ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1157 (consolidated with Nos. 23-1181, 23-1193, 23-1202, 23-1205)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, by and through its Governor, SPENCER J. COX, and its Attorney General, SEAN D. REYES,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, U.S. EPA,

Respondents.

On Petitions for Review of a Final Rule
of the U.S. Environmental Protection Agency

BRIEF OF *AMICUS CURIAE* ENERGY INFRASTRUCTURE COUNCIL IN SUPPORT OF MOTIONS FOR STAY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Energy Infrastructure Council submits this certificate as to parties, rulings, and related cases.

A. PARTIES AND *AMICI*

Except as follows, all parties, intervenors, and *amici* appearing in this Court are listed in Petitioners' Motion for Stay in consolidated case No. 23-1193.

The Energy Infrastructure Council files this *amicus* brief in support of the motions for stay. The Chamber of Commerce of the United States of America has also filed an *amicus* brief in support of the motions for stay.

The following are petitioners in recently consolidated cases:

1. No. 23-1195; *Associated Electric Cooperative, Inc. v. EPA*
    a. Petitioners: Associated Electric Cooperative, Inc.; Deseret Generation & Transmission Co-Operative, d/b/a Deseret Power Electric Cooperative; Ohio Valley Electric Corporation; Wabash Valley Power Association, Inc., d/b/a Wabash Valley Power Alliance; America's Power; National Rural Electric Cooperative Association; Portland Cement Association.
2. No. 23-1199, *National Mining Association v. EPA*
    a. Petitioner: National Mining Association

3. No. 23-1200, *American Iron & Steel Institute v. EPA*
    a. Petitioner: American Iron and Steel Institute
4. No. 23-1201, *Wisconsin v. EPA*
    a. Petitioner: State of Wisconsin
5. No. 23-1202, *Enbridge Inc. v. EPA*
    a. Petitioner: Enbridge Inc.
6. No. 23-1203, *American Chemistry Council v. EPA*
    a. Petitioners: American Chemistry Council; American Fuel & Petrochemical Manufacturers
7. No. 23-1205, *TransCanada Pipeline USA Ltd. v. EPA*
    a. Petitioner: TransCanada Pipeline USA Ltd.
8. No. 23-1206, *Hybar LLC v. EPA*
    a. Petitioner: Hybar LLC
9. No. 23-1207, *United States Steel Corp. v. EPA*
    a. Petitioner: United States Steel Corporation
10. No. 23-1208, *Union Electric Co. v. EPA*
    a. Petitioner: Union Electric Company, d/b/a/ Ameren Missouri
11. No. 23-1209, *State of Nevada v. EPA*
    a. Petitioner: State of Nevada

12. No. 23-1211, *Arkansas League of Good Neighbors v. EPA*

a. Petitioner: Arkansas League of Good Neighbors

In all but one of the consolidated cases, Respondents are the Environmental Protection Agency and its Administrator, Michael S. Regan.[1]

The following are Intervenors for Respondents in the consolidated cases: District of Columbia; State of New Jersey; State of Illinois; State of Maryland; State of New York; State of Connecticut; State of Delaware; City of New York; Commonwealth of Pennsylvania; Commonwealth of Massachusetts; State of Wisconsin; Harris County, Texas; Air Alliance Houston; Appalachian Mountain Club; Center for Biological Diversity; Chesapeake Bay Foundation; Citizens for Pennsylvania's Future; Clean Air Council; Clean Wisconsin; Downwinders at Risk; Environmental Defense Fund; Louisiana Environmental Action Network; Sierra Club; Southern Utah Wilderness Alliance; and Utah Physicians for a Healthy Environment.

B. RULING UNDER REVIEW

References to the rulings at issue appear in Petitioners' Motion for Stay in consolidated case No. 23-1193.

[1] Michael S. Regan is not named as a Respondent in case No. 23-1203.

C. RELATED CASES

This case has not previously been before this Court or any other court. The following cases have been consolidated in this matter: *State of Utah v. EPA*, No. 23-1157; *Kinder Morgan, Inc. v. EPA*, No. 23-1181; *Ohio v. EPA*, No. 23-1183; *American Forest & Paper Association v. EPA*, No. 23-1190; *Midwest Ozone Group v. EPA*, No. 23-1191; *Interstate Natural Gas Association of America v. EPA*, No. 23-1193; *Associated Electric Cooperative, Inc. v. EPA*, No. 23-1195; *National Mining Association v. EPA*, No. 23-1199; *American Iron & Steel Institute v. EPA*, No. 23-1200; *Wisconsin v. EPA*, No. 23-1201; *Enbridge Inc. v. EPA*, No. 23-1202; *American Chemistry Council v. EPA*, 23-1203; *TransCanada Pipeline USA Ltd. v. EPA*, 23-1205; *Hybar LLC v. EPA*, 23-1206; *United States Steel Corp. v. EPA*, 23-1207; *Union Electric Co. v. EPA*, 23-1208; *State of Nevada v. EPA*, 23-1209; *Arkansas League of Good Neighbors v. EPA*, 23-1211.

Date: August 11, 2023

Respectfully submitted,

/s/ Jeremy C. Marwell
Jeremy C. Marwell

CORPORATE DISCLOSURE STATEMENT

The Energy Infrastructure Council is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure. The Energy Infrastructure Council has no parent corporation and no publicly held company has 10% or greater ownership therein.

Date: August 11, 2023

Respectfully submitted,

/s/ Jeremy C. Marwell
Jeremy C. Marwell

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

The Energy Infrastructure Council has filed an unopposed motion for leave to participate in this matter as *amicus curiae*.

Pursuant to D.C. Cir. R. 29(d), counsel for *amicus curiae* hereby certifies that no other non-government *amicus* brief of which he is aware focuses on the subjects addressed herein, i.e., the potential for detrimental disruption to the national supply of natural gas absent a stay of the EPA's rule, and the irreparable harm that will be inflicted on natural gas pipeline companies and other participants in the natural gas supply chain, absent such a stay. As an organization focused on issues affecting numerous energy infrastructure companies with operations nationwide, the Energy Infrastructure Council is well-suited to provide the Court important context on the broader significance of these subjects that may assist the Court in resolving this case.

Date: August 11, 2023

Respectfully submitted,

/s/ Jeremy C. Marwell
Jeremy C. Marwell

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

GLOSSARY

EPA means the Environmental Protection Agency

FERC means the Federal Energy Regulatory Commission

INGAA means the Interstate Natural Gas Association of America

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in Petitioners' Motion for Stay in consolidated case No. 23-1193.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Energy Infrastructure Council ("Council") is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure.[1] Its membership comprises a large segment of the American pipeline community, including numerous interstate and intrastate natural gas and liquids pipelines, gatherers of natural gas, crude oil, and natural gas liquids, as well as owners and developers of, and investors in, other energy-related infrastructure. The Council's members include the owners and operators of natural gas pipelines that transport natural gas using the kinds of reciprocating internal combustion engines regulated by the Environmental Protection Agency ("EPA") rule at issue here. As an association representing energy infrastructure companies and other entities in the energy supply chain who are regulated by the rule at issue here, *amicus* has a significant interest in, and can offer a unique nationwide perspective on, the issues in this case. *See* Fed. R. App. P. 29(a)(3).

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Absent a stay pending judicial review, near-term implementation of EPA's rule will cause cascading adverse financial, operational, and market consequences across the natural gas supply chain—including the possibility of widespread natural gas pipeline outages as numerous compressor stations are taken offline simultaneously for equipment replacement or upgrades, affecting natural gas prices and availability, and the reliability of the natural gas pipeline and electric grids. Compliance efforts will also impose staggering and unrecoverable financial costs on pipeline operators, their shareholders, and ultimately their customers and natural gas consumers. This Court should grant a stay pending review to avoid those irreparable harms to regulated industry and adverse effects on the public interest.

ARGUMENT

Amicus files this brief in support of the motions for a stay pending review filed by Petitioners Kinder Morgan, Inc. ("Kinder Morgan") (No. 23-1181), Interstate Natural Gas Association of America ("INGAA") and American Petroleum Institute (No. 23-1193), Enbridge Inc. (No. 23-1202), and TransCanada Pipeline USA Ltd. (No. 23-1205). Those stay motions and supporting declarations document the adverse financial, operational, and practical impacts of EPA's rule on the nation's interstate natural gas pipeline grid, the companies who own and operate such pipelines, those who transport gas via pipeline, and the hundreds of millions of end-users of natural gas and gas-generated electricity nationwide. This *amicus* brief provides additional context on irreparable injury to regulated pipelines absent a stay, and harms to the public interest. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

EPA's "Good Neighbor" rule limits nitrogen oxide emissions from stationary, natural gas-fired reciprocating internal combustion engines with a maximum rated capacity of 1,000 horsepower or greater. 88 Fed. Reg. 36,654, 36,820 (June 5, 2023). The Rule will apply to more than 3,000 pipeline engines nationwide, some 1,200 of which will require retrofits or other upgrades, and some 500 of which are located in states where EPA's regulatory framework is not currently subject to a judicial stay—and thus where efforts at compliance must begin most urgently. Attempting to meet the Rule's May 2026 deadline will require pipeline operators to plan and execute prolonged and simultaneous outages across the nation's natural gas pipeline grid, with adverse reliability and price effects on myriad end-users of natural gas, including schools, hospitals, homes, manufacturers, businesses, and gas-fired electric generators. The impacts will be felt by energy users nationwide, with disproportionate harms to low-income and historically disadvantaged communities. Absent a stay, the nation's natural gas pipeline operators will incur hundreds of millions or even billions of dollars in compliance costs during the pendency of this appeal. Efforts to comply by the Rule's May 2026 deadline also face numerous practical and regulatory obstacles.

I. The Rule Will Have Significant, Near-Term, Nationwide Energy Scarcity Consequences.

Natural gas accounts for nearly a third of the United States' overall energy consumption, including residential, commercial, and industrial uses, transportation, and electric generation.[2] And natural gas accounted for nearly 40 percent of U.S. electric generation in 2022—up from 30 percent a decade ago—and is now the largest fuel source for electricity generation in the United States.[3] A broad range of end-users nationwide depend on the reliable and uninterrupted supply of pipeline gas to generate electricity, operate industrial plants, cook food, and heat homes and businesses.[4] Widespread and prolonged natural gas shortages would have grave effects on public health and safety. Yet, efforts to comply with EPA's Rule by May 2026 will risk precisely those consequences.

A. Compliance Will Require Widespread Outages on Multiple Pipeline Systems Simultaneously.

EPA's rule requires pipelines to implement control technologies by May 1, 2026. 88 Fed. Reg. at 36,756. The extent and scope of work required to implement the mandated infrastructure upgrades make that compliance target all but impossible

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[2] U.S. Energy Info. Admin., *U.S. Energy Facts Explained*, https://bit.ly/2P0AvyO (last visited Aug. 1, 2023).

[3] U.S. Energy Info. Admin., *Electricity Explained: Electricity in the United States*, https://bit.ly/44OKwUO (last updated June 30, 2023).

[4] U.S. Energy Info. Admin., *Natural Gas Explained: Use of Natural Gas*, https://bit.ly/2wmN8hm (last updated Apr. 28, 2023).

on an industry-wide scale. Modifying existing, operational pipeline engines is a "significant, custom, costly, and time-intensive undertaking." Kinder Morgan Stay Mot., App. B at 28, ECF No. 2009836 (No. 23-1181). EPA itself has estimated that thousands of pipeline engines would be subject to the rule. INGAA Stay Mot. 10, ECF No. 2009932 (No. 23-1193). Those engines provide pressure and flow control for intrastate and interstate pipelines, as well as natural gas storage facilities; impeding the operation of those facilities can impact the entire natural gas supply chain, from wellhead to burner tip. Given the practical, technical, and legal complexities involved in retrofitting existing, operational pipeline engines, compliance by May 2026, if feasible at all, will require pipelines "to take affected units offline *simultaneously*, reducing throughput throughout the nation because the natural gas pipeline system is highly integrated." Commissioner James Danly, Fed. Energy Reg. Comm'n, *Responses to Questions for the Record for June 13, 2023 House Energy & Commerce Oversight Hearing* 22 (Aug. 9, 2023), https://bit.ly/3DQyhv5 [hereinafter Danly Responses].

Absent a stay, during the 12-18 months it would likely take this Court to adjudicate the pending petitions for review, pipelines will need to begin shutting down numerous engines for several months at a time, "even potentially during the peak summer and winter [demand] seasons, threatening the interruption of natural gas services." INGAA Stay Mot. Addendum at 821a [hereinafter INGAA

Addendum], Decl. of Kimberly Tarr ¶ 11 (Boardwalk Pipelines), ECF No. 2009932. One pipeline's modeling of anticipated outages necessary to attempt to comply by May 2026 predicts, for just one illustrative high-demand market, an inability to provide volumes of natural gas needed to heat approximately 1.7 million homes, and a "20 percent overall deficit in meeting the Chicago market peak demand on winter days." INGAA Addendum at 874a-875a, Decl. of Kenneth W. Grubb at ¶ 66 (Kinder Morgan). With multiple companies taking pipeline engines offline at the same time, options for re-routing flows of natural gas will be "severely limited," "threaten[ing] overall system reliability." INGAA Addendum at 892a-893a, Decl. of Danika Yeager ¶ 22 (TC Energy). Commissioner James Danly of the Federal Energy Regulatory Commission ("FERC") recently expressed concern that EPA had not consulted with FERC about the risk that the rule's compelled retrofitting of natural gas compressor stations "could reduce already constrained [pipeline] capacity and affect electric reliability." Danly Responses 24.

To take another example, New England's independent electric grid operator has warned about the serious "energy-security risk[s]" presented by a lack of natural gas pipeline capacity to serve that region's gas-fired electric generators, leading to "reliability risks," "price volatility," and increased "air emissions" as power generators use alternate fuels during times of high demand. *See* ISO New England, *Natural Gas Infrastructure Constraints*, https://bit.ly/44ZOxG3 (last visited Aug. 4, 2023); *see also* Danly Responses 23 ("Areas like New England are already severely constrained and cannot afford to have *any* capacity taken offline."). Such risks are particularly acute in regions—or under operating conditions, such as those likely to be created by this rule—where gas flows cannot be "routed around" pipeline outages. *See* ISO New England, *supra.*

To similar effect, a 2017 case study examined a hypothetical outage of one major natural gas compressor station near the Florida-Alabama border. It predicted that reduced natural gas flows and subsequent delivery to natural-gas-fired power plants could lead to a statewide blackout. Edgar C. Portante et al., *Modeling Electric Power and Natural Gas System Interdependencies*, 23(4) J. Infrastructure Sys. 1, 11 (2017). Curtailment intensity was estimated to range from 10 to 100 percent, with a total load loss of nearly half the state's peak summer load. *Id*. at 12.

Although EPA's rule applies to engines in certain specific states, the negative impacts on natural gas supplies and prices will not be geographically limited. 88 Fed. Reg. at 36,654. The natural gas pipeline grid is a complex network that works as an integrated whole, and is "heedless of state boundaries." *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014). The natural gas outages required to comply with this rule will have cascading downstream impacts. Disruptions will be exacerbated by the reality that interstate gas pipelines are "overall, running closer to their total capacity more frequently throughout the year" than in the past, given increased domestic gas production and increased reliance on natural gas for electric power generation. U.S. Gov't Accountability Office, GAO-20-658, *Gas Transmission Pipelines: Interstate Transportation of Natural Gas Is Generally Reliable, but FERC Should Better Identify and Assess Emerging Risks* at 17 (Sept. 2020). As recent severe weather events have illustrated, natural gas supply and related power outages can result in millions of Americans being unable to heat their homes, refrigerate life-saving medicines, and keep and prepare food, with potentially tragic results.[5]

Because oil and gas are often produced simultaneously in some key regions, disruptions in the flow of natural gas can also ultimately affect crude oil production. Outages at natural gas compressor stations and reductions in pipeline throughput could lead to supply backups upstream. And because crude oil and natural gas are often produced together, restrictions in natural gas transportation capacity could require flaring of excess gas supply (if allowed by regulation) or limiting crude oil production outright. *See* Scott Disavino, *U.S. Permian Natgas Flaring Could Rise in 2024, Report Shows*, Reuters (May 23, 2023), https://bit.ly/47oQyNC; EPA,

[5] *E.g.*, FERC, *The February 2021 Cold Weather Outages in Texas and the South Central United States: FERC, NERC, and Regional Entity Staff Report* 172, https://bit.ly/3rOD0dR (Nov. 2021) (concluding that natural gas supply issues were the second largest cause of unplanned electric outages during Winter Storm Uri).

Overview of the Oil and Natural Gas Industry, https://bit.ly/3Ov6SUl (last visited Aug. 9, 2023).

B. The Rule Will Impose Significant Costs on Energy Users, Including Disadvantaged Communities.

EPA's rule will inflict billions of dollars in compliance costs on the pipeline industry alone. INGAA Addendum at 804a, Decl. of Scott Yager ¶ 10 (estimating $2.4 to $6.1 billion in costs for INGAA members). At least some of those costs will ultimately be borne by downstream customers of natural gas and electricity, including disadvantaged communities—increasing the cost of energy for nearly every American family, including those who can least afford it. *See* Kinder Morgan Stay Mot. App. B, at 36, ECF No. 2009836 (No. 23-1181). Low-income and minority households often devote a significantly higher proportion of their total income to meeting energy needs than the nationwide average;[6] that disproportionate burden will be exacerbated by price increases from this rule.

[6] The American Council for an Energy-Efficient Economy, *Report: Low-Income Households, Communities of Color Face High "Energy Burden" Entering Recession*, https://bit.ly/3OfiieP (Sept. 10, 2020) (providing that low-income households pay 3.5 times more on energy than the nationwide average).

II. Natural Gas Pipelines Will Be Irreparably Injured Absent a Stay.

A. Natural Gas Pipeline Operators Are Already Incurring Significant and Irreparable Costs.

The interstate natural gas pipeline community has estimated that retrofitting *a single engine* to comply with the EPA rule will cost between $2 to $5 million. INGAA Stay Mot. 21, ECF No. 2009932; *see also* Enbridge Stay Mot. 19, ECF No. 2011121 (No. 23-1202) (replacing one engine is estimated to cost $11.5 million). The pipeline industry as a whole is facing billions of dollars in compliance costs. Pipelines must begin spending money now, to have an outside chance of meeting the May 2026 deadline.

Pipelines will also incur significant and irreparably lost revenue during compliance-related outages while engines are being upgraded or replaced. Generally speaking, FERC-regulated pipelines collect revenue via a "reservation" charge to secure firm pipeline capacity and a "commodity" or "usage" charge based on the actual throughput of natural gas. Pipelines will forego all commodity/usage charge revenue during system outages. And pipelines must credit customers for reservation charges in periods when a pipeline is not able to provide nominated firm service. *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 at PP 55-59 (2011). Overall, interstate pipelines will forego billions of dollars of lost revenue—upwards of $120 million for just three *segments* of a single pipeline—on top of capital expenditures related to the EPA rule. INGAA Addendum at 843a, 879a-880a, Grubb Decl. ¶¶ 12, 70-72 (modeling reservation charge credits in one scenario).

As the delivered price of natural gas increases to recover the billions of dollars of costs associated with the rule, these costs will eventually flow downstream to pipelines' direct and indirect customers, and to the ultimate consumers of natural gas and electricity. Costs flowing downstream will include the costs of capital upgrades to replace or modify existing operational engines.

B. Compliance Efforts Will Face Significant Legal and Practical Obstacles.

EPA has suggested that pipelines should simply "coordinate outages" to minimize impacts. Such coordination, however, could raise concerns under applicable competition laws. *See* Kinder Morgan Stay Mot. 15. It could also implicate FERC's Standards of Conduct. The latter restrict a pipeline's "transmission function employees" from disclosing non-public, transmission-related information (such as outage schedules) to "marketing function" employees, responsible for communicating with customers. *See* 18 C.F.R. Pt. 358 (2022). Coordinating simultaneous outages across multiple pipeline systems, affecting various pipeline customers, could be difficult or impossible given these restrictions.

Compliance will also require extensive engineering, project planning, and regulatory work long in advance of installing replacement units. For instance, pipeline operators must seek and obtain new or modified state and federal permits applicable to the construction and operation of regulated engines. *See* INGAA Stay Mot. 23. Indeed, to the extent pipelines must replace existing engines with new, more efficient units, or upgrade other connected infrastructure to accommodate the modified engines, they may need approval from FERC, the Army Corps of Engineers, the Fish & Wildlife Service, federal land management agencies, or a range of state and local authorities. More significant replacements or remediation work could trigger extensive approval processes and delays before construction activity could begin.

CONCLUSION

Because implementing the rule during the pendency of this appeal would cause irreparable harms to pipelines and disserve the public interest, the motions for stay should be granted.

Date: August 11, 2023

Respectfully submitted,

<u>/s/ Jeremy C. Marwell</u>

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 27(d)(2), because this brief contains 2,582 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Date: August 11, 2023

/s/ Jeremy C. Marwell
Jeremy C. Marwell

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on August 11, 2023, I electronically filed the foregoing *Brief of* Amicus Curiae *Energy Infrastructure Council in Support of Motions for Stay* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

/s/ Jeremy C. Marwell
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