[ORAL ARGUMENT NOT SCHEDULED]

No. 24-1054 (consolidated with Nos. 24-1059, 24-1101, 24-1103, 24-1111, 24-1114, 24-1115, 24-1116, 24-1117)

In the United States Court of Appeals For the District of Columbia Circuit

State of Texas, *et al.*,
Petitioners,
Continental Resources Inc.,
Intervenor for Petitioners,
v.
United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency,
Respondents,
Center for Biological Diversity, *et al.*,
Intervenors for Respondents.

On Petitions for Review of Final Agency Action from the U.S. Environmental Protection Agency
89 Fed. Reg. 16,820 (Mar. 8, 2024)

OPENING BRIEF FOR INDUSTRY PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Industry Petitioners provide the following certificate as to parties, rulings, and related cases:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 24-1054 (L): State of Texas; Railroad Commission of Texas; Texas Commission on Environmental Quality

No. 24-1059: State of Oklahoma; State of West Virginia; State of Arkansas; State of Alabama; State of Alaska; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Iowa; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of North Dakota; State of Ohio; State of South Carolina; State of Tennessee; State of Utah; Commonwealth of Virginia; State of Wyoming; Arizona Legislature

No. 24-1101: Michigan Oil and Gas Association; Miller Energy Company II, LLC

No. 24-1103: Independent Petroleum Association of America; Arkansas Independent Producers and Royalty Owners; Domestic Energy Producers Alliance; Eastern Kansas Oil & Gas Association; Gas and Oil Association of West Virginia;

Illinois Oil and Gas Association; Independent Petroleum Association of New Mexico; Indiana Oil and Gas Association; International Association of Drilling Contractors; Kansas Independent Oil and Gas Association; Kentucky Oil and Gas Association; National Stripper Well Association; North Dakota Petroleum Council; Ohio Oil and Gas Association; Petroleum Alliance of Oklahoma; Panhandle Producers and Royalty Owners Association; Pennsylvania Independent Oil & Gas Association; Permian Basin Petroleum Association; Texas Alliance of Energy Producers; Texas Independent Producers and Royalty Owners Association; Western Energy Alliance

No. 24-1111: GPA Midstream Association

No. 24-1114: Texas Oil and Gas Association

No. 24-1115: Interstate Natural Gas Association of America

No. 24-1116: American Petroleum Institute

No. 24-1117: American Exploration & Production Council

Respondents:

Respondents are the United States Environmental Protection Agency (in No. 24-1115) and the United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency (in Nos. 24-1054, 24-1059, 24-1101, 24-1103, 24-1111, 24-1114, 24-1116, 24-1117).

Intervenors and *Amici Curiae*:

Continental Resources Inc. is an Intervenor-Petitioner.

Center for Biological Diversity; Clean Air Council; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Dakota Resource Council; District of Columbia; State of Wisconsin; Earthworks; Environmental Defense Fund; Environmental Law & Policy Center; Food & Water Watch; Fort Berthold Protectors of Water and Earth Rights; GreenLatinos; Natural Resources Defense Council; Sierra Club; State of California; State of Colorado; State of Connecticut; State of Delaware; State of Illinois; State of Maine; State of Maryland; State of Michigan; State of New Jersey; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Interstate Natural Gas Association of America; and American Exploration & Production Council are Intervenor-Respondents.

There are no *amici curiae* in support of Petitioners at the time of this filing.

There are no *amici curiae* in support of Respondents at the time of this filing.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing

Sources: Oil and Natural Gas Sector Climate Review," 89 Fed. Reg. 16,820 (Mar. 8, 2024) ("Rule"), JA___–___.

C. Related Cases

These consolidated cases have not been before this Court or any other court. Industry Petitioners are aware of numerous cases challenging distinct, but prior versions of the New Source Performance Standards for the Crude Oil and Natural Gas source category. The designated lead case for those cases is *American Petroleum Institute, et al. v. EPA* (No. 13-1108). The cases consolidated with that case are *American Petroleum Institute v. EPA* (No. 13-1289), *GPA Midstream Association v. EPA* (No. 13-1290), *Texas Oil and Gas Association v. EPA* (No. 13-1292), *Independent Petroleum Association of America, et al. v. EPA* (No. 13-1293), *Western Energy Alliance v. EPA* (No. 13-1294), *Independent Petroleum Association of America, et al. v. EPA* (No. 15-1040), *GPA Midstream Association v. EPA* (No. 15-1041), *Texas Oil and Gas Association v. EPA* (No. 15-1042), *Western Energy Alliance v. EPA* (No. 15-1043), *American Petroleum Institute v. EPA* (No. 15-1044), *State of North Dakota v. EPA* (No. 16-1242), *State of Texas, et al. v. EPA* (No. 16-1257), *Independent Petroleum Association of America, et al. v. EPA* (No. 16-1262), *Interstate Natural Gas Association of America v. EPA* (No. 16-1263), *State of West Virginia, et al. v. EPA* (No. 16-1264), *Western Energy Alliance v. EPA* (No. 16-1266), *GPA Midstream Association v. EPA* (No. 16-1267), *Texas Oil and Gas*

Association v. EPA (No. 16-1269), and *American Petroleum Institute v. EPA* (No. 16-1270). There is also a case, *Natural Resources Defense Council v. EPA* (No. 16-1425), that was severed from the above cases, and another set of cases, *Environmental Defense Fund, et al. v. Regan* (No. 20-1360 and consolidated case Nos. 20-1364, 20-1367), involving technical amendments to a previous iteration of the action being challenged here.

Pursuant to the Court's September 4, 2024 Order, ECF No. 2073084, *Air Alliance Houston, et al. v. EPA* (No. 24-1118), which also challenges the instant Rule, has been severed from this consolidated action and held in abeyance. Pursuant to the same Order, two aspects of the Rule for which administrative reconsideration has been sought have been severed from this consolidated action, assigned a separate docket number, and held in abeyance. *American Petroleum Institute, et al. v. EPA* (No. 24-1289).

/s/ *Michael J. Edney*
Michael J. Edney

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and D.C. Circuit Local Rules 26.1 and 28(a)(1)(A), Industry Petitioners submit the following corporate disclosure statements:

1. **American Petroleum Institute** ("API") is a national trade association representing all aspects of America's oil and natural gas industry. API has approximately 600 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10 percent or greater ownership interest in API.

2. **Michigan Oil and Gas Association** ("MOGA") is a "trade association" as defined by D.C. Circuit Rule 26.1(b). Specifically, MOGA is an association that represents the interests of companies involved in the exploration, drilling, production, transportation, processing and storage of crude oil and natural gas in the State of Michigan. MOGA has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad, and no publicly held company owns more than ten (10) percent ownership in MOGA.

3. **Miller Energy Company II, LLC** ("MEC") owns and operates oil and gas wells in the State of Michigan. MEC is a wholly owned subsidiary of Miller

Energy Partners LLC. No publicly held company owns more than ten (10) percent ownership in MEC or Miller Energy Partners LLC.

4. **Independent Petroleum Association of America** ("IPAA") is an incorporated trade association that represents thousands of independent oil and natural gas producers and service companies across the United States that are active in the exploration and production segment of the industry, which often involves the hydraulic fracturing of wells. IPAA serves as an informed voice for the exploration and production segment of the industry, and advocates its members' views before the United States Congress, the Administration and federal agencies. IPAA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

5. **The Arkansas Independent Producers and Royalty Owners** ("AIPRO") is an incorporated trade association that represents independent oil and natural gas producers and service companies across the state of Arkansas that are active in the exploration and production segment of the industry, which often involves the hydraulic fracturing of wells. AIPRO serves as an informed voice for Arkansas oil and gas producers, and advocates for its members' views before the Arkansas General Assembly, state agencies and commissions, United States Congress, the Administration and federal agencies. AIPRO has no parent

corporation and there is no publicly held corporation that owns 10% or more of its stock.

6. **The Domestic Energy Producers Alliance** ("DEPA") is a nationwide collaboration of 25 coalition associations, representing about 10,000 individuals and companies engaged in domestic onshore oil and natural gas production and exploration. Founded in 2009, DEPA gives a loud, clear voice to the majority of individuals and companies responsible for enduring work to secure our nation's energy future. DEPA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

7. **The Eastern Kansas Oil & Gas Association** ("EKOGA") is a nonprofit organization founded in 1957 to become a unified voice representing the unique interests of eastern Kansas oil and gas producers, service companies, suppliers and royalty owners on matters involving oil and gas regulations, safety standards, environmental concerns and other energy related issues. EKOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

8. **The Gas and Oil Association of WV, Inc.** ("GO-WV") is one of the oldest trade organizations in the State and is the only association that serves the entire oil and natural gas industry. The activities of our members include exploration, drilling, completion, gathering, transporting, distribution, processing,

and environmental services. GO-WV has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

9. **The Illinois Oil & Gas Association** ("IOGA") was organized in 1944 to provide an agency through which oil and gas producers, land-owners, royalty owners, and others who may be directly or indirectly affected by or interested in oil and gas development and production in Illinois, may protect, preserve and advance their common interests. IOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

10. **Independent Petroleum Association New Mexico** ("IPANM") advances and preserves the interests of independent oil and gas producers while educating the public to the importance of oil and gas to the state and all our lives. IPANM continues to grow and provide the services that protect, defend, and promote the industry that is the very foundation of our way of life. IPANM is a member-driven non-profit association and has no parent corporation. There is no publicly held corporation that owns 10% or more of its stock.

11. **The Indiana Oil and Gas Association** ("INOGA") has a rich history of involvement in the exploration and development of hydrocarbons in the State of Indiana. INOGA was formed in 1942 and historically has been an all-volunteer organization principally made up of representatives of oil and gas exploration and development companies (operators), however, it has enjoyed support and

membership from pipeline, refinery, land acquisition, service, supply, legal, engineering and geologic companies or individuals. INOGA has been an active representative for the upstream oil and gas industry in Indiana and provides a common forum for this group. INOGA represents its membership on issues of state, federal, and local regulation/legislation that has, does and will affect the business of this industry. INOGA is a 501(c)(6) trade association incorporated as a Non-Profit Domestic Corporation under the statutes of Indiana. INOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

12. **The International Association of Drilling Contractors** ("IADC") has exclusively represented the worldwide oil and gas drilling industry. IADC's contract-drilling members own most of the world's land and offshore drilling units that drill the vast majority of the wells producing the planet's oil and gas. IADC's membership also includes oil-and-gas producers, and manufacturers and suppliers of oilfield equipment and services. Through conferences, training seminars, print and electronic publications, and a comprehensive network of technical publications, IADC continually fosters education and communication within the upstream petroleum industry. IADC has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

13. **The Kansas Independent Oil & Gas Association** ("KIOGA") is a nonprofit organization founded in 1937 to represent the interests of oil and gas producers in Kansas, as well as allied service and supply companies. Today, KIOGA is a trade association with nearly 3,000 members involved in all aspects of the exploration, production, and development of crude oil and natural gas resources. KIOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

14. **The Kentucky Oil & Gas Association** ("KOGA") was formed in 1931 to represent the interests of Kentucky's crude oil and natural gas industry, and more particularly, the independent crude oil and natural gas operators as well as the businesses that support the industry. KOGA is comprised of over 130 companies and individual members which consist of over 600-member representatives that are directly related to the crude oil and natural gas industry in Kentucky. KOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

15. **The National Stripper Well Association** ("NSWA") was founded in 1934 as the only national association solely representing the interests of the nation's smallest oil and natural gas wells before Congress, the Administration and the Federal bureaucracies. It is the belief of NSWA that producers, owners, and operators of marginally-producing oil and gas wells have a unique set of needs and

concerns regarding federal legislation and regulation. NSWA is a member-based trade association with over 1,000 members nationwide across 30 states. NSWA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

16. **The North Dakota Petroleum Council** ("NDPC") is a trade association representing more than 520 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, and storage, as well as mineral leasing, consulting, legal work, and oil field service activities in North Dakota, South Dakota, and the Rocky Mountain Region. Established in 1952, NDPC's mission is to promote and enhance the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in North Dakota, South Dakota, and the Rocky Mountain region; to promote opportunities for open discussion, lawful interchange of information, and education concerning the petroleum industry; to monitor and influence legislative and regulatory activities on the state and national level; and to accumulate and disseminate information concerning the petroleum industry to foster the best interests of the public and industry. NDPC has no parent corporation and there is no publicly held corporation that owns 10% of more of its stock.

17. **The Ohio Oil & Gas Association** ("OOGA") is a trade association with members involved in all aspects of the exploration, production, and

development of crude oil and natural gas resources within the State of Ohio. OOGA represents the people and companies directly responsible for the production of crude oil, natural gas, and associated products in Ohio. OOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

18. **The Petroleum Alliance of Oklahoma** was formed in 2019 by the mergers of the Oklahoma Oil and Gas Association and the Oklahoma Independent Petroleum Association and represents more than 1,400 individuals and member companies from the Mid-Continent oil and natural gas industry. The Alliance is the state's largest oil and natural gas association and one of the industry's strongest advocacy groups, representing upstream, midstream, and downstream industry sectors. The Alliance has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

19. **The Panhandle Producers & Royalty Owners Association** was founded in 1929 and registered in 1939 by the Texas Secretary of State as an oil and gas membership association registered as a 501(c)(3), governed by a board of directors, whose mission is to protect our industry segments from overreach harmful to our members. We are not owned nor operated by a parent company and are not publicly traded. Our primary purpose is to lobby and represent membership before political parties, state, and federal agencies, to develop policy and position papers,

and to act as an informed voice for exploration and production of clean, affordable, abundant fuel with regard to proposed legislation that impacts our industry.

20. **The Pennsylvania Independent Oil & Gas Association** ("PIOGA") is a non-profit corporation that was initially formed in 1978 as the Independent Oil and Gas Association of Pennsylvania ("IOGA of PA") to represent the interests of smaller independent producers of Pennsylvania natural gas from conventional limestone and sandstone formations. Effective April 1, 2010, IOGA of PA and the original trade association representing Pennsylvania conventional oil and natural gas producers founded in 1918, the Pennsylvania Oil, Gas and Minerals Association ("POGAM"), merged and the name of the merged organization changed to its present name. PIOGA's membership currently is over 300 members: oil and natural gas producers developing both conventional and unconventional formations in Pennsylvania; drilling contractors and service companies; engineering companies; manufacturers; marketers; Pennsylvania Public Utility Commission-licensed natural gas suppliers ("NGSs"); professional services firms and consultants; and royalty owners. PIOGA promotes the interests of its members in environmentally responsible oil and natural gas operations, as well as the development of competitive markets and additional uses for Pennsylvania-produced natural gas. PIOGA has no parent corporation and has not issued any stock.

21. **The Permian Basin Petroleum Association** ("PBPA") is the largest regional oil and gas association in the United States. It represents the men and women who work in the oil and gas industry in the Permian Basin of West Texas and southeastern New Mexico. The Permian Basin is the largest inland oil and gas reservoir and the largest oil and gas producing region in the world. PBPA consists of the largest producers as well as the smallest operators in the Permian Basin. Part of PBPA's mission is to promote environmentally conscious operations and sustainable economic profitability among all our members, large and small. PBPA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

22. **The Texas Alliance of Energy Producers** ("Texas Alliance") became a statewide organization in 2000 with the merger of two of the oldest oil & gas associations in the nation: the North Texas Oil & Gas Association and the West Central Texas Oil & Gas Association. The Texas Alliance is now the largest statewide oil and gas association in the country representing Independents. With members in 34 states, the Texas Alliance works on behalf of our members at the local, state, and federal levels on issues vital to the industry. The Texas Alliance is a non-profit entity, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

23. **The Texas Independent Producers & Royalty Owners Association** ("TIPRO") is a trade association representing the interests of nearly 3,000 independent oil and natural gas producers and royalty owners throughout Texas. As one of the nation's largest statewide associations representing both independent producers and royalty owners, members include small family businesses, the largest, publicly-traded independent producers, and mineral owners, estates, and trusts. Members of TIPRO are responsible for producing approximately 90 percent of the oil and natural gas within Texas, and own mineral interests in millions of acres across the state. TIPRO has no parent corporation and there is no publicly-held corporation that owns more than 10% of its stock.

24. **Western Energy Alliance** is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Its expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. Most independent producers are small businesses, with an average of fourteen employees. The Alliance has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

25. **GPA Midstream Association** ("GPA Midstream") is a non-profit trade organization representing over 50 domestic corporate members engaged in the gathering, transportation, processing, treating, storage and marketing of natural gas, natural gas liquids, crude oil and refined products. GPA Midstream has no parent company, and no publicly held company has a 10 percent or greater ownership interest in GPA Midstream.

26. **Texas Oil and Gas Association** ("TXOGA") is a statewide organization representing every facet of the Texas oil and gas industry including small independents and major producers. Collectively, the membership of TXOGA produces approximately 90 percent of Texas' crude oil and natural gas and operates the vast majority of the state's refineries and pipelines and, therefore, own and operate facilities that are affected by the rule at issue in this case.

TXOGA has not issued shares or debt securities to the public, has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in TXOGA.

27. **Interstate Natural Gas Association of America** ("INGAA") is a national trade association that represents interstate natural gas transmission pipeline companies. INGAA has no parent corporation, and no publicly held corporation has a 10% or greater ownership in INGAA.

28. **American Exploration & Production Council** ("AXPC") is an incorporated national trade association representing 30 leading independent oil and natural gas exploration and production companies in the United States. AXPC members are "independent" in that their operations are predominantly limited to exploration for and production of oil and natural gas. Its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce oil and natural gas in environmentally responsible ways. AXPC has no parent corporation and no publicly held corporation owns more than 10% of its stock.

/s/ *Michael J. Edney*
Michael J. Edney

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GLOSSARY OF ABBREVIATIONS

EPA	U.S. Environmental Protection Agency
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RTC	Response to Public Comments
Rule	"Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review," 89 Fed. Reg. 16,820 (Mar. 8, 2024)
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INTRODUCTION

This case involves EPA's latest Clean Air Act air emissions standards for the oil and gas production industry. This is EPA's third rule in ten years. Each rule is more stringent and expansive than the prior rule—in this case most notably by including first-ever federal guidelines for existing sources.

Industry Petitioners cover the breadth of the operations subject to the rule, from oil and natural gas production wells to midstream natural gas services to interstate transportation of oil and gas to customers. Industry Petitioners also reflect the range of affected businesses, from small independent oil and gas production companies (which may operate only a handful of very low production wells) to large vertically integrated oil and gas production companies.

Despite their widely divergent positions in the industry, Industry Petitioners support fact-based, sensible regulation of air emissions. Thus, Industry Petitioners do not seek to eliminate these rules but, rather, more narrowly challenge nine discrete elements of the rule where EPA has imposed requirements that are not firmly grounded in the law or cannot reasonably be supported by the facts. Resolving these issues will significantly improve implementation of the Rule while not materially diminishing the emissions reductions that it accomplishes.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

1. Did EPA act arbitrarily, capriciously, or contrary to law in imposing zero-emissions standards on covers and closed vent systems?
2. Did EPA act arbitrarily, capriciously, or contrary to law in imposing rule-specific "legally and practicably enforceable" criteria?
3. Did EPA act arbitrarily, capriciously, or contrary to law in defining "modification" for process controller, pump, storage vessel, and certain fugitive emissions components?
4. Did EPA act arbitrarily, capriciously, or contrary to law in setting the threshold for the Rule's super-emitter program?
5. Did EPA act arbitrarily, capriciously, or contrary to law in imposing compliance costs on marginal wells?
6. Did EPA act arbitrarily, capriciously, or contrary to law in imposing process controller standards?
7. Did EPA fail to provide sufficient notice that it would mandate replacement of low-emission valve equipment in violation of the Administrative Procedure Act's notice and comment rulemaking requirements?
8. Is the Rule's December 6, 2022 effective date unlawful because the proposed regulatory text was not published until March 8, 2024?

9. Did EPA act arbitrarily, capriciously, or contrary to law in defining "existing sources"?

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the Addendum.

STATEMENT OF THE CASE

I. Clean Air Act Section 111 Establishes a Detailed System for Regulating Sources of Air Pollution.

Clean Air Act Section 111 directs EPA to promulgate "Federal standards of performance for new sources" for listed source categories. 42 U.S.C. § 7411(b)(1)(B). EPA must "(1) 'determine[],' taking into account various factors, the 'best system of emission reduction which...has been adequately demonstrated,' (2) ascertain the 'degree of emission limitation achievable through the application' of that system, and (3) impose an emissions limit on new stationary sources that 'reflects' that amount." *West Virginia v. EPA*, 597 U.S. 697, 709 (2022) (quoting 42 U.S.C. § 7411(a)(1)). A source regulated by a new source performance standard is an "affected facility."

Once EPA establishes a *new* source performance standard, under certain circumstances EPA must ensure regulation of *existing* sources in that source category. 42 U.S.C. § 7411(d). EPA does so by issuing "emissions guidelines" that states must follow in submitting plans to regulate existing sources. *Id.*

II. EPA Finalizes a Rule Regulating Emissions From Oil and Gas Operations.

This case concerns EPA's most recent Section 111 rules for the oil and gas industry: 89 Fed. Reg. 16,820 (Mar. 8, 2024) ("Rule"), JA___. The Rule adopts new source performance standards for methane and volatile organic compounds (Subpart OOOOb) and emissions guidelines for methane (Subpart OOOOc). The prior rules are found in Subparts OOOO and OOOOa.

The Rule imposes the following requirements relevant here.

A. Covers and Closed Vent Systems.

The Rule requires inspection and repair of leaks from "covers" and "closed vent systems." A "cover" prevents vapors from certain equipment from escaping (such as a roof on a tank). A "closed vent system" conveys vapors from affected equipment to an air pollution control device (*e.g.*, a metal pipe connecting the headspace of a storage tank to a fume incinerator) or back to a piece of processing equipment. *See, e.g.*, 40 C.F.R. § 60.5430b. Fugitive emissions leaks from a cover or closed vent system reduce the overall efficiency of an air pollution control system because leaked emissions do not reach the control device.

The Rule requires that covers and closed vent systems have "no identifiable emissions." *Id.* § 60.5411b(b)(4), (a)(3). To comply, owner/operators must periodically monitor for leaks and fix any leak within a defined time period. *Id.* § 60.5416b(b)(5)–(8). The requirement to detect and repair leaks from covers and

closed vent systems is indistinguishable from fugitive emission standards for other equipment, such as valves and connectors. *See generally id.* § 60.5397b.

Those similarities are no accident. The same types of piping and components (*e.g.*, valves) regulated under the equipment leak standards are used in closed vent systems. API Supplemental Proposal Comments at 34–35 (Feb. 13, 2023), JA___–___.

But a profound difference is that equipment leak standards are work practice standards—emissions control measures such as design requirements (*e.g.*, caps on open ended lines) or a requirement to fix a leaking valve within a specified time—while the "no identifiable emissions" standard for covers and closed vent systems is a numeric emission limitation of zero. 40 C.F.R. § 60.5416b(b)(2)–(4). EPA uses work practice standards for equipment leaks because numeric limitations are not "feasible." *See* 42 U.S.C. § 7412(h)(2) (work practice standards used where emissions "cannot be emitted through a conveyance designed and constructed to emit or capture" the emissions or "application of [a] measurement methodology…is not practicable due to technological and economic limitations"). The disparate treatment of leaks from the same type of equipment is stark. Under the equipment leak work practice standard, owners or operators only violate the equipment leak work practice standard when they fail to monitor for leaks or fail to timely repair leaking components. By contrast, under the "no identifiable emissions" standard,

merely detecting a leak would be a deviation, even when the leak is timely repaired. 89 Fed. Reg. at 16,986, JA___.

B. "Legally and Practicably Enforceable" Emissions Limits.

A storage vessel or storage tank battery (*i.e.*, a group of interconnected storage vessels) is subject to the storage vessel emissions standards if potential emissions exceed 6 tons-per-year of volatile organic compounds or 20 tons-per-year of methane. 40 C.F.R. § 60.5365b(e)(1)(i)–(ii). Potential emissions determinations "may take into account requirements under a legally and practicably enforceable limit in an operating permit or other requirement established under a Federal, state, local, or Tribal authority." *Id.* § 60.5365b(e)(2). The Rule establishes six criteria not found in prior rules that an emissions limit must meet to be "legally and practicably enforceable," including: (1) quantitative production or operating limits; (2) short averaging times; (3) parametric limits for equipment and control devices; (4) testing and monitoring; (5) recordkeeping; and (6) reporting provisions. *Id.* § 60.5365b(e)(2)(i)(A)–(F).

EPA claims the new criteria will ensure that owners/operators that rely on emissions "limits to claim nonapplicability of [Subpart] OOOOb or [Subpart] OOOOc indeed have potential emissions below the relevant applicability threshold(s)." 89 Fed. Reg. at 16,974, JA___.

But what constitutes a legally effective emissions limit is an issue that goes far beyond this Rule. It is a fundamental element of numerous Clean Air Act stationary source programs, including EPA-approved state air permitting programs. There has been "skirmishing" since passage of the Clean Air Act Amendments of 1977 as to how potential to emit should be defined. *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1362–63 (D.C. Cir. 1995) (per curiam) ("*NMA*"). In *NMA*, this Court overturned EPA's definition of potential to emit under the Section 112 air toxics program because "EPA has not explained why the criteria for federal approval and the consequences of that approval are related to ensuring the practical effectiveness of state controls." *Id*. at 1365. This Court also overturned similar potential to emit provisions under the New Source Review preconstruction permitting program and Title V operating permit program. *Chem. Mfrs. Ass'n v. EPA*, 70 F.3d 637 (D.C. Cir. 1995) (per curiam); *Clean Air Implementation Project v. EPA*, No. 96-1224, 1996 WL 393118, at *1 (D.C. Cir. June 28, 1996) (per curiam).

When EPA proposed the new "legally and practicably enforceable" criteria here, commenters objected to the rule-specific approach, arguing EPA should instead promulgate a single rule that establishes coherent and consistent criteria for all purposes under the Clean Air Act. API Proposed Rule Comments at 64 (Jan. 31, 2022), JA___. A rule here "could inadvertently call into question existing permitting

and regulatory regimes that do not specifically include the parameters proposed by EPA." *Id.*

EPA dismissed such concerns and promulgated the criteria as proposed.

C. "Modification" Definitions.

Because a modified source is treated as "new," 42 U.S.C. § 7411(a)(2), an overly broad modification definition can substantially expand rule applicability. Subpart OOOOb contains new rule-specific definitions of "modification" for process controllers and pumps, storage vessels, and fugitive emissions components located at a centralized production facility. *See* 40 C.F.R. §§ 60.5365b(d)(1), (h)(1), (e)(3)(ii), (i)(2).

The Clean Air Act defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Thus, a "modification" only occurs when there is: (1) a physical change or a change in the method of operation at the affected facility; (2) an emissions increase from the facility; *and* (3) a causal connection between the change at the facility and the emissions increase.

The Rule departs from the statute. The Rule defines "modification" for process controllers and pumps as an increase in the number of process controllers or pumps, without regard to whether that increases emissions from the affected facility.

EPA claims adding equipment necessarily increases emissions. 89 Fed. Reg. at 16,930, 16,938, JA___, JA___. Commenters explained this is not always true—*e.g.*, when newly added process controllers or pumps are zero-emissions natural gas-driven units (*e.g.*, INGAA Supplemental Proposal Comments at 32 & n.93 (Feb. 13, 2023), JA___). EPA ignored these examples in the final action. *See* EPA, Response to Public Comments at II-7-8 (Nov. 2023) ("RTC"), JA___.

The Rule would have storage vessels and fugitive emissions components at a centralized production facility "modified" by activities undertaken entirely at *another* facility (generally by third-parties)—at upstream well sites that undertake activities to increase their production. 40 C.F.R. §§ 60.5365b(e)(3)(ii)(C)–(D), (i)(2)(i)–(iii). EPA claims those activities may cause increased emissions from the tanks or from fugitive emissions components at a centralized production facility that receive the (additional) product. *See* 89 Fed. Reg. at 16,981, JA___. But EPA nowhere explains why a physical activity undertaken at another facility—a remote well—causes a physical or operational change at downstream storage tanks or centralized production facilities. Nor does EPA explain why increased throughput is a change in the method of operation, where that increase is within the facility's capacity as designed and constructed.

D. The Super-Emitter Program.

The Rule establishes a first-of-its-kind program called the "Super-Emitter Program." 89 Fed. Reg. at 16,876–81, 16,915–23, JA___–___, JA___–___. Under this program, EPA-certified "third-party notifiers" can notify EPA of so-called "super-emitter events." *Id.* at 16,879, JA___. "[A] super-emitter event is one that has a quantified emission *rate* of 100 kg/hr of methane or greater." *See id.* at 16,877–80, JA___–___ (emphasis added). There is no duration or total amount associated with this rate threshold. The Supplemental Proposal acknowledged that normal, lawful, and necessary venting might exceed the 100 kg/hr threshold and stated the program "is not intended to address these events." 87 Fed. Reg. 74,702, 74,747 n.101 (Dec. 6, 2022), JA___, JA___. EPA did "not expect unintentional releases at [the 100 kg/hr threshold level] to occur in normal operations," noting "the occurrence of an unintentional release at this emissions rate should be unusual." *Id.* at 74,749, JA___. Despite comments explaining that such events are not unusual, INGAA Supplemental Proposal Comments at 12, JA___, EPA retained the threshold in the Rule.

If EPA determines a third-party super-emitter notification is complete and accurate, it notifies the suspected source owner/operator and posts the notification publicly. 89 Fed. Reg. at 16,880, JA___. A notification triggers numerous obligations for the owner/operator, including a requirement to conduct a

comprehensive investigation and submit a "[s]uper-[e]mitter [e]vent [r]eport" to EPA within 15 days. *Id.* EPA must make reports publicly available, even if the report concludes that no super-emitting event occurred. *Id.* at 16,880–81, JA___–___.

E. Marginal Wells.

Without adequate explanation, EPA imposed onerous requirements on low-producing oil wells—*i.e.*, "marginal wells"—that will make their continued operation infeasible. Marginal wells generally produce 15 or fewer barrel oil equivalents/day. They represent approximately 78% of all producing wells in the U.S. But their production volume and emissions are much less than larger-producing wells, collectively accounting for about 10% of the nation's oil supply. *See* EPA, Regulatory Impact Analysis at 4-11 (Dec. 2023), JA___; Indep. Petroleum Ass'n of Am., *et al*. Supplemental Proposal Comments at 8 (Feb. 13, 2023), JA___.

First, EPA required marginal wells in most cases to route "associated gas" to a sales line. "Associated gas" means "the natural gas from wells operated primarily for oil production." 40 C.F.R. § 60.5430c. Under the Rule: (1) wells constructed after May 7, 2026 must route associated gas to a sales line or use it for certain other purposes; (2) wells constructed between May 7, 2024 and May 7, 2026 are required to do the same, unless doing so is not technically feasible, in which case the gas must be routed to a control device; (3) wells constructed between December 6, 2022 and

May 6, 2024, older wells reconstructed or modified after December 6, 2022, and older wells with associated gas greater than 40 tons-per-year of methane must do the same as the preceding category; and (4) older wells with associated gas of 40 tons-per-year of methane or less must route associated gas to a sales line or a control device, or use it for certain other purposes. 89 Fed. Reg. at 16,832–33, 16,835, JA___–___, JA___.

As commenters noted, many wells are remotely located and produce such low gas volumes that it is economically infeasible to connect to a sales line; well operators do not control sales lines or have the ability to force gathering and distribution companies to install necessary infrastructure or purchase associated gas; and marginal wells often do not operate continuously or have enough gas to keep a flare pilot continuously lit. *See, e.g.*, Mich. Oil and Gas Ass'n Supplemental Proposal Comments at 13–14 (Feb. 13, 2023), JA___–___; The Petroleum All. of Okla. Supplemental Proposal Comments at 11 (Feb. 13, 2023), JA___. EPA bypassed this evidence and finalized these associated gas requirements.

Second, the Rule imposes new fugitive emission monitoring requirements for marginal well sites, often requiring expensive optical gas imaging. EPA proposed exempting marginal wells emitting less than three tons-per-year of methane from those monitoring requirements. 86 Fed. Reg. 63,110, 63,118–21 (Nov. 15, 2021), JA___, JA___–___. EPA, however, changed course and required optical gas

imaging monitoring for all well sites not categorized as "Single Wellhead Only Well Sites" or "Small Well Sites." 89 Fed. Reg. at 16,830, 16,833, JA___, ___. The definition of a "Small Well Site" is not based on a well's actual emissions or throughput, but is instead based on equipment count. 40 C.F.R. § 60.5430b.

Commenters explained that optical gas imaging is cost-prohibitive for many marginal wells; using audio-visual olfactory monitoring is sufficient for marginal well sites; and the large majority of marginal well sites would not qualify as small, notwithstanding low emissions. *See, e.g.*, Indep. Petroleum Ass'n of Am., *et al*. Supplemental Proposal Comments at 13, JA ___; Penn. Indep. Oil & Gas Ass'n Supplemental Proposal Comments at 2–4 (Feb. 13, 2023), JA___–___. EPA nonetheless finalized these optical gas imaging monitoring requirements in the Rule.

F. Process Controllers.

Without explanation, the Final Rule treats process controllers without access to electricity differently depending on their location. Historically, controllers have been powered by the natural gas being produced at the site, which typically results in methane emissions. EPA evaluated the cost effectiveness of alternatives. "EPA concluded that there was at least one option for each model plant size" that was reasonably cost effective and justified setting a zero-emissions standard for all process controllers. 89 Fed. Reg. at 16,923, JA___.

But the Rule exempts sites in Alaska without access to electrical power from the zero-emissions standard. EPA allows for natural gas-driven process controllers or the routing of controller emissions to a control device that achieves a 95 percent reduction in emissions. 40 C.F.R. § 60.5390b(b)(3). Solar-powered controllers are dependent on sunshine. 86 Fed. Reg. at 63,207, JA___. EPA summarily explained that this exemption for sites in Alaska without electricity is justified because the state undergoes prolonged periods without sunshine. Several commenters requested that EPA allow sites *outside* of Alaska to have the same compliance options because such sites also experience limitations on solar-powered controllers in areas with limited sunlight. RTC at I-10-9 to I-10-11(Nov. 2023), JA___–___.

EPA determined that the zero-emissions standard for sites outside of Alaska was "adequately demonstrated," even for sites without access to electricity, because owners and operators allegedly had several zero-emitting options. 89 Fed. Reg. at 16,926, JA___. But EPA failed to explain how sites *in Alaska* without access to electricity were distinguishable from sites *outside of Alaska* that also lack access to electricity and similarly experience prolonged periods without sunshine.

G. Low Emissions Valves.

In the Supplemental Proposal, EPA stated that it was not proposing a requirement for owners or operators to repair leaking equipment with low-emission valves and recognized that such replacements are not necessary for all valve repairs.

87 Fed. Reg. at 74,808, JA___. Despite this, the Rule mandates replacing leaking natural gas plant valves with low-emissions valves. 40 C.F.R. § 60.5400b(h)(2)(i)(B), (ii)(D).

H. Publication in the Federal Register.

The Clean Air Act requires publication of the regulatory text in the *Federal Register* of new source performance standards *prior to* the applicability date of the new standards. The Rule specifies that the trigger date for defining new sources subject to Subpart OOOOb is December 6, 2022, the date the Supplemental Proposal was published in the *Federal Register*. However, neither that Supplemental Proposal nor the earlier Proposed Rule included proposed regulatory text, which was not published in the *Federal Register* until the Rule was published on March 8, 2024.

Accordingly, Subpart OOOOb can apply only to new sources that commenced construction on or after March 8, 2024.

I. "Existing Source" Definition.

Performance standards apply to the *new sources* within a specific category, *i.e.*, sources that are constructed or modified after the publication date of a proposed "standard of performance under this section which will be applicable to such source." 42 U.S.C. § 7411(a)(2). *Existing sources* are sources that are not new, *i.e.*, those constructed prior to the proposal of any new source performance standard for that category. *Id.* § 7411(a)(6). That dichotomy between new and existing sources

ensures that owner/operators have notice of the standards to which they will be subject.

The Rule provides that a "new" source already subject to a performance standard may simultaneously be treated as an "existing" source because EPA proposed a subsequent standard. The Rule thus requires sources to simultaneously comply with the standard applicable when they were constructed or last modified and a different standard for existing sources, contrary to Section 111.

SUMMARY OF ARGUMENT

I. The zero-emissions standard for covers and closed-vent systems is unlawful and arbitrary and capricious. EPA failed to determine that the zero-emissions standard is the best system of emission reduction as Section 111 of the Clean Air Act requires. EPA identified no zero-emitting equipment and components that might be used to meet the standard, failed to assess whether potentially available technology has been "adequately demonstrated," and neglected to estimate the "cost of achieving" a zero-emissions standard. In addition, the zero-emissions standard is arbitrary and capricious because the EPA ignored or failed to adequately account for commentors' input that covers and closed vent system components are indistinguishable from components regulated under the Rule's existing equipment leak standards. Further, by characterizing standards for covers and closed vent

systems as numeric emission limits, EPA's treatment conflicts with Section 111(h) of the Clean Air Act, governing work practice standards.

II. The definition of "legally and practicably enforceable" emissions limits imposes significant obligations on sources and state permitting programs without a rational basis and is, therefore, arbitrary and capricious. EPA's new definition requires that long-standing state permit limitations be ignored when calculating a storage tank's potential to emit. By ignoring or failing adequately to account for EPA's pre-existing definition of "legally and practicably enforceable" or to explain why divergence from that existing and applicable definition is necessary, the Rule is arbitrary and capricious. The Rule is also arbitrary and capricious because EPA failed to acknowledge or explain the new definition's direct conflict with EPA-approved state permitting regulations and refused to provide evidence supporting the new definition.

III. The statute defines a "modification" as "any *physical change in*, or *change in the method of operation of*, a stationary source *which increases* the amount of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4) (emphases added). The Rule's "modification" definitions for process controller and pump affected facilities are unlawful, because they include activity that does not increase emissions, inconsistent with the statute. The "modification" definitions for storage vessel, and certain fugitive emissions components affected facilities are also

unlawful because they include activity undertaken at *other* facilities (well sites) owned and operated by third-parties. These off-site activities are not a "physical change in" the storage vessel/fugitive emissions components affected facilities. Nor are they a "change in the *method* of operation of" those facilities because an increase in throughput of product through these facilities does not change their *method* of operation—*i.e.*, the *way* they operate.

IV. The Super-Emitter Program is unlawful because the 100 kg/hr threshold that defines a "super-emitter" event will be triggered frequently by normal, necessary venting from standard operations and maintenance. Although EPA claims that it did not intend for the program to cover normal emissions, EPA finalized the Rule with this threshold, ignoring comments—supported by EPA's own data—showing that normal operations and maintenance practices would often exceed the threshold. Commenters emphasized that the low threshold will sweep into the program numerous events that EPA did not intend to subject to the program. Yet, EPA failed to acknowledge or respond to this issue. As a result, oil and gas sources throughout the country will now be labeled "super-emitters" and be required to conduct costly and time-consuming investigations for allowable emissions from normal operations that should never have been included in the program.

V. EPA ignored or failed adequately to account for comments explaining that the Rule's compliance costs are "prohibitive for small owners and operators and will

result in the end of their operations." 89 Fed. Reg. at 16,905, JA___ (citing comments). EPA's incomplete and inaccurate cost assessment failed to meet the "best system of emission reduction" standard, making the standards for associated gas generated at marginal wells arbitrary and capricious. EPA likewise failed to demonstrate that routing associated gas to a sales line was cost-justified or achievable, thereby violating Section 111(a)(1)'s mandate to "tak[e] into account the cost of achieving…reduction[s]." 42 U.S.C. § 7411(a)(1). Further, the Rule would arbitrarily treat marginal wells the same as large wells, newly relying on a "component count" as a basis for determining the stringency of leak detection requirements, rather than emissions or throughput.

VI. The zero-emissions standard for process controllers is arbitrary and capricious. For sites that are located in Alaska and that lack access to electricity, the Rule allows additional flexibility from the zero-emissions standard by permitting natural gas-driven process controllers with low natural gas emission rates or routing emissions to a control device. 89 Fed. Reg. at 16,882, JA___. EPA based this exemption on the premise that solar-powered controllers are dependent on sunlight and Alaska undergoes long periods without sunshine. *See* 86 Fed. Reg. at 63,207, JA___. But Alaska is not the only location with limited sunlight. In the Rule, EPA arbitrarily limited that additional flexibility to sites in Alaska by failing to explain

why the lack of sunlight in Alaska is different than a similar lack of sunlight in other states. *See* 87 Fed. Reg. at 74,764, JA___.

VII. EPA failed to provide any notice that it might adopt requirements to replace leaking natural gas plant valves with low-emission valves, providing no opportunity for public comment. In fact, EPA explicitly stated in the Supplemental Proposal that it would not adopt such requirements. *Id*. at 74,808, JA___. This requirement is not a logical outgrowth of EPA's proposals and, thereby, violates the Administrative Procedure Act. Further, EPA did not provide the technological and cost analyses for this new requirement, as required by Section 111.

VIII. The Clean Air Act requires EPA to publish a new source performance standard regulation's (or proposed regulation's) rule text in the *Federal Register* to establish the date for when a source is "new" for purposes of the standards. Neither the Proposed Rule, nor the Supplemental Proposal satisfied those requirements, as each lacked proposed rule text. EPA did not publish the regulatory text in the *Federal Register* until March 8, 2024. Therefore, EPA's claim that Subpart OOOOb's effective date is no later than December 6, 2022 violates the Clean Air Act.

IX. EPA's distinction between "new" and "existing" sources "relative to a particular [new source performance standard]" is inconsistent with the Clean Air Act. Section 111(a) defines a sharp dichotomy between "new" and "existing"

sources. Thus, the Agency's claim to apply Subpart OOOOc to "existing sources" constructed or modified prior to December 6, 2022 is incorrect. The EPA's interpretation would result in a particular source potentially being simultaneously found to be both "new" and "existing" sources, depending on whether such determination is made relative to Subpart OOOO or to Subpart OOOOc. Section 111(a) establishes that once a source is subject to a performance standard, it thereafter cannot be an "existing" source for purposes of Section 111, even if subsequent performance standards are proposed.

STANDING

Most Industry Petitioners are trade associations. Their members, and Industry Petitioner Miller Energy Company II, LLC, are directly regulated by the Rule, making their standing "self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002). The Industry Petitioner associations have standing to sue on behalf of their members because the associations seek to protect interests germane to their purposes and thus member participation is not required. *See United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553–54 (1996). Because all Industry Petitioners are similarly situated, the Court need only be satisfied that one Industry Petitioner has standing. *J.D. v. Azar*, 925 F.3d 1291, 1323 (D.C. Cir. 2019) (per curiam).

STANDARD OF REVIEW

"[C]ourts, not agencies" must "decide '*all* relevant questions of law' arising on review of agency action[.]" *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (quoting 5 U.S.C. § 706). The Court must apply "the statute's 'best' reading," "without deference" to the agency's interpretation. *U.S. Sugar Corp. v. EPA*, 113 F.4th 984, 991 & n.7 (D.C. Cir. 2024) (per curiam) (citing *Loper Bright*, 144 S. Ct. at 2266).

The Clean Air Act requires the Court to set aside agency regulations that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9). A regulation is "arbitrary and capricious" if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Ohio v. EPA*, 603 U.S. 279, 292 (2024) ("An agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.'" (citation omitted)). The agency must also offer "a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted); *see also Genuine Parts Co. v. EPA,* 890 F.3d 304, 312 (D.C. Cir. 2018)

(agency cannot "'ignore evidence contradicting its position'") (citation omitted); *Ohio,* 603 U.S. at 295 (when presented with evidence contradicting its position, an agency may not simply "sidestep it").

ARGUMENT

I. The Zero-Emissions Standard for Covers and Closed Vent Systems is Unfounded and Unlawful.

EPA erred by imposing a zero-emissions standard for leaks from covers and closed vent systems because EPA failed to determine it is the "best system of emission reduction" as required under Clean Air Act Section 111. EPA's approach is also arbitrary and capricious, as leaks from fugitive emissions components have long been subject to "work practice" standards under Section 111(h)(2). EPA offered no justification for treating covers and closed vent systems differently.

A. The Zero-Emissions Standard for Covers and Closed Vent Systems Is Not Based on a Best System of Emissions Reduction Determination.

The zero-emissions standard constitutes a "standard of performance" under 42 U.S.C. § 7411(a)(1). Every "standard of performance" must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction" that "the Administrator determines has been adequately demonstrated." *Id.*; *see also* 89 Fed. Reg. at 16,847, JA___ ("[A]n essential, although not sufficient, condition for a 'system of emission reduction' to serve as the basis for an 'achievable' emission limitation is that the Administrator *must*

determine that the system is 'adequately demonstrated.'") (emphasis added); *accord West Virginia*, 597 U.S. at 709 (Administrator must consider "cost of achieving" emission reduction).

EPA ignored the mandatory statutory standard-setting measures in establishing the zero-emissions limit for covers and closed vent systems. EPA did not identify zero-emitting equipment and components that might be used to meet the standard, assess whether potentially available technology has been "adequately demonstrated," or estimate the "cost of achieving" a zero-emissions standard. Instead, EPA's sole justification is that such a limit is needed "to ensure that associated affected/designated facilities comply with the 95 percent emission reduction standard when using a control device." 89 Fed. Reg. at 16,986, JA___. That justification falls far short.

EPA's argument that the zero-emissions standard is not a "standard of performance" but an adjunct to the standard for control devices fails. *Id.* EPA treats the zero-emissions standard as an enforceable, stand-alone "standard of performance," *id.*, while also denying it was created under either Clean Air Act Section 111(b) or 111(h). *Id.* But EPA identifies no alternative statutory authority. And, if EPA was not required to perform a best system of emissions reduction analysis under Section 111, it never explained what criteria it used to establish the zero-emissions standard. Indeed, EPA conducted a best system of emissions

reduction analysis for other zero-emissions standards imposed in Subpart OOOOb. *See, e.g.*, *id*. at 16,923, JA___ (best system of emissions reduction analysis for zero-emissions standard for pneumatic controllers). But not here.

EPA's claim that "the requirement to operate the [closed vent system]…without emissions to the atmosphere has previously been required in [new source performance standards] OOOO and OOOOa," as well as 40 C.F.R. Part 60, Subpart Kb likewise fails. *Id*. at 16,986, JA___. Each of those are *work practice standards*. *See generally* 40 C.F.R. §§ 60.5411, 60.5411a, 60.112b(a)(3)(i) (Subparts OOOO, OOOOa, and Kb, respectively). They do not impose a numeric zero-emissions standard and cannot establish that a zero-emissions standard is "adequately demonstrated." The zero-emissions standards for covers and closed vent systems are unprecedented.

The zero-emissions standards for covers and closed vent systems must be vacated because they were not devised according to the statutory standard setting procedures.

B. The Standard for Covers and Closed Vent Systems Is Arbitrary and Capricious.

Imposing a zero-emissions standard for covers and closed vent systems is also arbitrary and capricious. Commenters explained covers and closed vent system components (*e.g.*, piping, valves, connectors) are indistinguishable from components regulated under the equipment leak standards in the Rule. API

Supplemental Proposal Comments at 34–35, JA___–___. As such, "[t]here is no reason why a typical fugitive leak should be treated differently [than components covered by the equipment leak standard] simply because it occurs on a cover or closed vent system." *Id*. at 35, JA___.

EPA's only answer was the conclusory assertion that components on covers and closed vent systems "are not fugitive components" but "are part of the emission control for an associated affected/designated facilit[y]" that uses "a control device to meet" a standard. 89 Fed. Reg. at 16,986, JA___. According to EPA, closed vent systems "should be properly designed to minimize the possibility of leaks" and sources should consider whether "welded piping can be used" or "low emission equipment" is appropriate, as well as "which gaskets are most suitable" or "whether pressure setpoints are appropriate for relief devices." *Id*.

EPA thus claims that it is possible to eliminate leaks from components on covers and closed vent systems through careful design and planning, even though EPA does not demand the same for identical components covered by the equipment leak standards. More importantly, EPA offers absolutely no data or analyses to support its assertion that a zero-emissions limit is feasible, consistently achievable, already demonstrated in practice, or cost-effective. EPA's failure to make this demonstration or explain the disparate treatment of identical components is patently arbitrary and capricious. *See State Farm*, 463 U.S. at 43 ("[A]gency must examine

the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (citation omitted); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016) ("[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice[.]'" (citation omitted)).

Moreover, the Clean Air Act prohibits EPA from setting a numeric emissions limit for covers and closed vent systems. Clean Air Act Section 111(h) requires work practice standards rather than numeric emissions limits when it is "not feasible to prescribe or enforce a standard of performance," such as where "pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant." 42 U.S.C. § 7411(h)(1), (2). EPA has consistently determined that "fugitive emissions" from leaking components must be regulated using work practice standards. *See* 40 C.F.R. §§ 51.301 ("emissions which could not reasonably pass through a stack, chimney, [or] vent"), 51.166(b)(20) (same), 52.21(b)(20) (same), 70.2 (same).

Emissions from covers and closed vent systems do not emit from any conveyance, like a stack or chimney. Instead, they are "fugitive emissions" that emit from "cracks, holes, or gaps…or broken or missing caps." *Id.* § 60.5416b(a)(1)(ii). And, like other fugitive emission sources regulated under work practice standards,

they require inspection with leak detection equipment and repair of detected leaks—an implicit acknowledgment that EPA expects *fugitive* emissions to occur. *Id.* § 60.5416b(a)(1)(i), (a)(1)(ii), (b)(6). Those requirements, along with the Rule's "design and operate" standard, are archetypal work practice standards. *Compare id.* § 60.5411b(a)(3) ("You must *design and operate* the closed vent system with no identifiable emissions as demonstrated by [a leak detection and repair program]….") (emphasis added) *with* 42 U.S.C. § 7411(h)(1) (Administrator may "promulgate a *design*, equipment, *work practice*, or *operational* standard, or combination thereof" instead of numeric emission limits) (emphases added). The Rule's numeric emission limit for covers and closed vent systems should be vacated as it violates both statutory and regulatory definitions of work practice standards.

II. The "Legally and Practicably Enforceable" Criteria Are Arbitrary and Capricious.

A storage vessel is not subject to emission standards if a permit caps its potential to emit methane and volatile organic compounds with "legally and practicably enforceable" emissions limits. However, EPA's new definition of "legally and practicably enforceable" imposes significant changes on state permitting programs without adequate explanation for or appreciation of the changes' consequences. That new definition asserts that no permit or other limitation may be considered enforceable unless it includes all of the following six criteria: (1) quantitative production or operating limits; (2) short averaging times;

(3) parametric limits for equipment and control devices; (4) testing and monitoring; (5) recordkeeping; and (6) reporting. 40 C.F.R. § 60.5365b(e)(2)(i)(A)–(F).

Virtually no state permit, general permit, permit-by-rule, or regulatory program includes all of these requirements, and the new definition prohibits commonly used work practice standards. Thus, the Rule requires that long-standing permit limitations that actually reduce emissions be ignored when calculating a storage vessel's potential to emit. 89 Fed. Reg. at 16,973, JA___. The Rule's new definition of "legally and practicably enforceable" should be vacated because EPA failed to acknowledge its pre-existing definition of the term, failed to acknowledge or explain the new definition's conflict with EPA-approved state permitting regulations, and failed to provide evidence supporting the need for a new definition, preventing the public from submitting meaningful comments.

A. The "Legally and Practicably Enforceable" Criteria Are Arbitrarily Rigid.

EPA's new criteria for "legally and practicably enforceable" emissions limits are exceedingly specific and rigid, for example, an effective limit must include "[a] quantitative production limit and quantitative operational limit(s) for the equipment, or quantitative operational limits for the equipment." *See, e.g.*, 40 C.F.R. § 60.5365b(e)(2)(i)(A). Under that criterion, one emissions limit is not enough—an effective limit must include quantitative production and quantitative operational limits or at least two quantitative operational limits.

But the Rule fails to allow for other types of limits that could be demonstrated as effective but do not meet EPA's particular criteria. And the Agency does not explain why such limits are excluded. As a result, EPA has committed the same error that caused this Court in 1995 to invalidate the then-applicable rules defining "potential to emit" because "[t]here may…be regulatory techniques in addition to those that EPA deems susceptible to 'federal enforceability' that are equally effective, and yet which are foreclosed as mechanisms for reducing a source's capacity to emit as a result of EPA's approach." *NMA*, 59 F.3d at 1363–64.

B. EPA Changed Its Position Without Explanation.

1. EPA Disregarded Its Own Pre-Existing Rules.

The Rule's novel definition of "legally and practicably enforceable" likewise fails because it is a sharp and unexplained departure from EPA's existing definition. *See* 40 C.F.R. §§ 49.152, 49.167, 63.2. EPA's long-standing definition of "legally and practicably enforceable" requires only "an emission limitation or other standard," such as "(design standards, equipment standards, work practices, operational standards, pollution prevention techniques)," with a "time period for the limitation or standard (*e.g.*, hourly, daily, monthly and/or annual limits such as rolling annual limits)," "appropriate monitoring, recordkeeping, reporting and testing" requirements, and the right of "the reviewing authority…to enforce it." 40 C.F.R. § 49.167. The Rule now prohibits all "design standards, equipment

standards, work practices" or other "pollution prevention techniques," as well as limits with longer term averages even though they are still permitted in other contexts under Section 49.167. The existing definition expressly authorizes permits-by-rule (*i.e.*, an authorization contained in a generally applicable rule rather than a site-specific permit) and general permits (*i.e.*, a generic permit for a particular source type, which an owner/operator may choose to apply to a particular source), *id.*, while the Rule now prohibits them. EPA provided no meaningful explanation for why its long-standing definition of "legally and practicably enforceable" is deficient for storage vessels but still valid for other equipment.

An agency is free to change its position, but it must "provide reasoned explanation for its action" and "display awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA never acknowledged its existing definition of "legally and practicably enforceable" in the proposed rulemakings and did not discuss it in the Rule. Instead, EPA declared that the existing definition is irrelevant because the new definition's criteria were "unique and specifically tailored" for this rule. 89 Fed. Reg. at 16,975, JA___. But EPA never explains what is "unique" about storage vessels or why they require "specifically tailored" criteria that are unnecessary for other, similar equipment. "Agency action is arbitrary and capricious if 'the agency offers insufficient reasons for treating similar situations differently.'" *Muwekma Ohlone Tribe v. Salazar*, 708

F.3d 209, 216 (D.C. Cir. 2013) (citation omitted). EPA's failure to explain why different definitions of "legally and practicably enforceable" are necessary for certain equipment but not for other equipment is arbitrary and capricious.

2. The Rule Effectively Reverses Prior Approvals of State Implementation Plans.

EPA asserts that most state permitting programs cannot be used to restrict a storage vessel's potential emissions because they are not enforceable. 86 Fed. Reg. at 63,201, JA___. Yet, EPA previously approved State Implementation Plans containing those programs.[1] For instance, EPA approved Oklahoma's permit-by-rule for storage tank batteries in 2017. 82 Fed. Reg. 22,281 (May 15, 2017); 40 C.F.R. § 52.1920(c). However, the new definition of "legally and practicably enforceable" now considers Oklahoma's approved regulations to be unenforceable because they do not include all of the new definition's criteria. EPA changed its position without any analysis or identifying any specific deficiency in those approved regulations.

When commenters raised this issue, EPA *agreed* that "approved [State Implementation Plan] rules are federally enforceable," 89 Fed. Reg. at 16,977, JA___, even though the entire rationale for the new definition is that these same rules are *not* federally enforceable. *Id.* at 16,974, JA___ (State "permits, general permits,

[1] State implementation plans cannot be approved without a demonstration that the State may enforce all regulations and permits. 40 C.F.R. § 51.230.

and permits-by-rule for storage vessels" are "in nearly [] all cases…not legally and practicably enforceable."). That is not reasoned decisionmaking. Not only did EPA "simply disregard rules that are still on the books," *Fox Television Stations*, 556 U.S. at 515, but it "failed to address significant comments raised during the rulemaking." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). EPA's finding that previously approved state permitting programs are now unenforceable is arbitrary and capricious.

C. EPA Deprived the Public of the Opportunity to Comment.

EPA proposed the new definition of "legally and practicably enforceable" based on an unsupported assertion that "numerous" permits are "unenforceable or otherwise lack measures to assure the required emission reduction." 86 Fed. Reg. at 63,201, JA___. Commenters sought specific examples of purportedly unenforceable permit terms so they could evaluate and respond to EPA's claims. RTC at I-9-17 to I-9-19, JA___–___. EPA refused to provide this, or any other information, that would allow for informed comment.

Clean Air Act Section 307 requires EPA to disclose the information it relies upon in promulgating a rule. 42 U.S.C. § 7607(d)(2); *see also, e.g.*, *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994). Instead of providing the required information, EPA chided commenters for "fail[ing] to acknowledge the EPA's concern, claiming that it does not exist," and not "offer[ing] any alternative to

address the EPA's concern." 89 Fed. Reg. at 16,974, JA___. EPA asserted that "in nearly…all cases, across nearly 400 storage vessels, these permits or other requirements are not legally and practicably enforceable." *Id.* But instead of providing specific examples, EPA presented a "Permit 1" and "Permit 2" along with bullet points paraphrasing purportedly unenforceable terms. *Id.* at 16,975, JA___. EPA never identified the permits or provided their actual text, despite this information being in the public domain, claiming that there is an ongoing investigation. *Id.* & n.581. EPA also circularly asserts that these permits are not enforceable because they do not contain the criteria for enforceability from its new definition. For instance, Permit 1 and Permit 2 are unenforceable because they "do not have operational or parametric limits." *Id*. at 16,975, JA___. EPA previously found permits to be enforceable without these limits, *see, e.g.*, 85 Fed. Reg. 57,398, 57,425 (Sept. 15, 2020), and the Rule never explains why EPA has changed its position.

Thus, EPA presented unverifiable paraphrasing as the sole evidentiary basis for its new "legally and practicably enforceable" definition. This violates the basic tenet that an "agency must either disclose the contents of what it relied upon or, in the case of publicly available information, specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review." *U.S. Lines,*

Inc. v. Fed. Maritime Comm'n, 584 F.2d 519, 534–35 (D.C. Cir. 1978). The definition of "legally and practicably enforceable" should be vacated.

III. The "Modification" Definitions Are Unlawful.

The rule-specific definitions of "modification" should be vacated as contrary to the express language of the Clean Air Act. The Clean Air Act defines "modification" to require, among other things: (1) a physical change or a change in the method of operation *at* the affected facility; and (2) an emissions increase *from* the facility. 42 U.S.C. § 7411(a)(4) (emphases added); *supra* at 8–9. EPA's rule-specific definitions of "modification" for process controller and pump affected facilities contradict the second element. And the "modification" definitions for storage vessel affected facilities and fugitive emissions components affected facilities located at a centralized production facility contradict the first element.

A. The Definitions of "Modification" for Process Controller and Pump Affected Facilities.

"[A] modification" of a process controller and pump affected facility "occurs when the number of natural gas-driven" process controllers or pumps "in the affected facility is increased by one or more." 40 C.F.R. § 60.5365b(d)(1), (h)(1). This definition is flawed, as it does not require an emissions increase, as the Clean Air Act mandates.

Instead, EPA merely *assumes* that the addition of a natural gas-driven process controller or pump increases emissions from the facility. 89 Fed. Reg. at 16,930,

JA___ (process controllers); *see also id.* at 16,938, JA___ (pumps). But that is not always the case. For example, while a natural-gas driven controller or pump may be installed, it may be zero-emitting. *See* 40 C.F.R. §§ 60.5390b(a)(1)–(2); 60.5393b(a). In that case, there cannot be any increase in emissions, and therefore it cannot be a modification.

The Rule, however, improperly assumes an emissions increase, triggering the new source standards. This is particularly problematic because the controller- or pump-affected facility includes not only the controllers and pumps that triggered the modification, but all the other regulated controllers and pumps found at that facility, requiring wholesale replacement or retrofitting of all controllers and pumps to meet the new source standard. In fact, replacing existing higher-emitting process controllers or pumps with lower-emitting or zero-emissions natural gas-driven process controllers or pumps might *decrease* emissions, even if the total number of process controllers or pumps increases. The Rule simply assumes there is always an emissions increase from such a scenario.

Because the Rule's definitions of "modification" for process controller and pump affected facilities do not include a requirement for an emissions increase, they are inconsistent with the statute and unlawful.

B. The Definitions of "Modification" for Storage Vessels and Fugitive Emissions Components at Centralized Production Facilities.

The definitions of "modification" for storage vessel affected facilities and fugitive emissions components at centralized production facilities likewise do not comport with the Clean Air Act. EPA defines a "modification" to include a mere increase in the throughput of liquid stored in the tank battery with a potential to emit greater than applicability thresholds or the throughput of product to the fugitive emissions components facility. *See* 40 C.F.R. § 60.5365b(e)(3)(ii)(C)–(D) and (i)(1)(i)–(iii). Thus, upstream off-site activities at wells, often owned and operated by third-parties, would "modify" tank batteries and fugitive emission components without the owners or operators of those downstream facilities doing anything at all. The tanks remain exactly the same before and after the activity. No physical change occurs *at* the affected facility—and the mere increase in throughput is not a change in the *method* of operation of the storage vessel facility or the fugitive emissions components facility. Thus, there cannot be a "modification" under the statute.

EPA contends that the mere increase in throughput is an "*operational change* that results in an emission increase." *See, e.g.*, 89 Fed. Reg. at 16,981, JA___ (emphasis added). Whatever EPA means by "operational change," that is not what the statute says. The statute demands a "change in the *method* of operation." 42 U.S.C. § 7411(a)(4) (emphasis added). A "method" is "a particular *way* of doing something." CAMBRIDGE DICTIONARY, https://tinyurl.com/24y2wnt4 (emphasis

added). A tank accepts, stores, and discharges liquid. The *way* it does that is exactly the same, regardless of throughput. Similarly, fugitive emissions components are valves, connectors, and similar components that have the potential to leak and emit fugitive emissions. *See* 40 C.F.R. § 5430b. The *way* they operate is exactly the same, regardless of throughput. Any other interpretation of the term "method" would not be "best" and should be rejected. *See Loper Bright*, 144 S. Ct. at 2266.

Because the Rule's criteria for modification are not physical changes in, or changes in the method of operation of, the relevant affected facility, the Rule is contrary to statute and unlawful.

IV. EPA Failed to Justify the Threshold for the Rule's Super-Emitter Program.

The Rule established a first-of-its-kind Super-Emitter Program. This program requires owners and operators of oil and gas sources to conduct an exhaustive investigation whenever they receive a notification from EPA of a "super-emitter event." 89 Fed. Reg. at 16,878, 16,880, JA___, JA___. Investigations must begin within five calendar days and conclude with a report to EPA within fifteen days. *Id.* at 16,880, JA___.

The Rule sets a 100 kg/hr instantaneous methane emissions rate as the threshold for a "super-emitter event." That threshold is arbitrary and capricious because it is a *rate* threshold without any reference to duration. It will therefore be triggered frequently by normal, lawful, and necessary venting from normal

operations and maintenance that could last only minutes or less. *See* INGAA Supplemental Proposal Comments at 12, JA___. "These intentional releases, which include blowdowns, are performed for important safety purposes." *Id.*

EPA's reasoning in support of the selected threshold contradicts the record evidence. EPA justified the threshold on the grounds that emissions above this threshold "should be unusual," 87 Fed. Reg. at 74,747 n.101, 74,749, JA___, JA___. But record data show that emissions from normal operations above that threshold are routine. Data collected under Subpart W of the Greenhouse Gas Reporting Program ("GHGRP") include emissions figures by event type, including compressor blowdowns, which can occur when a unit is taken out of service due to a decrease in pipeline demand or for maintenance. Data from the GHGRP for 2016 show an average emission rate for a compressor blowdown of approximately 500 kg per event and an average emission rate for a scrubber blowdown of approximately 1,700 kg per event. RTC at II-14-59, JA___. These blowdown events are typically short, lasting only a few minutes, and will generally exceed the 100 kg/hr *rate* threshold (for a few minutes). *See* INGAA Supplemental Proposal Comments at 6, JA___; INGAA Proposed Rule Comments at 32 (Jan. 31, 2022), JA___. Any instance where a blowdown might last more than an hour would be exceptionally rare.

Further, the record demonstrates that the compressor blowdowns that would be deemed unusual events are in fact not rare at all. The report of Pipeline Research

Council International ("PRCI"), cited favorably by EPA, *see* RTC at II-14-59 n.119, JA___, shows that well over 90% of well blowdowns exceed 100 kg, and for 2015 and 2016, a total of 70,000 blowdowns were reported across about 350 facilities (each year), equaling about 100 blowdowns per facility, per year. PRCI White Paper, "Methane Emissions from Transmission and Storage Subpart W Sources" at 10 (Aug. 2019) (Attachment 6 to INGAA Proposed Rule Comments), JA___. The average emissions per event were over 900 kg. *Id.* About 75% of these blowdowns are compressor blowdowns. *Id.* These EPA data conclusively show that exceedances of the threshold will not be "unusual," and EPA cannot reasonably conclude otherwise. *See Sierra Club v. EPA*, 884 F.3d 1185, 1198 (D.C. Cir. 2018) (court will not uphold EPA conclusion that runs "counter to the only empirical evidence EPA ha[s] before it") (citing *State Farm*, 463 U.S. at 43).

EPA also failed to meaningfully respond to comments on this issue. In response to comments that the low threshold will sweep into the program a very large number of normal, routine events, EPA said it "revised the defined [sic] the owner of operators' requirements for responding to super-emitter notifications," and that "[t]he goal of this program is not to prevent allowable maintenance or operational events from being conducted, but to inform an owner or operator when these large events occur, so an owner or operator can investigate, correct, and repair if necessary." RTC at II-14-11, JA___. This "response" sidesteps the issue. An

owner/operator does not need to be "informed" that it intentionally conducted a routine blowdown and that such lawful activities need no investigation, correction, or repair. EPA says the super-emitter program is limited but nevertheless set the threshold so low it pulls in routine occurrences.

In response to comments that normal, permitted operations will exceed the threshold, EPA said only: "we acknowledge that some super-emitter events will be larger than 100 kg/hr however limiting investigation to only higher-level emissions, negates the potential emission reductions from emission events using the threshold of 100 kg/hr." *Id*. at II-14-60, JA___. This response also misses the mark. The problem is not that "some super-emitter events will be larger than 100 kg/hr"; it is that there will be too many blowdowns and similar events (thousands every year) that are required for operation and maintenance that will exceed the threshold (at least for a short period of time). EPA provided no rational basis for subjecting these permissible activities to the program. EPA has "ignore[d] 'an important aspect of the problem'" and failed to "offer[] 'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Ohio*, 603 U.S. at 292–93 (quoting *State Farm*, 463 U.S. at 43).

As a result of EPA's fatal error, normal operations will be treated as abnormal super-emitting events. In addition to the regulatory burden, information about the event will be spotlighted on EPA's website as a Super-Emitter Event, which may

lead to reputational harm for the identified companies. The Super-Emitter Program should be vacated.

V. EPA Failed to Comply with the Best System of Emissions Reduction Standard and Acted Arbitrarily and Capriciously in Regulating Marginal Wells.

A. EPA Did Not Demonstrate That the Rule is Achievable for Marginal Well Owners.

EPA failed to adequately consider the Rule's economic impacts on marginal wells. In doing so, EPA established an unachievable standard contrary to the Clean Air Act.

EPA must consider costs when imposing new source performance standards under Clean Air Act Section 111, and the Agency is prohibited from imposing exorbitant compliance costs. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464–71 (2001); 89 Fed. Reg. at 16,847, 16,866, JA___, JA___ (EPA admitting same). Hand-in-hand with economic considerations, EPA's standards must be "achievable." *See Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431–33 (D.C. Cir. 1980).

Commenters explained that the low-production volumes from marginal wells render the Rule's compliance costs "prohibitive for small owners and operators and will result in the end of their operations." 89 Fed. Reg. at 16,905, JA___ (citing comments). Yet, EPA ignored those comments. EPA instead stated only that it was "*difficult to determine* the full impact of regulation on the financial status of marginal well owners," *id*. at 16,906, JA___ (emphasis added)—a concession that it did not

do so. *See also* EPA, Background Technical Support Document at 6-1 (Nov. 2023), JA___ (admitting EPA "*cannot* estimate" impacts on marginal wells) (emphasis added).

Because EPA did not conduct the required cost assessment, the standards applicable to associated gas generated at marginal wells are thus unlawful.

B. EPA Did Not Demonstrate that Routing Associated Gas to a Sales Line is Cost Justified for Marginal Wells.

EPA failed to adequately demonstrate that routing associated gas to a sales line was cost-justified. It simply assumed that because such measures *could* be cost-effective in some circumstances, it *must* be cost-effective in all situations. That assumption is unsupported, thus violating the Clean Air Act.

Section 111(a)(1) of the Act requires EPA's best system of emissions reduction analysis to "tak[e] into account the cost of achieving such reduction." 42 U.S.C. § 7411(a)(1). The best system of emissions reduction must be "adequately demonstrated," "reasonably reliable, reasonably efficient, and…reasonably be expected to serve the interests of pollution control *without becoming exorbitantly costly*." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433–34 (D.C. Cir. 1973) (emphasis added). Section 111(b)(1)(B) similarly requires EPA to promulgate standards of performance for new sources "as [it] deems *appropriate*" and to "review and, if *appropriate*, revise such standards." 42 U.S.C. § 7411(b)(1)(B) (emphases added).

"'[A]ppropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'" *Michigan v. EPA*, 576 U.S. 743, 752 (2015). "Read naturally," the word "requires at least some attention to cost." *Id.* Indeed, "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs…for a few dollars in health or environmental benefits." *Id.* Cost is a "centrally relevant factor," and considering costs "reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id.* at 753.

Here, EPA concluded that the best system of emissions reduction for oil well "associated gas" is (and the Rule requires with limited exceptions) routing associated gas to a sales line. 89 Fed. Reg. at 16,943, 16,947, JA___, ___. "Associated gas" is incidentally emitted at certain oil wells. Unlike natural gas wells that are designed with pipelines to carry the product to market, many oil wells have no ability to route associated gas to a pipeline. Significantly, marginal wells typically do not operate continuously.

EPA failed to account for the disproportionately high cost of marginal wells routing associated gas to a sales line. Instead, it simply concluded "'that in situations where gas sales line infrastructure is available, there is minimal cost to owners and operators to route the associated gas to the sales line.'" *See id.* at 16,940 (quoting

86 Fed. Reg. at 63,237), JA___. EPA admitted that circumstances at well sites can differ, which would impact this cost. *Id*. Yet, EPA then wrongly assumed that "'in *every* situation the value of the natural gas captured and sold would outweigh the[]…costs of routing the gas to the sales line.'" *Id.* (quoting 86 Fed. Reg. at 63,237) (emphasis added). Instead of "taking into account" the costs of achieving such reductions, 42 U.S.C. § 7411(a)(1), EPA simply *assumes* there were no cost impacts because in *some* (but not *all*) cases it is economical to recover associated gas.

Economic reality belies EPA's logic. Operators would not forego routing gas to a sales line *but for* a barrier to do so. Their choice to forego such an option evidences it is not economical in that circumstance. EPA's assumption also ignores the critical fact that operators generally do not control sales-line capacity. Sales lines are often owned and constructed by separate midstream companies. Operators cannot force midstream companies to provide that capacity. Nor can operators force midstream to provide the infrastructure to the marginal wells. Thus, requiring operators to route gas to a sales line imposes an emission "control" entirely out of operators' control. And, when EPA imposes a rule "by design" where there are "no control[s] a[n]…operator can deploy to attain the emissions limits established," it oversteps its authority. *West Virginia*, 597 U.S. at 726. The Rule's requirement to route associated gas to a sales line is exactly such an overstep.

Further, EPA did not consider the costs of alternative control technologies. Instead, it analyzed solely an emissions prohibition (routing to a sales line) and compared it to the cost of flaring. But it failed to conduct any cost analysis of *other* potential technologies like enclosed combustion devices, thermal oxidizers, catalytic incinerators, and deep well injection. *See* 89 Fed. Reg. at 16,940–41, JA___–___.

EPA's analysis also assumes continuous operation of the well. Yet marginal wells typically do not operate continuously. Consequently, the flare cannot operate continuously. EPA's best system of emissions reduction analysis ignored those facts. "One size does not fit all" and EPA's assumption to the contrary renders the regulations arbitrary. *See, e.g.*, *Nat'l Lime Ass'n*, 627 F.2d at 431–33 (holding that EPA could not rely on a subset of tested facilities as being representative of the entire industry).

EPA also did not analyze the costs of its other three allowable control options, instead simply allowing injection, use as a fuel source, or other beneficial use as "regulatory alternatives" because they "achieve equivalent emissions reductions." 89 Fed. Reg. at 16,942–43, JA___–___. All three options should have been evaluated as to the "cost of achieving such reduction" to be "adequately demonstrated." 42 U.S.C. § 7411(a)(1). Rather, the Rule now requires operators to fully recover associated gas without flaring (unless it is technically impossible), without regard to the cost of such recovery.

That the Rule allows in certain situations wells constructed between December 6, 2022, and May 7, 2026 to route associated gas "to a control device that reduces methane and volatile organic compound emissions by at least 95.0 percent," 89 Fed. Reg. at 17,053, JA___ (40 C.F.R. § 60.5377b(b) and (c)), does not remedy the prohibition on flaring associated gas or EPA's failure to select an "adequately demonstrated" and cost-effective best system of emissions reduction control technology. The demonstration required by Section 60.5377b(g) concerns technical feasibility *only*. *See id*. at 16,951, JA___. It does not allow operators to consider the costs of the prescribed options. *Id*. Thus, operators must route associated gas to a sales line, even at exorbitant cost, whenever it is technically feasible. *See West Virginia,* 597 U.S. at 729 (confirming that EPA could not demand "'exorbitantly costly'" controls).

Because EPA bars consideration of costs in technical infeasibility determinations, *see* 89 Fed. Reg. at 16,951, JA___, EPA improperly assumes operators will build any necessary sales line infrastructure, despite their capacity or ability to do so. That violates Clean Air Act Section 111.

C. EPA Arbitrarily and Capriciously Imposed Unnecessary "Leak Detection" Compliance Costs on Marginal Wells.

The Rule is also invalid because EPA arbitrarily treated marginal wells no differently than large wells. EPA initially proposed exempting marginal wells emitting less than three tons-per-year of methane from expensive optical gas

imaging monitoring requirements. In the final rule, however, EPA based leak detection requirements on the number and type of equipment at the well site. 86 Fed. Reg. at 63,118–21. EPA and state regulators have historically based applicability of regulations on emissions, typically calculated from throughput multiplied by emissions. *See* Indep. Petroleum Ass'n of Am., *et al*. Supplemental Proposal Comments at 18, JA ___.

Yet, here, EPA changed course and relied on "component count"—or the number of pieces of certain equipment as a basis for determining the stringency of leak detection requirements. *See* 89 Fed. Reg. at 16,830–34, JA___–___. EPA then arbitrarily created four categories of well site "sizes" based on component count. EPA exempted "Single Wellhead Only Well Sites and Small Well Sites" from optical gas imaging monitoring requirements—even though the term "Small Well Sites" is defined not by throughput or actual emissions, but by well sites containing only one piece of certain equipment. *Id*. at 16,830–34, 17,134, 17,217, JA___–___, JA___, JA___.

Commenters explained that optical gas imaging monitoring is cost-prohibitive for many marginal wells, and that other methods are sufficient to identify emissions risks from marginal well sites. *See, e.g.*, Indep. Petroleum Ass'n of Am., *et al*. Supplemental Proposal Comments at 13, JA ___; Penn. Indep. Oil & Gas Ass'n Supplemental Proposal Comments at 2–4, JA___. And most marginal well sites

(which typically have low emissions) require at least *two* pieces of relevant equipment, notwithstanding low throughput. *Id*. The better approach, commenters argued, was to exempt wells based on the level of emissions. *Id*.

EPA offered no reasoned response to these comments. Thus, EPA's decision to tie the Rule to equipment count rather than throughput renders its rule arbitrary and capricious. *Ohio*, 603 U.S. at 293.

VI. EPA's Process Controller Standards Are Arbitrary and Capricious.

A. EPA Arbitrarily Failed to Justify Disparate Rules for Process Controllers.

The Rule establishes a zero-emissions standard for process controllers, unless the site is located in Alaska and lacks access to electricity. For those sites, the Rule allows natural gas-driven process controllers with low natural gas emission rates or routing emissions to a control device. 40 C.F.R. § 60.5390b(b). EPA explained that Alaska sites without electricity merit additional flexibility because solar-powered controllers are dependent on sunshine and Alaska experiences "prolonged periods without sunshine." 86 Fed Reg. at 63,207, JA___. Commenters requested that these options be applied to sites *outside of Alaska* that also lack access to electricity and have limited sunlight exposure. *See* 87 Fed. Reg. at 74,764, JA___.

In response, EPA determined that the zero-emissions standard was the best system of emissions reduction for sites outside of Alaska, both with and without access to electricity. *Id*. at 74,765, JA___. But EPA did not explain how sites

outside Alaska without access to electricity and with limited sunlight exposure were situated differently than sites in Alaska that share the same characteristics.

EPA's failure to explain why it established different standards is arbitrary, capricious, and without justification. *See State Farm*, 463 U.S. at 43; *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) ("agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently").

B. The Best System of Emissions Reduction Analysis for Intermittent Pneumatic Devices is Fundamentally Flawed.

A sub-category of process controllers is "intermittent pneumatic devices," meaning they operate at irregular intervals. These intermittent pneumatic devices are prevalent throughout the industry. These devices often serve as safety backups and are used irregularly, ranging from a few times per day to a few times per year. *See* Indep. Petroleum Ass'n of Am., *et al*. Supplemental Proposal Comments at 19, JA ___. EPA's Subpart W rule acknowledges these facts and provides multiple methods to calculate emissions from intermittent pneumatic devices. *See* 89 Fed. Reg. 42,062, 42,107 (May 14, 2024). EPA arbitrarily failed to consider the full range of Subpart W methods in its best system of emissions reduction analysis for pneumatic devices.

The Rule's best system of emissions reduction analysis is based on an emission rate of 8.8 standard cubic feet per hour for the entire category of

intermittent pneumatic devices, which is the most conservative factor in revised Subpart W. *Id*. at 42,114. In the recently finalized Subpart W rule, EPA provides an alternative to the 8.8 standard cubic feet per hour by assigning an emission factor of 0.3 standard cubic feet per hour for a properly operating intermittent pneumatic device and 24.1 standard cubic feet per hour for a malfunctioning device. *Id*. at 42,227. Petitioners submitted to EPA a case study based on 10,000 intermittent devices at 1,500 locations with 4,000 wells. *See* Indep. Petroleum Ass'n of Am., *et al*. Supplemental Proposal Comments at 22–26, JA ___–___. Consistent with EPA's methodology, a malfunction rate of 1.0% was established based on two years of leak detection surveys. *Id.* Using EPA's overly conservative 8.8 standard cubic feet per hour factor, the 10,000 devices would be calculated to produce 14,505 metric tons of methane. *Id.* If the combined factors of 0.3 and 24.1 standard cubic feet per hour for properly and malfunctioning intermittent pneumatic devices were used, the 10,000 devices would more accurately emit 887 metric tons of methane per year—94% less than EPA's estimates. *Id.* More importantly, using EPA's formulas, the cost per ton of methane reduced would be $4,681—well above EPA's reasonableness threshold of $1,970/ton. *Id.*

Thus, EPA's failure to conduct additional best system of emissions reduction analysis based on its own approved methods to calculate emissions was arbitrary and capricious.

VII. The Low-Emission Valve Replacement Requirement is Unlawful.

As EPA provided no notice of its intention to mandate use of low-emission valves, the requirement is unlawful and should be vacated. EPA unambiguously stated in the Supplemental Proposal that it was "not proposing" to mandate replacement of leaking natural gas plant valves with low emissions valves or valve packing because doing so is "not appropriate for all valve repairs." 87 Fed. Reg. at 74,808, JA___. It neither requested comments nor included the technological and cost analyses required by Clean Air Act Section 111. EPA's unequivocal conclusion that low emissions valves are "not appropriate" appeared to preclude any finding of achievability. *Id.* The requirement to use low emissions equipment unless technically infeasible, addition of a technical feasibility definition, and annual reporting requirements for valves not replaced with low emissions equipment came out of the blue. 89 Fed. Reg. at 16,901, JA___.

By declining to request comment or provide necessary information supporting a low emissions equipment requirement the proposal "gave no indication that [EPA] was considering a different approach," *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). Instead, EPA impermissibly reversed itself without warning. *See Env't Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) ("Whatever a 'logical outgrowth' of this proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and

adopt its inverse."). Because EPA failed to provide any notice of or opportunity for comment on its final action, the low emissions equipment requirement should be vacated.

VIII. The Trigger Date for New Sources is Erroneous.

The Clean Air Act entitles owners and operators to have timely notice of the standards that will apply to them. 42 U.S.C. §§ 7411(a)(2), 7607(d). EPA violated those requirements by insisting that the effective date for Subpart OOOOb would be no later than December 6, 2022, despite the fact that the statutory notice requirements for those standards were satisfied only on March 8, 2024.

Clean Air Act Section 111(a)(2) defines a "new source" as one constructed or modified "after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section." 42 U.S.C. § 7411(a)(2). A "regulation" in this context includes rule text. *See* 44 U.S.C. § 1510(a)–(b). Section 307 further mandates that for all Section 111 rulemakings, "notice of proposed rulemaking *shall be published* in the *Federal Register*, …[and] *shall* be accompanied by a statement of its basis and purpose," which "*shall* include a summary of—(A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3) (emphases added). Together, Sections 111(a)(2) and 307

mandate publication of a new source regulation's (or proposed regulation's) rule text in the *Federal Register* to establish the date for when a source is "new" for purposes of the new source performance standard.

Neither the Proposed Rule, 86 Fed. Reg. at 63,110, JA___, nor the Supplemental Proposal, 87 Fed. Reg. at 74,702, JA___, satisfies those requirements because they did not contain proposed rule text. *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (distinguishing between the "preamble of a regulation," which does not have legal effect, and "the language of the regulation itself," which does).

While their preambles constituted the required "statement of…basis and purpose," a preamble is a mere policy statement with no legal effect, and is not a "proposed regulation" that can satisfy Section 111(a)(2). *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986).

EPA argues that it complied with Section 307(d), because the Administrative Procedure Act, 5 U.S.C. § 553, provides that a notice of proposed rulemaking may contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved," and that Section 307(d) itself does not require proposed regulatory text to be published in the *Federal Register*. 5 U.S.C. § 553(b)(3); 87 Fed. Reg. at 74,716, JA___. But the Administrative Procedure Act cannot excuse EPA's failure to provide notice of the regulatory language, for

rulemaking under Section 111 is governed by Section 307(d), not the Administrative Procedure Act. 42 U.S.C. § 7607(d)(1)(C); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983). Because EPA did not publish the regulatory text in the *Federal Register*, as required by the Clean Air Act, until March 8, 2024, that is the only permissible applicability date for Subpart OOOOb sources.

IX. The "Existing Source" Definition is Unlawful.

For over 40 years, the plain language of Section 111 has been interpreted and applied to ensure that source owners and operators have prior notice of all new source standards. A key component of the scheme is limiting applicability of new source standards to sources that are constructed, reconstructed, or modified. The Rule defies that plain language and overturns that long-established scheme.

Under Section 111(b)(1)(B), EPA is authorized to promulgate standards of performance for only *new sources*, which the Clean Air Act defines as "any stationary source, the construction or modification of which is commenced after the publication of regulations…prescribing a standard of performance…which will be applicable to such source." 42 U.S.C. § 7411(a)(2). Section 111(d) regulates only *existing sources*, which are defined as—and limited to—"any stationary source other than a new source." *Id.* § 7411(a)(6). Thus, a particular source may only be a "new source," one constructed or modified after the standards' publication date, or an

"existing source." It cannot be both. This dichotomy prohibits Section 111(b) and (d) rules from simultaneously applying to the same source.

EPA's claim to apply Subpart OOOOc to "existing sources" constructed or modified prior to December 6, 2022, is based on an interpretation of "existing source" that is inconsistent with the Clean Air Act's definitions. Whereas Section 111(a) defines a sharp dichotomy between "new" and "existing" sources, EPA defines the distinction between "new" and "existing" sources "relative to a particular [new source performance standard]." 89 Fed. Reg. 16,820, 16,869, JA___, JA___. EPA's definition thus has the paradoxical consequence that a particular source "*S*" constructed or modified in 2014 can be said to be both "new" and "existing" simultaneously: it just depends on whether the statement is made relative to Subpart OOOO—in which case *S* is "new"—or made relative to Subpart OOOOb—in which case *S* is "existing."

EPA relies on its "new"/"existing" distinction to conclude that, because Subpart OOOOb applies to "new" sources whose construction, reconstruction, or modification commenced *after* December 6, 2022, it "[t]herefore" follows that, relative to Subpart OOOOb, "existing sources are those that commenced construction, reconstruction, or modification *on or before* December 6, 2022," *Id.* at 16,869, JA___ (emphasis added), and so are subject to standards for existing sources under Subpart OOOOc.

But EPA's "new"/"existing" distinction is untethered to the statutory definitions. Section 111(a) requires that once a source is subject to a standard for new sources, it thereafter cannot be an "existing" source, even if subsequent performance standards are proposed. Thus, if source *S* was constructed in 2014 (and so, is subject to Subpart OOOO), it satisfies the statutory definition of a "new source," and so must be excluded from the definition of an "existing source" for future performance standards.

EPA's rationale fails. First, EPA claims that its definition of "new" and "existing" sources as "relative to" a particular new source performance standard "is further reinforced" by Section 111(d)(1). RTC at I-23-22, JA___. Not so. Section 111(d)(1) does not define "existing sources." Rather, it pertains to how standards of performance for such sources are set. Section 111(d)(1) thus *presumes* the dichotomy between "existing" and "new" sources established in Section 111(a), and cannot be used to justify EPA's effort to rewrite those statutory definitions.

Second, EPA asserts that "[n]othing in the text of section 111 bars the EPA from regulating sources that complied with previous new source performance standards...as 'existing sources' after the EPA has promulgated updated new source performance standards after the source's construction." *Id*. EPA's interpretation of Section 111 is not entitled to deference. *See Loper Bright*, 144 S. Ct. at 2261 ("[A]gency interpretations of statutes…are not entitled to deference."). EPA's

interpretation is also wrong. The unambiguous text of Sections 111(a)(2) and (6) requires that once EPA regulates a source under a new source performance standard it thereafter is not an "existing source," and so cannot be regulated by the EPA as an existing source.

Entities whose sources are already subject to Subpart OOOO or OOOOa have made significant capital investments in reliance on the regulations applicable to their facilities. That reliance is reasonable, for Section 111(d) does not permit EPA to impose "existing source" standards on "new sources" within a source category—those already subject to a Section 111(b) rule. To adopt EPA's definitions of "new" and "existing" sources would not just contradict the statute, but undermine the certainty as to applicable regulations that entities with regulated sources need and eliminate the efficiencies built into the Clean Air Act's long-established iterative regulatory process.

CONCLUSION

Industry Petitioners respectfully request vacatur of the aspects of the Rule addressed in this brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Court's September 4, 2024 briefing order, ECF No. 2073084, because it contains 12,979 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman font, using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will automatically send e-mail notification of such filing to all counsel of record.

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