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Submitted Electronically via Regulations.gov

Re: Comments on Proposed Rulemaking Titled "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category-Deadline Extensions" by the Attorneys General of the States of West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming (Docket No. [EPA-HQ-OW-2009-0819; FRL-8794.3-01-OW])

Dear Administrator Zeldin:

We appreciate the opportunity to comment on EPA's Proposed Rule, which (among other things) updates and extends deadlines in the agency's previously promulgated 2024 Rule, "Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category," 89 Fed. Reg. 40,198 (May 9, 2024). *See* 90 Fed. Reg. 47,693 (Oct. 2, 2025). Our comments are to be applied solely to this proposal and not the companion direct final rule.

The 2024 Rule placed unjustified and substantial burdens on coal-fired power plants, so the States are relieved to see EPA begin undoing the damage. Dialing back deadlines and relaxing implementation requirements are welcome initial steps. Still, the States believe EPA should go further. The 2024 Rule is unlawful. Rather than bandage the wound, EPA should rescind the rule entirely in a later rulemaking.

BACKGROUND

The Clean Water Act tasks EPA with regulating the unauthorized discharge of "pollutant[s]" from "point sources" into "waters of the United States." 33 U.S.C. § 1311(a), (e).

To accomplish this, EPA uses a system of Effluent Limitations Guidelines (ELGs) and National Pollutant Discharge Elimination System (NPDES) permits. Under this system, national effluent limitations restrict pollutant discharges. An "effluent limitation" is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." *Id.* § 1362(11). Some ELGs focus on hitting certain water-quality standards, *id.* §§ 1312, 1342, while others (like the rules at issue here) are focused on the amount that can be discharged after use of certain technology, *id.* §§ 1314, 1342.

After EPA sets ELGs, the agency and authorized States issue NPDES permits to enforce the limitations, incorporating ELGs and other conditions. *Id.* § 1311. Without an NPDES permit, it is unlawful for a point source to discharge *any* pollutants. *See Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 969 (5th Cir. 1986). The CWA levies significant financial penalties against sources that fail to comply with the conditions of NPDES permits. S*ee* 40 C.F.R. § 122.41.

EPA doesn't have free rein to just set ELGs at whatever level it pleases. Rather, ELGs must reflect the "capabilities of available pollution control technologies to prevent or limit different discharges rather than the impact that those discharges have on the waters." *Tex. Oil and Gas Ass'n v. EPA*, 161 F.3d 923, 927 (5th Cir. 1998). In this way, Congress envisioned that ELGs would—via advancing technology—"result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." 33 U.S.C. § 1311(b)(2)(A).

Thus, the CWA requires EPA to periodically update these ELGs for "classes and categories of point sources" to reflect advancing pollution-control technology. *See, e.g., id.* § 1314(b); *see also Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) (discussing how the "statutory framework of technology-based standards" is designed to anticipate technological advancements). Just like when EPA sets ELGs in the first place, EPA needs to keep real-world implications in mind when it updates ELGs. The agency can't just aspirationally set ELGs to an impossibly low or cost-prohibitive threshold. *See, e.g., FMC Corp. v. Train*, 539 F.2d 973, 979 (4th Cir. 1976) ("EPA must take seriously its statutory duty to consider cost.").

Instead, the CWA requires the agency to base ELGs on limits that are attainable through use of the "best available technology economically achievable" (BAT). 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2). Under the BAT standard, discharges can only be eliminated if "such elimination is technologically and economically achievable for a category or class of point sources." *Id.* § 1311(b)(2)(A). Further, before identifying "control measures and practices available to eliminate the discharge of pollutants," BAT requires EPA "tak[e] into account the cost of achieving" complete elimination. *Id.* § 1314(b)(3). Finally, EPA must identify specific "scientific data or other demonstrative evidence" to justify its ELG determinations. *Tanners' Council of Am., Inc. v. Train*, 540 F.2d 1188, 1193 (4th Cir. 1976).

BAT thus requires that the technology be both "available" and "economically achievable." *Tex. Oil*, 161 F.3d at 928.

In 2015, EPA issued a new rule, 80 Fed. Reg. 67,838 (Nov. 3, 2015), in which the agency purported to use BAT as the basis for "one of its many 'War on Coal' regulations" targeting power plants. America's Power, *Fixing EPA's ELG Rule* (Apr. 13, 2017), https://tinyurl.com/22w9pat6. The 2015 Rule claimed that current ELG standards were "out of date" and imposed new standards for six power-plant waste streams: (1) flue gas desulfurization (FGD); (2) fly ash transport; (3) bottom ash transport; (4) flue gas mercury control; (5) combustion residual leachate (CRL); and (6) gasification. 80 Fed. Reg. at 67,840-41. Additionally, the 2015 Rule announced new ELGs for legacy wastewater, which acts as a stop-gap limitation that applies to five of the wastewater streams until the implementation deadline. *Id.* at 67,854-55.

The 2015 Rule was a mistake. It "directly and significantly affect[ed] our nation's generation fleet," bringing "enormous cost impacts, and significant impacts on energy supply and reliability." Edison Electric Institute, Comment Letter on Proposed Rule on Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (July 6, 2017), https://bit.ly/3BB5zgH. The rule cost many plants so much that they simply shut down rather than comply with the new standards. *See*, *e.g.*, America's Power, *supra* (noting that "two utilities in Indiana … cited the rule in their decisions to retire seven coal-fueled electric generating units"). But this result shouldn't be surprising given that the 2015 Rule was one of the Obama-era EPA's "War on Coal" regulations. *Id.*

Both industry and environmental groups sued EPA across the country seeking to overturn the 2015 Rule. Eventually, the U.S. Judicial Panel on Multidistrict Litigation consolidated these many challenges and assigned them to the Fifth Circuit. *See Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1012 (5th Cir. 2019). By then, EPA had realized that it might need to revise the rule's unrealistic compliance dates. *See* 82 Fed. Reg. 19,005 (Apr. 25, 2017). So EPA moved to sever the industry-side case and hold that part in abeyance; the Fifth Circuit granted the motion. *Sw. Elec. Power Co.*, 920 F.3d at 1013. EPA then officially announced that it was reconsidering the 2015 Rule and stayed the rule entirely in the meantime. *See* 82 Fed. Reg. 43,494 (Sept. 18, 2017). In doing so, EPA observed that a reevaluation and pause of the onerous 2015 Rule fit its mission of being "good stewards of our natural resources, while not developing regulations that hurt our economy and kill jobs." Sonal Patel, *EPA Rescinds Effluent Limitations Guidelines Rule*, POWER (Apr. 13, 2017), https://tinyurl.com/tey6fsuk.

Still, the Fifth Circuit heard the environmental groups' case and ultimately vacated the 2015 Rule's provisions on CRL and legacy wastewater. *See Sw. Elec. Power Co.*, 920 F.3d at 1033.

In 2020, the backlash against the 2015 Rule prompted EPA to try again. It replaced the 2015 Rule with the 2020 Steam Electric Reconsideration Rule. *See* 85 Fed. Reg. 64,650 (Oct. 13, 2020). The 2020 Rule concluded that new, more feasible technologies could achieve pollution-removal results like the technology considered previously, so EPA changed the technology basis for FGD wastewater and bottom-ash transport water. *Id.* at 64,651-52. The new rule also made new subcategories and requirements for high-flow facilities, low-utilization electric-generating

units, and units transitioning from coal combustion by 2028. *Id.* at 64,652. The 2020 Rule sought to correct course from the wayward 2015 Rule.

Unfortunately though, even the 2020 Rule continued to impose significant costs on the coal-fired power industry, so it was not enough to avoid catastrophic harms to the market. *See, e.g.*, Hannah Northey, *Trump rule meant to save coal is forcing plants to close*, E&E NEWS: GREENWIRE (Dec. 2, 2021, 1:40 p.m.), https://tinyurl.com/4j6tfemx.

Despite the 2015 Rule's failures (and the agency's partial retreat in 2020), EPA released an "unprecedented … suite of regulations" targeting the coal industry in 2024. Sonal Patel, *EPA Unleashes Four-Pronged Assault on Fossil Fuel Power Pollution*, POWER (Apr. 25, 2024), https://tinyurl.com/3y2m7uvf. Although it appeared to be driven largely by political considerations, a brief reduction in energy consumption in 2023 may have given the Biden administration the factual pretense to use various EPA-controlled regulatory initiatives to weaken coal. *See* EIA, *U.S. energy production exceeded consumption by record amount in 2023* (June 26, 2024), https://tinyurl.com/yzryjmze.

The Biden EPA's multi-pronged strategy against coal included the 2024 Rule, which backtracked EPA's attempt to rein in the 2015 Rule's harms. *See* 89 Fed. Reg. 40,198 (May 9, 2024). The 2024 Rule required the use of costly technologies that were either unavailable or unproven. For instance, the rule decreed that certain "zero-discharge" technologies—which EPA deemed too costly in both 2015 and 2020—were now economically achievable, even though their costs remained the same. *Id.* at 40,218.

The 2024 Rule's measures "marked EPA's most stringent wastewater discharge standards for coal-fired power plants to date." Sonal Patel, *EPA Extends Steam-Electric Wastewater Deadlines to 2034, Citing Grid Reliability and Rising Power Demand* (Oct. 8, 2025), https://tinyurl.com/yvwad693. And EPA could not even justify them as cost-appropriate; the agency instead conceded that it might inexplicably be both over- and underestimating costs at various facilities yet nonetheless claimed the cost-estimation methodology was "reasonable." 89 Fed. Reg. 40,198, 40,261.

States—including West Virginia and many others—joined major industry groups and others in again challenging the rule. *See Sw. Elec. Power Co. v. EPA*, No. 24-2123(L) (8th Cir. filed May 30, 2024).

Undeterred by the conceded flaws in its own rule, EPA required compliance with the 2024 Rule's impossible requirements by no later than 2030 unless a facility agreed to cease operations by 2035; facilities were forced to make this binding retirement election by the end of *this* year (Notice Deadline). *Id.* at 40,200. Making matters worse, the 2023 consumption decrease EPA may have relied on for its aggressive requirements quickly proved to be an anomalous flashpoint, as energy needs soon soared to all-time highs. *See, e.g.*, EIA, *After more than a decade of little change, U.S. electricity consumption is rising again* (May 13, 2025), https://tinyurl.com/yc3r9x3r.

The Proposed Rule pushes back the 2024 Rule's unrealistic deadlines, largely because of the recent shifts within the U.S. energy market. *See* 90 Fed. Reg. at 47,694 (table showing summary of proposed deadline extensions). Its key effect is to push compliance requirements back to the end of 2034. *Id.* The rule also extends the Notice Deadline to 2032, giving companies more breathing room to determine if they'll be able to meet the requirements in the first place. *Id.* The Proposed Rule also updates existing transfer provisions in the federal register "to allow facilities to switch between compliance alternatives." *Id.* It also enables "alternative applicability dates and paperwork submission dates, based on site-specific factors." *Id.* The Proposed Rule further "establish[es] tiered pretreatment standards for existing sources." *Id.*

As the Proposed Rule says, its "compliance deadline extensions would give utilities flexibilities needed to provide affordable and reliable power." 90 Fed. Reg. at 47, 694.

At the same time, though, the Proposed Rule notes that it doesn't propose to "change the underlying technology bases for the effluent limitations based on BAT." 90 Fed. Reg. at 47,694. Major industry groups have urged the agency to do so. *Id.* at 47,698.

DISCUSSION

The Proposed Rule offers a welcome reprieve from the rapidly approaching deadlines of the 2024 Rule. It gives facilities a better chance to meet those deadlines, which will lead to more effective compliance decisions. Perhaps most critically, extending the Notice of Planned Participation Deadline avoids premature shutdowns based on artificially hasty decisions (while allowing for greater transfer among compliance pathways and affording more flexibility in submission). In total, the Proposed Rule recognizes that the nation's energy market is in a state of flux, requiring more flexibility and nuance in planning than the 2024 Rule allows.

We support these measures wholeheartedly. Still, EPA should eventually go further. The 2024 Rule was an ill-advised venture from the outset, and the most prudent path forward is to rescind it altogether.

I. The Proposed Rule's Extensions, Transfer Adjustments, and Flexibilities Are Urgently Needed.

Enforcing the 2024 Rule's deadlines would have catastrophic effects. When EPA announced the rule, industry warned it would "lead to confusion, stranded assets, and wasteful capital investments." Paul Ciampoli, *EPA Steam Electric Effluent Limitation Proposal is "Unwarranted Change of Course," APPA Says*, AMERICAN PUBLIC POWER ASSOCIATION (June 6, 2023), https://tinyurl.com/359cuzfj. Beyond just costs, the 2024 Rule threatened to "forc[e] early coal plant retirements" by a "forced fuel-switching regulatory strategy." National Mining Association, Comment Letter on Proposed Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (May 30, 2023), https://tinyurl.com/5n6e6kpf.

Even by proposing them, the tight deadlines had a powerful, coercive impact on facilities, which only heightens as the rule's deadlines loom. *See* James W. Coleman, *Policymaking by*

Proposal: How Agencies Are Transforming Industry Investment Long before Rules Can Be Tested in Court, 24 GEO. MASON L. REV. 497, 498 (2017) (explaining that "[e]ven if an agency's rules are likely to be reversed eventually," the mere "proposals can effectively set the agenda for industry investment" because it would "be foolhardy to invest in facilities that the federal government was looking to forbid"). After all, major capital expenditures for the 2024 Rule required near-term business decisions, so energy companies were placed on an artificial clock that in turn squeezed the market.

Since the 2024 Rule's enactment, American energy has indeed suffered. As the Proposed Rule observes, "the last year" brought "extraordinary increases in energy demand across the U.S., decreases in energy reserves, difficulties in transmission across the electricity grid, and decreased energy reliability." 90 Fed. Reg. at 47,694. That's putting it lightly. The nation is facing an energy crisis, and the "spike in electricity needs is unprecedented." Alastair Green, et al., *How data centers and the energy sector can sate AI's hunger for power*, MCKINSEY & COMPANY (Sept. 17, 2024), https://tinyurl.com/3awdvbyz.

In particular, States like West Virginia, which relies on coal for 86% of its generation, *see* EIA, *West Virginia State Profile and Energy Estimates* (Feb. 20, 2025), https://tinyurl.com/3v2fpn5b, suffer under the 2024 Rule's ongoing effects; many in that State face "soaring energy costs" that force them to "choose between paying their electric bills and buying groceries." Susan Elizabeth Turek, *Homeowners in coal country left scrambling after facing months of 'ridiculous' utility costs: 'Electric bills shouldn't be equal to rent'*, YAHOO! NEWS (Oct. 26, 2025, 3:20 a.m.), https://tinyurl.com/vzf2y43b. Likewise, in States like North Dakota, the accelerated move away from coal portends "unusually large increase[s]" in electricity prices. *See, e.g.*, Jeff Beach, *Xcel's coal exit an issue in North Dakota electric rate case* (Oct. 6, 2025, 5:00 a.m.), https://tinyurl.com/y5h9pnck.

So the nation's grid is "under more pressure than ever before." Samuel Newell, *The US is facing unprecedented load growth. Here's how we ensure resource adequacy.*, UTILITY DIVE (Apr. 17, 2025), https://tinyurl.com/3bm47xah. If production is to pace demand, it "will have to expand more than five times faster than in the previous two decades." *Id.* As States experiencing the energy crisis firsthand, we do not believe that enough reliable, adequate, and affordable energy will be available to meet this demand without coal-fired power. *See, e.g.*, Sonal Patel, *DOE Issues Rare Emergency Order to Delay Michigan Coal Plant Retirement Amid MISO Grid Risk*, POWER (May 29, 2025), https://tinyurl.com/yec7dfwr.

Perhaps the most frustrating aspect of this problem is its disconnect from reality. Coal has long "been the backbone of America's power supply," and by simply easing unduly burdensome regulations, coal-producing States like West Virginia and Wyoming are ready to "remain[] a cornerstone of America's energy supply." Rob Creager and Travis Deti, *Wyoming coal is ready to meet increasing demand for reliable, affordable energy*, WYOFILE (Oct. 27, 2025), https://tinyurl.com/3kf4ap5t.

Now is not the time to force early closures. As President Trump observed, America's "ability to remain at the forefront of technological innovation depends on a reliable supply of

energy and the integrity of our Nation's electrical grid." Exec. Order No. 14156 (Jan. 20, 2025). But even at an individual level, many "aspects of modern life crucially rely on electricity." MET, *Importance of Electricity: Powering Modern Life* (Jan. 31, 2024), https://tinyurl.com/3pha9dbj. "It enhances our quality of living, ensures safety and security, facilitates transportation, and contributes to medical progress." *Id.* In short, it's hard to overstate the importance of effective, reliable generation.

For much the same reason, we applaud the proposed new transfer provisions, 90 Fed. Reg. at 47,703, and proposed new site-specific flexibilities, *id.* at 47,706. Under the 2024 Rule, plants were effectively forced to gamble on facts such as future market conditions and the likelihood of meeting certain compliance targets despite serious constraints (like supply chain pressures). The Proposed Rule appropriately allows coal-fired facilities room to adjust in light of new information.

In particular, we applaud the agency's proposal to allow unanticipated changes in operations to justify a switch to a different compliance pathway—an especially important development given the state of flux in the present energy market. This flexibility will in turn create more flexibility for state regulators themselves, who might otherwise feel that *their* regulatory choices are constrained by an election the facility has already made.

Likewise, allowing flexibility for unexpected and uncontrollable circumstances to justify an extension serves similar purposes. Although we think it would be appropriate to define some circumstances that would justify an alternative applicability date, 90 Fed. Reg. at 47,706, we urge EPA to make plain that any listed circumstances are not the *exclusive* circumstances that would justify an extension. "Unexpected" circumstances are, by definition, hard to anticipate, so we believe the better approach is to leave local permitting authorities discretion to identify and account for those circumstances as they arise.

Reporting and information requirements for these flexibilities should also be left largely to the discretion of the local permitting authority, as the relevant and useful information is likely to vary significantly from case to case. But we do agree that covered entities seeking to make use of these flexibilities should at least be required to submit any overdue reports or elections at the time they request an alternative date.

Because of the importance of coal-fired generation, we applaud EPA for extending the 2024 Rule's compliance deadlines and offering more flexibility, thereby "ensuring that reliable, high-performing, domestic sources of energy can continue to be counted upon." EPA, *Steam Electric Power Generating Effluent Guidelines – Deadline Extensions Rule* (Oct. 16, 2025), https://tinyurl.com/4bukkkt9.

II. EPA Should Rescind The 2024 Rule.

Although we're glad EPA is extending the 2024 Rule's deadlines, the agency should do one better and instead rescind the rule outright. On his first day in office, President Trump vowed to "unleash America's affordable and reliable energy and natural resources." Exec. Order 14154 (Jan. 20, 2025). And he has done just that. *See, e.g.*, U.S. Dep't of Energy, *Secretary Wright*

Highlights 100 Days of Unleashing American Energy Under President Trump (Apr. 29, 2025), https://tinyurl.com/3j4rhvx5.

Consistent with President Trump's objectives, we're pleased that "EPA intends to undertake a further reconsideration of certain aspects of the existing regulations." 90 Fed. Reg. at 47,708. We firmly believe that reconsideration should entail a total rescission of the 2024 Rule.

A. The 2024 Rule Arbitrarily And Capriciously Evaluated The Relevant Technologies Underlying Its ELGs.

Under the APA, an agency action is "arbitrary" or "capricious" if it is not "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). To meet this standard, an agency must offer "a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up). And it cannot simply ignore "an important aspect of the problem," such as statutory definitions or real-world data. *Id.*

In the 2024 Rule, EPA did just that. It disregarded its statutory duties, conjured its own vision of what it could require, and bulldozed any and all contrary data and information. For at least these reasons, the rule is arbitrary and capricious; the agency should rescind it.[*]

Were that not enough, the "facts and circumstances" have changed, justifying a policy change on its own. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). In 2023, "despite [the Biden administration's] push to decarbonize the U.S. economy," "natural-gas and crude-oil production" drove an increase of 4% in energy production in the United States, while consumption fell 1%. Kavya Balaraman, *US energy production exceeds consumption by widest-recorded margin*, REUTERS (June 26, 2024, 5:03 p.m.), https://tinyurl.com/26v3ptjx. But that short-lived decrease quickly gave way to "rising electricity demand" driven by emerging technologies like artificial intelligence. Ian Goldsmith and Zachary Greene, *3 Ways to Manage Skyrocketing US Electricity Demand*, WORLD RESOURCES INSTITUTE (Mar. 20, 2025), https://tinyurl.com/bd2ynkzt. The "era of stability is now over," and "[i]n 2024, the national five-year forecast for electricity load was 5 times higher than 2022 predictions." *Id.*

Demand is thus increasing "at a rate not seen for decades." *Id.* And in large part due to regulatory burdens, the coal-fired power industry is in a more financially precarious state than it was before the 2024 Rule even as increasing demand has made it more essential for coal-fired facilities to remain online. *See generally* Trevor Fugita, *Navigating Coal Plant Retirements Amid Rising Power Demand Challenges*, FACTSET INSIGHT (June 9, 2025), https://tinyurl.com/2p9sbrra; Darrell Proctor, *U.S. Coal Plants Get Reprieve as Market and Policies Change*, POWER (Feb. 6, 2025), https://tinyurl.com/yckykect.

[*] We briefly explain why below, but our briefing in our challenge to the 2024 Rule explains these points in full. *See* Opening Br. of Utility and State Petitioners, *Sw. Elec. Power Co. v. EPA*, No. 24-2123 (8th Cir. filed Nov. 12, 2024) (Opening Brief). We incorporate that briefing by reference here.

It would make little sense, then, for the administration to issue must-run orders for coal-fired facilities while leaving in place the regulations that have pushed those facilities toward retirement in the first place. Zack Colman, *Trump Energy Department eyes must-run orders for power plants*, E&E NEWS (Sept. 25, 2025, 4:20 p.m.), https://tinyurl.com/3t32n7p4

a. Zero-Discharge Technologies Are Not "Available."

The CWA requires "application of the best available technology economically achievable." 33 U.S.C. § 1311(b)(2)(A). For a technology to be "available," it must be "present or ready for immediate use," "accessible," or "obtainable." *Available*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020). This mandate isn't just a throwaway requirement, either: "availab[ility]" is a "limitation" with "real content" that means EPA must consider "the facts on the ground." *Ross v. Blake*, 578 U.S. 632, 642-43 (2016) (interpreting the term in another statute). And "available," means "actually available," not theoretically available. *Safeco Ins. Co. of Am. v. Robey*, 399 F.2d 330, 338 (8th Cir. 1968) (interpreting the term in another context).

In the 2024 Rule, EPA went astray of this available-technology-only requirement when it mandated certain zero-discharge technologies. To the agency, BAT didn't actually mean what the statute said. It didn't mean that technology was actually available and could function at a real, existing facility. No. Instead, BAT could be based on an imaginary "pilot plant" that "acts as a beacon to show what is possible" at some point, rather than what is available now. 89 Fed. Reg. at 40,202. Under that conception of BAT, EPA required "a higher level of performance than is currently being achieved" by modern technology. *Id.* Yet EPA could point to nothing in the language of the statute that would permit that approach.

EPA then used this castle-in-the-sky definition to adopt certain zero-discharge technologies that are not available. Those technologies—membrane systems, thermal evaporation systems, and spray dryers—are unproven at the scale required, and EPA's across-the-board mandate of their use failed to account for the variances in performance across plants. *See* Opening Brief at 30-39. Even EPA's dream scenario of combining the technologies has no basis in reality. *Id.* at 38. EPA had recognized as much only four years before in the 2020 Rule. It should recognize that reality again in a full-scale reconsideration.

b. Even If They Were Available, Zero-Discharge Technologies Are Not "Economically Achievable."

Even if the 2024 Rule's definition of "available" were permissible—despite the CWA's plain text—EPA made yet another mistake in its economic-achievability determination. The CWA says that EPA can select only technologies that are "economically achievable" and must consider "the cost of achieving such effluent reduction." 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2)(B). So "cost" is "a centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 576 U.S. 743, 752-53 (2015).

But as we explained in connection with our challenge to the 2024 Rule, that rule brushed aside industry concerns and reports showing the agency drastically underestimated the regulation's

costs. *See* Opening Brief at 41-44. The 2024 Rule also failed to account for the substantial compliance costs that industry had already incurred from the 2020 Rule—costs that would be effectively rendered meaningless by the new guidelines. *Id.* at 44-45.

The 2024 Rule did little to accurately estimate the costs associated with the rule. Instead, the agency claimed it was fine to "overestimate costs at some facilities" because it was *probably* "underestimat[ing] costs at others." 89 Fed. Reg. at 40,261. This lackadaisical approach will not do, especially given clear indications from real-world comparisons that the cost-projection model (which had also been used in 2020) was flawed.

EPA must seriously engage with data contrary to its models and explain why its data is sufficient despite these inconsistencies; "awareness is not itself an explanation." *Ohio v. EPA*, 603 U.S. 279, 295 (2024). After all, "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). And unless EPA meaningfully rebuts or explains the "real-world data" contradicting its estimates, the 2024 Rule is arbitrary and capricious. *See, e.g.*, *Wild Virginia v. U.S. Forest Serv.*, 24 F.4th 915, 928 (4th Cir. 2022).

EPA ignored many of the States here when we cautioned EPA about the cost-prohibitive realities of these technologies *before* the 2024 Rule was adopted. *See* State of West Virginia and 19 Other States, Comment Letter on Proposed Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (May 30, 2023), https://tinyurl.com/5fsffxh7. We hope the agency will not repeat this mistake. And to the extent that the Proposed Rule suggests that the longer compliance timelines will render the 2024 Rule economically achievable, *see* 90 Fed. Reg. at 47,708, we respectfully disagree.

As we anticipate industry groups will explain in further detail, coal-fired plants would still be forced to bear unsustainable costs even under the longer period, especially considering the sunk costs from the 2020 Rule that would effectively become orphaned investments.

B. The 2024 Rule Seeks To Answer A Major Question Without Clear Congressional Authorization.

The 2024 Rule should be rescinded for its attempt to answer a major question as well. In the rule, EPA told coal-fired plants to either "use" the agency's imaginary technology or shut down. This Hobson's choice represents an attempted reconfiguration of America's energy production fleet from the ground up. And while EPA might be empowered to push technological innovation under the CWA, *see, e.g.*, *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 575 (2d Cir. 2015), the agency cannot simply decide what sources should and should not power the country. In doing so, EPA "assert[ed] highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).

Thus, the 2024 Rule sought to answer a major question that courts "presume" Congress would keep for itself. *Id.* at 723. To sustain the rule then, EPA must point to "something more than a merely plausible textual basis." *Id.* It needs "clear congressional authorization." *Util. Air*

Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (*UARG*). We've already explained how the 2024 Rule's definitions don't fit with the CWA's text at all, *see supra*, Sections II.A.a-b, so the fact that this is a major question only confirms that EPA lacked the power to issue the rule in the first place.

And there's no doubt this situation embraces a major question.

- *First*, by telling facilities to shut down entirely, the 2024 Rule abandons EPA's previous goal of reducing pollution using incremental technological advancement and instead works a "radical" and "fundamental revision" to ELGs. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229, 231 (1994).

- *Second*, the 2024 Rule's novel approach (shut down or do the impossible) wields the CWA in a way EPA never before thought permissible and thereby "claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority." *West Virginia*, 597 U.S. at 724 (cleaned up).

- *Third*, the 2024 Rule makes decisions affecting the entire country, but it has particularly devastating ramifications for coal-producing States.

- *Fourth*, a decision about how to power the entire country and which States should bear the costs is one of "vast" "political significance" that Congress itself struggles with year after year. *West Virginia*, 597 U.S. 716. There is no reason to suspect Congress would shirk that debate and delegate such calls to EPA.

- *Fifth*, EPA has no "comparative expertise" as an energy regulator to rely on. *Id.* at 729.

- *Sixth*, the 2024 Rule obviously has massive financial effects and so exerts "extravagant statutory power over the national economy" by upending the coal industry and harming the millions of Americans who rely on it. *UARG*, 573 U.S. at 324.

For at least these reasons, the "basic and consequential tradeoffs" at stake reveal the 2024 Rule as an attempt to answer a major question. *Biden v. Nebraska*, 600 U.S. 477, 506 (2023). The rule's requirements are "so strict that no existing coal plant" could achieve them under the terms required by the CWA. *West Virginia*, 597 U.S. at 714. As we've repeatedly said, the 2024 Rule amounted to nothing more than a shutdown order. EPA obviously lacks the authority to outright issue such a proclamation, and "[w]hat cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (cleaned up). Without clear authorization then, the 2024 Rule impermissibly confronts a major question, yet another reason to rescind it.

C. The 2024 Rule Was Political, Not Scientific.

Separate and apart from the mistakes in the Rule's substantive assessments, EPA should still rescind the 2024 Rule as an inappropriate use of political power.

The Biden EPA did not hide its disdain for coal. *See, e.g.*, Andre Follett, *Biden Effectively Bans Coal Power … Again*, NATIONAL REVIEW (Apr. 30, 2024, 6:30 a.m.), https://tinyurl.com/3844xc5b. And the rule was part of a previous "power sector" strategy designed to overhaul American energy and shutter coal-fired plants. Dino Grandoni, *In Texas speech, Biden's EPA chief puts power plants on notice for pollution*, WASHINGTON POST (Mar. 10, 2022), https://tinyurl.com/5xb7hps7. As you recently lamented, your predecessor "tried to pick winners and losers in our energy sector." Lee Zeldin, et al., *This is how America will achieve energy dominance*, FOX NEWS (Sept. 30, 2025, 1:21 p.m.), https://tinyurl.com/39kamnua. And he picked coal as one of the losers. *See, e.g.*, K. Kaufmann, *EPA Power Plant Rules Squeeze Coal Plants; Existing Gas Plants Exempt*, RTO INSIDER (Apr. 25, 2024), https://tinyurl.com/3p23vzf9.

The previous administration continued this assault all the way to the end, going so far as to halt coal leases in the country's largest mining area on the way out the door. *See* American Energy Alliance, *Biden Takes Parting Shot At American Coal Producers* (Dec. 10, 2024), https://tinyurl.com/msf8efn7. The current administration has taken great strides to undo these unfair, and often illegal, regulations. But many, like the 2024 Rule, are still on the books, and we ask that you correct that here.

Although judicial inquiry into "executive motivation" is typically looked down upon, there are times it's necessary. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). One such situation is "a strong showing of bad faith" in the decisionmaking process. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Then, if the true reason for the action turns out to be "contrived," the rule is arbitrary and capricious due to the lack of "[r]easoned decisionmaking." *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019). Especially given how the 2024 Rule was a coordinated attack on the coal industry, the rule appears to be one such indefensible contrivance.

Aside from the problems of defensibility, the Biden administration's widescale effort to regulate coal-fired energy out of existence did—and continues to do—real damage. As Congresswoman Harriet Hageman explained, it amounted to an "ideological assault on coal" that "crippl[ed]" the "energy potential" of coal-producing regions and "set[] our nation on a path to energy poverty." Press Release, Rep. Harriet Hageman, *Hageman Introduces COAL Act to End Biden Administration's War on Coal* (Jan. 11, 2025), https://tinyurl.com/4wv4he94. Reversing the 2024 Rule would advance the administration's goal of "strengthen[ing] our domestic supply chains and secur[ing] reliable energy." Dep't of Interior, *Interior Unleashes American Coal Power in Bold Move to Advance Trump Administration Priorities* (Sept. 29, 2025), https://tinyurl.com/3d2h3wdr.

* * *

The Proposed Rule relaxes the stranglehold the last administration placed on the coal industry. We welcome this choice and appreciate EPA's thoughtful reconsideration. In particular, the extension of the rapidly approaching Notice Deadline and the other adjustments reflected in the Proposed Rule are a godsend considering the ongoing energy crisis.

But we hope you will go one step further. The rule suffers from fundamental legal and technical deficiencies that cannot be cured through timeline adjustments alone. Its technology-forcing requirements exceed EPA's statutory authority, and its analytical foundations rest on flawed assumptions about technology availability, costs, and industry conditions.

Either way, we support and appreciate your efforts at reviving our nation's energy sector while serving EPA's environmental mission. The States stand ready to provide additional information or technical assistance as EPA considers these comments. We look forward to working with EPA to achieve our mutual goals.

Sincerely,

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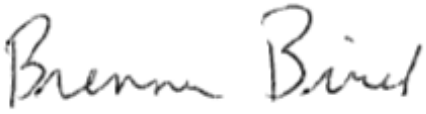

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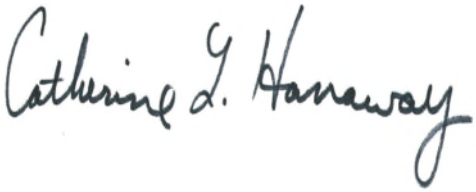

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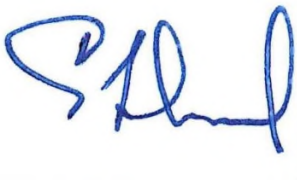

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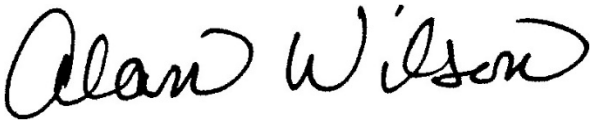

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