ORAL ARGUMENT NOT YET SCHEDULED

Case No. 24-1200
(consolidated with Nos. 24-1267, 24-1269, 24-1274, 24-1275, 24-1276)

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

CITY UTILITIES OF SPRINGFIELD, MISSOURI, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND VACATUR

Nash E. Long
Brent A. Rosser
HUNTON ANDREWS KURTH LLP
101 South Tryon Street, Suite 3500
Charlotte, NC 28280
nlong@HuntonAK.com
brosser@HuntonAK.com
(704) 378-4728

Elbert Lin
Counsel of Record
David N. Goldman
HUNTON ANDREWS KURTH LLP
951 East Byrd Street, East Tower
Richmond, VA 23219
elin@HuntonAK.com
dgoldman@HuntonAK.com
(804) 788-8200

Additional counsel listed on following page

F. William Brownell
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
bbrownell@HuntonAK.com

Andrew R. Varcoe
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), *amicus curiae* states as follows:

I. Parties and *Amici Curiae*

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Electric Generator Petitioners at pages i-iii, and in the Brief for State Petitioners at pages i-ii:

Amicus curiae in support of Petitioners is the Chamber of Commerce of the United States of America.

II. Rulings Under Review

The ruling under review is EPA's final rule entitled "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments," 89 Fed. Reg. 38,950 (May 8, 2024).

III. Related Cases

Six consolidated cases (Case Nos. 24-1200, 24-1267, 24-1269, 24-1274, 24-1275, and 24-1276) seek review of the agency action challenged here. *Amicus curiae* is unaware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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GLOSSARY

2015 Rule	Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015)
APA	Administrative Procedure Act
CCR	Coal combustion residuals
CCRMU	CCR management unit
EPA	U.S. Environmental Protection Agency
Final Rule	Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024)
RCRA	Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 *et seq*.
RTC	Response to Comments

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

This case concerns a rule promulgated by the Environmental Protection Agency ("EPA" or "the Agency") to expand federal regulations governing the disposal of Coal Combustion Residuals ("CCR") under Subtitle D of the Resource Conservation and Recovery Act ("RCRA")—*i.e.*, its "Subpart D regulations." *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments*, 89 Fed. Reg. 38,950 (May 8, 2024) (Final Rule) (codified at 40 C.F.R. pt. 257, subpt. D). CCR

[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus curiae* has filed an unopposed motion for leave to file this brief. *Amicus curiae* is unaware of any other *amici curiae* that intend to file a brief in support of Petitioners.

"are generated from the combustion of coal … for the purpose of generating steam for the purpose of powering a generator to produce electricity or electricity and other thermal energy by electric utilities and independent power producers." *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities*, 80 Fed. Reg. 21,302, 21,303 (Apr. 17, 2015) (2015 Rule). Once generated, CCR can be put to "beneficial use" (such as road or dam construction) or "disposed" of in landfills, surface impoundments, or other solid waste disposal facilities. *Id.*; *see* 42 U.S.C. § 6903(3) (defining "disposal"); 40 C.F.R. § 257.53 (defining "beneficial use," "CCR landfill," and "CCR surface impoundment"). The Final Rule establishes a new class of regulated CCR facilities that were not regulated under EPA's earlier 2015 Rule: "CCR management units," 89 Fed. Reg. at 38,956, which are broadly defined as "any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit," 40 C.F.R. § 257.53. Noncompliance can lead to penalties as high as $25,000 per day. 42 U.S.C. § 6928(a)(1), (3).

The Chamber submits this brief to emphasize two problems with EPA's attempt in the Final Rule to regulate the broad category of CCR management units. First, the Final Rule reverses *sub silentio* EPA's decades-long position that it should not (and *could not*) regulate beneficial uses of CCR under RCRA. That reversal was arbitrary and capricious, as EPA reversed course without acknowledging the change

and failed to consider regulated businesses' reliance interests in EPA's prior position. The Administrative Procedure Act ("APA") does not countenance such flip-flops. Second, EPA's reversal violates fundamental fair notice and due process protections. An agency cannot expose the regulated business community to onerous and costly obligations, as well as potential civil penalties, without first considering reliance interests and providing regulated parties with fair notice of what is prohibited. EPA did none of that here.[2]

STATUTES AND REGULATIONS

All applicable statutes are included in the Electric Generator Petitioners' addendum.

SUMMARY OF THE ARGUMENT

In the Final Rule, EPA created a new type of regulated Coal Combustion Residuals facility—the CCR management unit—with a new expansive definition. That definition includes "any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit." 40 C.F.R. § 257.53.

[2] The Chamber agrees with Petitioners that the Final Rule is defective on other grounds. But in this *amicus* brief, the Chamber focuses its attention on the two problems described above.

As the Electric Generator Petitioners explain, EPA's new regulatory definition exceeds the Agency's statutory authority. Elec. Generators Br. 19-27. In addition, the definition oversteps at least two important legal boundaries established by the APA and the Constitution. First, the definition effects an EPA flip-flop on whether on-site beneficial uses are exempt from Subpart D regulations—a change in position that is arbitrary and capricious because the Agency neither acknowledged it nor considered regulated parties' reliance interests on the old position. Second, applying the definition to hold regulated parties liable under the Final Rule based on their prior beneficial uses of CCR violates their due-process rights due to a lack of fair notice.

I. A basic requirement of administrative law is that agency action must be reasonable and reasonably explained. One component of a reasonable explanation is that, when an agency changes its existing position, it must at least acknowledge the change, explain the reasons for the new policy, and grapple with any serious reliance interests that the agency's prior position engendered. EPA did not satisfy these requirements when it reversed its longstanding position on beneficial uses in the Final Rule.

A. For more than three decades, EPA has declined to regulate CCR that qualifies as "beneficial use." The Agency had found that such beneficial uses provided significant environmental benefits and did not pose sufficient risk of harm

to human health or the environment to warrant regulation. Additionally, EPA concluded in 2015 that it has no statutory authority to regulate beneficial uses. The 2015 Rule accordingly created a broad exemption from regulation for all CCR practices that qualified as "beneficial uses."

The Final Rule abruptly reverses this position. The broad new definition of CCR management unit encompasses beneficial uses and makes them subject to Subpart D regulation, so long as they occur "on site." That definition marks a major deviation from EPA's prior approach of exempting from regulation all beneficial uses, whether on- or off-site.

B. EPA did not, however, even acknowledge that it changed position. Instead, the Agency insisted in the Final Rule that on-site beneficial uses had *always* been subject to regulation under the 2015 Rule. That is incorrect. As noted above, the 2015 Rule expressly stated that beneficial uses were exempt from regulation. And, though EPA now says that this exemption did not include on-site beneficial uses, the 2015 Rule relied in part on documented on-site beneficial uses in support of the exemption.

C. What is more, EPA did not recognize the reliance interests undermined by its change in position. The 2015 Rule's blanket exemption for beneficial uses—following decades of EPA's encouragement of beneficial uses—triggered reasonable, predictable, and substantial reliance interests. Yet, as part of EPA's

refusal in the Final Rule to even acknowledge that it was changing position, the Agency never recognized these reliance interests, let alone explained why they were outweighed by the Agency's preferred new policy.

II. The Due Process Clause, as well as general administrative law principles, requires an agency to provide fair notice of what conduct is permitted and prohibited before that agency may penalize entities or individuals for transgressing the agency's strictures. Because a regulated party does not have reasonable notice that an agency will change its understanding of the law in the future, agencies cannot punish parties for past behavior taken in reliance on the agencies' prior positions.

The Final Rule flouts these principles. By making earlier beneficial uses subject to retroactive punishment, EPA has violated regulated parties' due-process rights. EPA's decades-long approach to beneficial uses—namely, encouraging them, exempting them from regulation, and declaring them beyond the Agency's authority—caused many in the industry to undertake substantial actions and investments in beneficial uses. Because those entities had no notice that the Agency would later flip and claim that these beneficial uses were indeed subject to regulation, they may not be held liable for their previous actions taken in reliance on EPA's settled position.

ARGUMENT

I. EPA's Reversal Regarding Beneficial Uses Is Arbitrary and Capricious.

The APA's "arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). An explanation is legally insufficient if it "relie[s] on factors which Congress has not intended [the agency] to consider, entirely fail[s] to consider an important aspect of the problem, … 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 Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Cigar Ass'n of Am. v. U.S. FDA*, No. 23-5220, 2025 WL 286514, at *4 (D.C. Cir. Jan. 24, 2025) (affirming, in relevant part, district court vacatur of agency decision, where agency entirely failed to consider an important aspect of the problem).

The Supreme Court has long recognized that when an agency wants to change course and abandon a position it has previously embraced, the agency must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *State Farm*, 463 U.S. at 42; *see Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 (2015) ("underscor[ing]" this requirement). As pertinent here, this means two things. First, the agency must "at least 'display awareness that it is changing position.'" *Encino Motorcars, LLC v.*

Navarro, 579 U.S. 211, 221 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox I*)). Second, the agency "must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* at 221-22 (quoting *Fox I*, 556 U.S. at 515). In the Final Rule, EPA met neither of these requirements.

A. EPA deviated from its longstanding position on beneficial uses.

1. EPA has long encouraged beneficial use and found such uses beyond its authority to regulate.

In RCRA, Congress tasked EPA with balancing the risk of harm to human health and the environment from solid-waste disposal against the need to "maximize the utilization of valuable resources." 42 U.S.C. § 6941. To implement these objectives, Subtitle D requires EPA to develop "criteria for sanitary landfills" that define when placement of solid waste on land (*i.e.*, "disposal")—whether historic or prospective—is environmentally acceptable. *Id.* § 6944(a). Any disposal site that does not satisfy EPA's criteria for a sanitary landfill is an "open dump," *id.* § 6903(28), and disposal in an open dump is prohibited, *id.* § 6945(a). *Utility Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 424 (D.C. Cir. 2018) (per curiam) (*USWAG*).

In line with RCRA's objectives, EPA's authority to create criteria for sanitary landfills is inherently risk-based. Confirming as much, Congress insisted that these criteria shall "[a]t a minimum … provide that a facility may be classified as a sanitary

landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 U.S.C. § 6944(a). In other words, to draw the line between sanitary landfills and open dumps, EPA must at a minimum characterize and quantify the risk of the practice at issue so it can draw a line in light of that risk. *See, e.g.*, Final Rule, 89 Fed. Reg. at 38,953 (describing EPA's authority as reaching practices that "present[] a reasonable probability of causing adverse effects on human health or the environment"); *id.* at 38,974 (similar).

Applying that risk-based analysis, EPA has long declined to regulate CCR that is "used beneficially." *Notice of Regulatory Determination on Wastes From the Combustion of Fossil Fuels*, 65 Fed. Reg. 32,214, 32,214 (May 22, 2000) (2000 Bevill Determination). At a general level, "beneficial use" refers to using CCR to serve a function that would otherwise be served by use of another natural resource. *See* 40 C.F.R. § 257.53; *see also* 42 U.S.C. § 6941a(2). Examples include road construction and roofing materials, where CCR is used to improve the strength and durability of materials. 2000 Bevill Determination, 65 Fed. Reg. at 32,229. Because EPA has found that these uses "are not likely to pose significant risks to human health and the environment," it has deemed Subpart D regulation inappropriate. *Id.* at 32,214, 32,229.

Indeed, EPA has long "encourage[d]" such beneficial use, *Final Regulatory Determination on Four Large-Volume Wastes From the Combustion of Coal by Electric Utility Power Plants*, 58 Fed. Reg. 42,466, 42,475 (Aug. 9, 1993) (1993 Bevill Determination), which "conserve[s] natural resources and reduce[s] disposal costs," 2000 Bevill Determination, 65 Fed. Reg. at 32,229; 2015 Rule, 80 Fed. Reg. at 21,330. Beyond the "substantial environmental benefits" of beneficial use, 2000 Bevill Determination, 65 Fed. Reg. at 32,232, EPA has explained that "use" of CCR is neither "disposal" nor "solid waste management" and thus is not within the Agency's Subtitle D authority. 2015 Rule, 80 Fed. Reg. 21,348; *see* 42 U.S.C. § 6903(3), (28); Elec. Generator Br. 28-30.

In accord with these prior determinations, EPA's 2015 Rule carved out "beneficial uses" from Subpart D regulation: "This subpart does not apply to practices that meet the definition of a beneficial use of CCR." 80 Fed. Reg. at 21,468 (codified at 40 C.F.R. § 257.50(g)); *see also* 40 C.F.R. § 257.53 (defining "beneficial use" and carving out "beneficial use" from the definition of "disposal"). Additionally, the Agency left alone pre-2015 beneficial uses, which had been regulated at the state, rather than federal, level. *See* 80 Fed. Reg. at 21,302 ("This rule does not affect past beneficial uses….").

2. By EPA's own admission, the Final Rule sweeps in certain beneficial uses.

But now, as Electric Generator Petitioners contend, the definition of CCR management unit in the Final Rule appears to bring large swaths of beneficial uses (those done "on site") within EPA's regulatory ambit for the first time. *See* Final Rule, 89 Fed. Reg. at 39,050 (treating "off site" beneficial uses differently). The new regulatory definition of CCR management unit is "any area of land on which any noncontainerized accumulation of CCR is received, *is placed*, or is otherwise managed, that is not a regulated CCR unit." 40 C.F.R. § 257.53 (emphasis added). On its face, that definition is agnostic as to what happens to the CCR (including whether and how it is used) after it "is placed" on site. The definition therefore "includes the [same] on-site uses that EPA *exempted* from the 2015 Rule—'the placement of unencapsulated CCR on the land.'" Elec. Generator Br. 28 (quoting 2015 Rule, 80 Fed. Reg. at 21,327). More than that, the definition also sweeps in pre-2015 beneficial uses that the 2015 Rule did not touch. *See* 2015 Rule, 80 Fed. Reg. at 21,302.

Indeed, EPA itself declined to assuage commenters' fears that the Final Rule's definition of CCR management units would cover on-site beneficial uses. Rather than insist that the commenters had read too much into the definition, the Agency doubled down. EPA made clear that, in its view, "*existing* regulations" rendered "any non-containerized CCR placed directly on the land on-site of a utility … not a

beneficial use" at all. 89 Fed. Reg. at 39,050 (emphasis added). This on-site/off-site distinction had no basis in the 2015 Rule's exemption or explanation thereof, nor in EPA's earlier approaches to beneficial uses. *See generally* Elec. Generators Br. 5-6, 8-10.

This is, in short, a 180-degree turn in the Agency's position on beneficial use. And as addressed below, that change fails basic administrative-law requirements.

B. EPA failed to explain its change in position.

As noted earlier, it is elementary that "[w]hen an agency changes its existing position," it "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars*, 579 U.S. at 221 (quoting *Fox I*, 556 U.S. at 515). It is not the "mere fact of policy change" that demands this "further justification," but rather the risk that the agency has disregarded either the "facts and circumstances that underlay or were engendered by the prior policy," or the "serious reliance interests" around "longstanding policies." *Fox I*, 556 U.S. at 515-16. At a bare minimum, then, an agency may not "depart from a prior policy *sub silentio*[.]" *Id.* at 515. Nor, as a corollary, may an agency pretend that the new position is anything other than a "deliberate[] change." *See Fairless Energy, LLC v. FERC*, 77 F.4th 1140, 1147 (D.C. Cir. 2023) (citation omitted).

Yet that is precisely what EPA did here. After EPA proposed its CCR management unit definition (which stayed substantially the same in the Final Rule), commenters objected that EPA was "effectively revok[ing] or amend[ing] the current exemption for beneficial use in [Section] 257.50[(g)]." Final Rule, 89 Fed. Reg. at 39,050.[3] EPA "disagree[d] that the" new definition would "effectively revoke[] or amend[] the current exemption." *Id.* Instead, EPA asserted that the new definition "merely accurately reflect[ed] the existing regulations," which had purportedly provided no carve-out for on-site beneficial uses to begin with. *Id.* In particular, EPA claimed that its 2015 Rule's definition of "CCR pile" had already rendered on-site beneficial use a type of "disposal." *Id.*; *see* 40 C.F.R. § 257.53. EPA asserted that the commenters had simply "misunderstood" the original definition. Final Rule, 89 Fed. Reg. at 39,050.

That assertion is incorrect, as betrayed by EPA's own practice and prior statements. Elec. Generator Br. 5-6, 29-30; *see also*, *e.g.*, JA_[CCIG Comments 14-16]. Indeed, the 2015 Rule itself documented on-site beneficial use when explaining the beneficial-use exemption. *See* Elec. Generator Br. 29. And for decades before that, EPA had extolled the virtues of, and even "*encourage[d]*," beneficial uses without any distinction between those occurring on-site and off-site. *E.g.*, 1993

[3] As noted above, Section 257.50(g) states: "This subpart does not apply to practices that meet the definition of a beneficial use of CCR."

Bevill Determination, 58 Fed. Reg. at 42,475 (emphasis added); Elec. Generator Br. 29; *see* 1993 Bevill Determination, 58 Fed. Reg. at 42,475 (CCR "is often beneficially used both onsite and offsite. EPA continues to encourage the beneficial use of [CCR].").[4] EPA's current position on beneficial uses is a major change in course, which requires acknowledgement and explanation. *Encino Motorcars*, 579 U.S. at 221.

None came. By refusing even to acknowledge that it had changed position, EPA avoided answering the key question: did EPA reasonably explain *why* it was changing its position on beneficial use? *See Fox I*, 556 U.S. at 515. Instead, the Agency reframed objections to the scope of the CCR management unit definition as requests to "reconsider[] the existing definition of a CCR pile." Final Rule, 89 Fed. Reg. at 39,050-51. Because the Proposed Rule had not "solicit[ed] comment" on that issue or "suggest[ed] that it was in any way" in play, EPA dismissed those comments as beyond the scope of the Final Rule. *Id.* But as noted above, EPA ignored entirely its prior conclusions regarding whether to regulate beneficial use (on-site and off-site) and its earlier interpretation of the 2015 Rule's beneficial-use exemption.

[4] As pointed out by Electric Generator Petitioners, EPA has not even explained why such a distinction would make sense. Elec. Generator Br. 33-34.

C. EPA further failed to consider reliance interests in its earlier understanding of beneficial use.

"When an agency changes course, as [EPA] did here, it must [also] be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (quotation marks and citation omitted); *see Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 736 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (noting that a change in position that undermines reliance interests "disrupts settled expectations," "impos[es] a significant cost on regulated parties and contraven[es] basic notions of due process and fundamental fairness"). Though EPA may "change[] its policy despite reliance interests, it must provide a 'reasoned explanation'" for that choice. *MediNatura, Inc. v. FDA*, 998 F.3d 931, 941 (D.C. Cir. 2021) (quoting *Regents*, 591 U.S. at 35). Absent that explanation regarding reliance interests, the agency action is invalid.

In *Encino Motorcars*, for example, the Supreme Court concluded that it was arbitrary and capricious for the Department of Labor to reverse a decades-old position that certain car-dealership employees were exempt from federal overtime-payment requirements under the Fair Labor Standards Act. 579 U.S. at 216-18, 223-24. The Court emphasized the expectations that dealerships had built up over time, and how they had "structured their compensation plans against" the backdrop of the Department's prior position. *Id.* at 222-23. It held that "[i]n light of the serious

reliance interests at stake, the Department's conclusory statements [about its new interpretation of the statute being reasonable] do not suffice to explain its decision." *Id.* at 224.

Then in *Regents*, the Court confronted the recission of the Deferred Action for Childhood Arrivals memorandum, which had affirmatively "stated that the [DACA] program 'conferred no substantive rights' and provided benefits only in two-year increments." 591 U.S. at 31. Notwithstanding these "disclaimers," the Court held that the government was obligated to consider "whether there were reliance interests" in the program, "determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 33. Again, the agency action was held to be arbitrary and capricious. *Id.*

As in *Encino Motorcars* and *Regents*, EPA's failure to consider reliance interests in this case is fatal to the Final Rule. For more than three decades, EPA has made clear that "no additional regulations are warranted for [CCR] that [is] used beneficially" without distinguishing between on- and off-site uses. 2000 Bevill Determination, 65 Fed. Reg. at 32,214; *see* 2015 Rule, 80 Fed. Reg. at 21,327; 1993 Bevill Determination, 58 Fed. Reg. at 42,475; Elec. Generator Br. 5-6. Rather than disclaim any guarantee that this hands-off approach would continue, *see Regents*, 591 U.S. at 33, EPA disclaimed its legal authority to do anything else, 2015 Rule, 80 Fed. Reg. 21,348.

The resulting reliance interests were not just predictable and reasonable; they were substantial. "Beneficial use of CCR at power plant facilities has been widespread as an important alternative to disposal and off-site shipment[.]" JA_[CCIG Comments 20]. Members of the Cross-Cutting Issues Group, for example, "report[ed] historically using CCR at operating sites across the country" for numerous purposes, including embankment construction and protection, dam construction, as structural fill, and for road construction and stabilization. JA_[*Id.* at 20]. Beneficial uses also support "active generating units [that] affect grid reliability." JA_[*Id.* at 22]. These are just a few of the reliance interests that the industry has established based on EPA's earlier position on beneficial uses.

Yet EPA never acknowledged or addressed any of these interests. When forced to respond to on-point comments about reliance on the earlier beneficial-use exemption, *e.g.*, JA_[RTC, vol. 2, 92, 96, 98, 104], EPA directed commenters to Part III.C.2.a.iv of the preamble, JA_[*id.* at 144]. Nothing in Part III.C.2.a.iv so much as mentions reliance interests. *See generally* 89 Fed. Reg. at 39,050-51. The closest EPA came to considering reliance interests was its statement that all those commenters fearing a "revo[cation] or amend[ment to] the current exemption for beneficial use in [Section] 257.50[(g)]" had "misunderstood" the exemption for the previous nine years. Final Rule, 89 Fed. Reg. at 39,050. That statement is incorrect. The Agency did not discharge its obligation to assess those reliance interests, weigh

them, and explain why they did not counsel against EPA's change in position. *Regents*, 591 U.S. at 33; *MediNatura*, 998 F.3d at 941.

II. EPA Cannot Constitutionally Hold Regulated Parties Liable for Prior Conduct Based on its New Interpretation of the Beneficial-Use Exemption.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012) (*Fox II*). That principle is embodied in the Due Process Clause of the Constitution as well as basic administrative-law principles. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995); *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012). Liability that is explicitly labelled a "penalty" qualifies as a deprivation of property. *See Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.). So too do non-punitive orders that require the party to "expend[] significant amounts of money," *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998), when they are based on past non-compliance.

For an agency to work such a deprivation, the law must be "sufficiently clear to warn a party about what is expected of it." *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *Gen. Elec.*, 53 F.3d at 1328-29). Stated otherwise, legal requirements must be "ascertainably certain," considering both the

text of the regulation being interpreted and the agency's past practice. *Id.* Parties cannot be expected to divine that an agency will, in the future, undertake "a 180-degree turn" in interpreting the law. *Fox II*, 567 U.S. at 250, 257 (citation omitted); *Chrysler*, 158 F.3d at 1357; *see also Mingo Logan Coal Co.*, 829 F.3d at 736 (Kavanaugh, J., dissenting). When the agency makes such a shift, it may not punish parties for operating in reliance on the agency's earlier interpretation. *Fox II*, 567 U.S. at 258.

In retroactively claiming that the 2015 Rule's beneficial-use exemption does not encompass on-site beneficial uses, EPA has newly exposed regulated industry to civil penalties and onerous regulatory requirements for justifiable decisions made in the past. *See* 42 U.S.C. §§ 6928(a)(1), 6945(d)(4)(A); 40 C.F.R. § 257.50(d)(1). Operating under the understanding that beneficial uses of CCR would not be (indeed, could not be) regulated by EPA, businesses invested resources in using CCR for a variety of beneficial uses. *See* pp. 9-10, *supra*. Examples include dam construction and stabilization prior to placement of infrastructure such as railroad tracks or pipelines. JA_[CCIG Comments 20]. Because CCR remains on the land, these completed projects now qualify as CCR management units under the Final Rule. 89 Fed. Reg. at 39,051-52 (relying on *USWAG*, 901 F.3d at 440, for the proposition that "it d[oes] not matter when the CCR was placed … provided the CCR remain[s] present at the site"). Now, EPA would demand that these same owners and operators

undertake, among other things, cumbersome and expensive monitoring and closure measures that they had no reason to anticipate.

The scope of EPA's CCR regulations and exemption (as now defined by EPA) was not "ascertainably certain" prior to the Final Rule. *Trinity Broad.*, 211 F.3d at 628. Start with the text of the 2015 Rule, which declares that it "does not apply to practices that meet the definition of a beneficial use of CCR" with no mention of an on-site/off-site distinction. 40 C.F.R. § 257.50(g). (Nor did the 2015 Rule apply to any pre-2015 beneficial uses. 80 Fed. Reg. at 21,302.) Turn to the referenced definition, which requires that the CCR "provide a functional benefit"; "substitute for the use of a virgin material"; and be used in accordance with "relevant product specifications, regulatory standards or design standards" or else "not [be] used in excess quantities." 40 C.F.R. § 257.53.[5] Again, the 2015 Rule made no distinction between on-site and off-site uses. *Id.*

EPA's past statements and actions point in the same direction. "[A]n agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation." *Chrysler Corp.*, 158 F.3d at 1356; *accord Christopher*, 567 U.S. at 155-56. As explained above (pp. 13-14), EPA has exempted from regulation and encouraged beneficial uses for decades

[5] There is an additional recordkeeping requirement for "unencapsulated use of CCR involving placement on the land of 12,400 tons or more in non-roadway applications." 40 C.F.R. § 257.53.

with no suggestion that its position depended on whether such uses occurred on- or off-site. And EPA supported the 2015 Rule's exemption for beneficial uses by relying in part on the documented beneficial use of millions of tons of CCR on-site. *See* Elec. Generator Br. 29. Even assuming that EPA acted lawfully in redefining the beneficial-use exemption, it cannot use its new understanding to impose liability on regulated entities based on beneficial uses undertaken prior to the Final Rule. *Fox II*, 567 U.S. at 243, 258.

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The two major defects of the Final Rule identified by the Chamber—the failure to adequately explain EPA's change in position and the due-process implications of the change—go hand-in-hand and are of concern to the business community well beyond the world of RCRA.

The costs of regulatory compliance overall on the American economy are already astronomically high. In 2022, such compliance cost about $3.079 trillion—12% of U.S. GDP. Nicole V. Crain & W. Mark Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* 4, Nat'l Ass'n of Manufacturers (Oct. 2023).[6] Small businesses felt the biggest brunt, with about

[6] https://nam.org/wp-content/uploads/2023/11/NAM-3731-Crains-Study-R3-V2-FIN.pdf.

$14,700 in compliance costs per employee compared to about $12,800 in compliance costs per employee for larger businesses. *Id.*

Arbitrary regulatory flip-flops can disrupt businesses' settled expectations and investments, with profound economic consequences for the country. Agency disregard for legal stability "significantly undercut[s] the productivity and value of past investments, made in reasonable reliance on the old regime." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 746-47 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part). To paraphrase the Supreme Court in an analogous circumstance: It is one thing to expect regulated parties to conform their conduct to an agency's stated position; it is quite another to require regulated parties to anticipate a radical change to that position on pain of liability. *Christopher*, 567 U.S. at 158. Businesses depend on clear, predictable rules—and fair and nonarbitrary administrative processes—when planning their operations and investing for their enterprises. The absence of such predictability creates business uncertainty, and all the more so when businesses risk the possibility of liability in the future for merely following what the law allows and requires today.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for review and vacate the Final Rule.

Dated: February 7, 2025 Respectfully submitted,

s/ Elbert Lin
Elbert Lin
Counsel of Record
David N. Goldman
HUNTON ANDREWS KURTH LLP
951 East Byrd Street, East Tower
Richmond, VA 23219
elin@HuntonAK.com
(804) 788-8200

Nash E. Long
Brent A. Rosser
HUNTON ANDREWS KURTH LLP
101 South Tryon Street, Suite 3500
Charlotte, NC 28280
nlong@HuntonAK.com
brosser@HuntonAK.com
(704) 378-4728

F. William Brownell
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
bbrownell@HuntonAK.com

Andrew R. Varcoe
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this document complies with the Federal Rule of Appellate Procedure 29(a)(5) and this Court's December 19, 2024 Order, because it contains 5,072 words, as counted by Microsoft Word, excluding the parts excluded by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1). This document also complies with typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: February 7, 2025

s/ Elbert Lin
Elbert Lin

CERTIFICATE OF SERVICE

I certify that on this 7th day of February, 2025, a copy of the foregoing document was served electronically through the Court's CM/ECF system on all registered counsel.

Dated: February 7, 2025

s/ Elbert Lin
Elbert Lin