decided to "leave it open for the EPA to address on remand the relevance of the WIIN Act, the Act's express incorporation of the EPA regulations published at 40 C.F.R. Part 257, and its definition of 'sanitary landfill.'" *USWAG*, 901 F.3d at 426. In fact, the closest the D.C. Circuit got to expressing an opinion on the effect of the WIIN Act was consistent with EKPC's views. The court observed that "[a]lthough a one-size-fits-all national standard might have been necessary for the self-implementing Final Rule [*i.e.*, the 2015 Rule], more precise risk-based standards are both feasible and enforceable under the individualized permitting programs and direct monitoring provisions authorized by the WIIN Act." *Id.* at 437 (citing the oral argument transcript). But EPA has failed to offer a

reasonable explanation for ignoring permitting programs in favor of more nationwide one-size-fits-all standards. *See Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979) (explaining that agencies must consider "reasonably obvious alternative" when rulemaking and "explain its reasons for rejecting alternatives in sufficient detail").

Elsewhere in the preamble, EPA explains that—in its view—it is appropriate to proceed with the self-implementing Rule rather than the permitting programs required by the WIIN Act "because all owners and operators of CCR units and CCRMU will need to follow the self-implementing rule until they obtain a State or Federal permit." 89 Fed. Reg. at 39,094. But that proves too much. Under this reasoning, EPA can forever ignore the direction to create a permitting regime.

EPA also contends that it is infeasible to rely on a permitting program because "it will be several years before permits are issued for every unit." *Id.* at 39025. This is not a satisfactory explanation because the delay is a problem of EPA's own making. EPA has had nearly a decade to create the permitting program that the WIIN Act mandates. Its failure to do so in a timely manner is not a sufficient reason to impose new and burdensome regulations on owners and operators of CCR units. And EPA's rationale is belied by the fact that it waited nearly four decades after the enactment of RCRA to create the 2015 Rule, and then waited almost another decade to create the Rule at issue here. At bottom, EPA's explanations for proceeding with the Rule in lieu of the federal permitting program mandated by the WIIN Act are wholly unsatisfactory.

4. Finally, the Rule inexplicably penalizes owners of impoundments who have responsibly and diligently maintained oversight of their facilities. It does this by exempting legacy impoundments that do not currently contain CCR and liquids if their owners do not have sufficient records or information to show whether the impoundments contained CCR and liquids as of October 19, 2015. *See* 89 Fed. Reg. at 39,106. In other words, an information gap coupled with a *current* absence of CCR and liquid will exempt a site from the Rule. But if an owner's records show that its impoundments contained CCR and liquids on October 19, 2015—regardless of the CCR-and-liquid status today—the Rule applies. EPA has not "reasonably explained" this illogical exemption that favors the lack of information over diligent documentation and recordkeeping. Nor has it shown "a rational connection between the facts found and the choice made." *Ohio*, 603 U.S. at 292 (citation omitted).

This exemption makes no sense, and it belies EPA's claim that legacy impoundments are so dangerous to health and the environment that they must be regulated even if they have been empty of CCR and liquids for years. It is the epitome of arbitrariness for the Rule to grant an exemption simply because an owner or operator lacks information showing whether an impoundment contained CCR and liquids on a particular date nearly a decade ago. Instead, everyone should be evaluated based on the current state of their impoundments, not just those who failed to keep—or otherwise lack—adequate records. Those who actively assessed impoundments should not be penalized. But that is what the Rule does. And that too is arbitrary and capricious.

II. EKPC will be irreparably harmed absent a stay.

A stay is necessary to protect EKPC and its customers from irreparable harm. If forced to comply with the Rule while this litigation is pending, EKPC will suffer unrecoverable compliance costs and unchangeable alterations to real property. *See Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 765 (2021) (per curiam). And the Rule's constitutional infirmities constitute irreparable harm as a matter of law.

Compliance Costs and Timing. EKPC has already begun preparations for complying with the Rule, and absent a stay, those preparations will have to intensify in the coming weeks and months.[5] To meet the 2028 closure deadline, EKPC will have to begin construction activities by March of 2025. App.422–23 (Purvis ¶ 30). This will entail performing hydrogeologic studies, reporting results of these studies, performing investigatory drilling, and designing, installing, developing, and certifying the groundwater-monitoring system. *See id.* It will also involve regrading and preparing earthwork for the installation of groundwater monitoring systems, and then installing and operating those systems. *See* App.420—26 (Purvis ¶¶26–39). Thus, EKPC will have to undo, and then redo, much of the closure work that it performed years ago when it closed the Dale Station impoundments by dewatering them and removing all the CCR. And once groundwater-sampling wells are installed,

[5] The least burdensome compliance pathway is unavailable to EKPC because that pathway requires the satisfaction of groundwater-monitoring standards by November 8, 2024. Simply put, there was not sufficient time for EKPC to install groundwater monitoring systems and conduct the necessary testing between the time the Rule was promulgated and the November 8 effective date. And, in any event, EKPC should not have to incur such unrecoverable compliance costs.

then EKPC must begin the work of sampling and performing statistical analyses of results to establish background water quality. *Id.* at ¶¶ 29–30. Stated simply, EKPC faces significant compliance work in the short term.

EKPC projects that these compliance efforts will cost more than $16.5 million—which is on top of the $27 million that EKPC already spent to clean-close the former impoundments.[6] App.424–25 (Purvis ¶ 36). As this Court recently reiterated, compliance costs incurred during the pendency of litigation against agency action are unrecoverable and thus create irreparable harm. *Ohio*, 603 U.S. 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)).

Unlike other cases where this Court has recently denied a stay, there is practically no chance that the D.C. Circuit will have decided the merits of this case before EKPC must engage in these compliance efforts. *See West Virginia v. EPA*, No. 24A95, 604 U.S. __, 2024 WL 4501235, at *1 (Oct. 16, 2024) (Kavanaugh, J., statement) (observing that "because the applicants need not start compliance work until June 2025, they are unlikely to suffer irreparable harm before the Court of Appeals for the D. C. Circuit decides the merits"). Merits briefing has not commenced, and a briefing schedule has not even been set.

Alterations to Real Property. Complying with the Rule will require EKPC to alter its land permanently, which cannot be undone. Specifically, EKPC will have to perform extensive regrading and earthwork and then install groundwater-monitoring

[6] The estimated cost of compliance does not include any corrective-action costs as EKPC does not see any basis to expect that corrective action would be needed.

devices—in other words, "a permanent physical occupation authorized by government." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). This Court has previously recognized that a stay during the pendency of litigation is appropriate to prevent alteration of real property. *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1310, (1974) (issuing stay to preserve the "*status quo*" of unaltered real estate in action to enjoin construction of a dam project).

Constitutional Harms. Finally, the Rule's constitutional infirmities impose *per se* irreparable harm. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976).

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

Some 93% of end users of the power EKPC generates are residential customers. Many of them live in communities afflicted with severe poverty and can ill afford a price hike in electricity, especially one that comes with no environmental benefits. But that is what the Rule will lead to if it goes into effect.

EKPC already spent $27 million to clean-close the Dale Station impoundments several years ago. The additional $16.5 million—or more—that it will have to spend to comply with the Rule is a hefty burden to impose on EKPC and, ultimately, the consumers who use the power it generates. Compliance costs and burdens that actually protect human health and the environment are one thing. But costs that do nothing to improve or protect the environment are quite another. Forcing EKPC—and, ultimately, its customers—to incur costs to essentially re-close an already-clean-closed surface impoundment is not only arbitrary and capricious, but also wasteful. The imposition of such costs does nothing to advance the public interest. At the same

time, it harms EKPC and its customers. Neither EKPC nor its customers will have recourse to recover these costs in the likely event that the Rule is struck down. *See Ohio*, 603 U.S. 292 (quoting *Thunder Basin Coal Co.*, 510 U.S. at 220–21 (Scalia, J., concurring in part and concurring in the judgment)). There is no balancing to be done here—it is a lopsided affair.

A stay will not "substantially injure" EPA, since "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. And it is hard for EPA to argue that it will be harmed by a stay when it waited six years after the *USWAG* case to promulgate this Rule. *Cf. Kentucky v. Biden*, 23 F.4th 585, 611 (6th Cir. 2022) (holding that the government could not show it would be harmed by a stay when it had voluntarily delayed enforcing a similar rule). Nor will the public be harmed since there is "no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Thus, the harm here is one-sided. Because the Rule "will force [EKPC] to incur [m]illions of dollars in unrecoverable compliance costs," "[t]he equities" favor staying the Rule. *NFIB v. OSHA*, 595 U.S. 109, 120 (2022).

CONCLUSION

This Court should stay the Rule pending judicial review. At the very least, the Rule should be stayed as applied to EKPC's former impoundments (and others like them) that were clean-closed under State oversight before promulgation of the Rule.

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Respectfully submitted,

/s/ S. Chad Meredith

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