State of West Virginia
Office of the Attorney General
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March 26, 2024

Michael S. Regan
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, 1101A
Washington, D.C. 20590

Submitted Electronically via Regulations.gov

Re: Comments on Proposed Rulemaking Titled "Waste Emissions Charge for Petroleum and Natural Gas Systems" by the Attorneys General of the States of West Virginia, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming (Docket No. [EPA-HQ-OAR-2023-0434])

Dear Administrator Regan:

We appreciate the opportunity to comment on the Environmental Protection Agency's proposed plan to implement the "waste emissions charge"—or Methane Tax—created in the recent Inflation Reduction Act. *See Waste Emissions Charge for Petroleum and Natural Gas Systems*, 89 Fed. Reg. 5,318 (Jan. 26, 2024) ("Proposed Rule"). Although many of our States urged Congress not to pass this unjustified tax in the first place, we recognize that EPA now has a statutory mandate to do so in Section 136 of the Clean Air Act. That said, EPA still must operate within the bounds of the law and make reasonable decisions.

Unfortunately, the Proposed Rule is both unlawful and ill-advised. *First*, the Proposed Rule is premature, resting on a regulatory landscape that is itself subject to ongoing legal challenges. *Second*, the EPA's additions to the Methane Tax's envisioned scheme push the Proposed Rule beyond the agency's statutory authority in several ways. *Third*, the Proposed Rule contains several unreasonable interpretations of statutory text that actually undermine Congress's intent, making the rule arbitrary and capricious. And *fourth*, the Proposed Rule lacks an adequate cost-benefit analysis.

Given these shortcomings, EPA should reconsider the rule altogether and focus on following Section 136's text. We recognize that methane control can be a real problem. But as with other of EPA's recent unlawful administrative actions, the States stand ready to respond if EPA insists on employing unreasonable means to address this challenging issue.

BACKGROUND

A. General Considerations

Section 60113 of the Inflation Reduction Act amended the Clean Air Act and directed EPA to impose a Methane Tax. In doing so, the IRA codified the Methane Tax in the newly made Section 136 of the CAA. *See* 42 U.S.C. § 7436. Specifically, Section 136(c) directs EPA to "impose and collect" the Methane Tax.

The Methane Tax is an annual tax on "methane emissions that exceed an applicable waste emissions threshold under subsection (f)." 42 U.S.C. § 7436(c). The statute tells EPA to collect this tax from each "owner or operator of an applicable facility that reports more than 25,000 metric tons of carbon dioxide equivalent of greenhouse gases emitted per year." *Id.* Although relevant emissions are to be calculated "pursuant to subpart W of part 98 of title 40, Code of Federal Regulations," *id.*, the actual amount of the tax is calculated according to Section 136(e).

Before laying out the Methane Tax's dollar amounts or other logistics, Section 136 describes its reach. In particular, the statute says that EPA must collect the tax from the "owner or operator of an applicable facility" that meets an emissions level threshold. 42 U.S.C. § 7436(c). And the statue defines the term "applicable facility" as a "facility within the following [nine] industry segments": (1) "Offshore petroleum and natural gas production," (2) Onshore petroleum and natural gas production," (3) "Onshore natural gas processing," (4) "Onshore natural gas transmission compression," (5) "Underground natural gas storage," (6) "Liquefied natural gas storage," (7) "Liquefied natural gas import and export equipment," (8) "Onshore petroleum and natural gas gathering and boosting," and (9) "Onshore natural gas transmission pipeline." *Id.* §§ 7436(d)(1)-(9). Those industry segments are used "as defined in subpart W of part 98 of title 40, Code of Federal Regulations." *Id.* § 7436(d).

B. Triggering Thresholds

Turning to reporting thresholds and calculations, the Methane Tax has two distinct emissions thresholds, each serving different purposes.

The first is the threshold that must be met for a facility to face *any* taxation under the statute. That initial threshold is set at 25,000 metric tons of carbon dioxide equivalent of greenhouse gases emitted per year. 42 U.S.C. § 7436(c). For the statute's purposes, the term "greenhouse gases" means "the air pollutants carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride." *Id.* § 7436(i). Though the initial reporting threshold is based off all these gases, the tax is on "methane emissions" alone. *Id.* § 7436(c).

The second threshold sets the limit beyond which the Methane Tax applies. Unlike the first, this threshold varies and can be calculated in several ways, depending on which industry segment a facility falls within. In part because of this variability, the taxing structure has proved to be rather complex and arcane, just as the States warned in their letter to Congress.

Starting first with petroleum and natural gas production facilities, the statute lays out two potential calculations: one for facilities that send natural gas to sale and one for facilities that don't. If a facility does send natural gas to sale, the Methane Tax applies to "the reported metric tons of methane emissions from such facility" which are above "0.20 percent of the natural gas sent to sale from such facility." 42 U.S.C. § 7436(f)(1)(A). On the other hand, if the facility does not send natural gas to sale, the Methane Tax is levied on all methane emissions above "10 metric tons of methane per million barrels of oil sent to sale from such facility." *Id.* § 7436(f)(1)(B).

The second set of industries are the so-called "[n]onproduction petroleum and natural gas systems." 42 U.S.C. § 7436(f)(2). These systems include onshore natural gas processing, liquefied natural gas storage, liquefied natural gas import and export equipment, and onshore petroleum and natural gas gathering and boosting industries. Facilities in those segments calculate the Methane Tax "on the reported metric tons of methane emissions that exceed 0.05 percent of the natural gas sent to sale from or through such facility." *Id.*

The third and final grouping covers the remaining three industries: onshore natural gas transmission compression, underground natural gas storage, and onshore natural gas transmission pipeline. 42 U.S.C. § 7436(f)(3). The statute refers to these industries collectively as "[n]atural gas transmission." *Id.* And for these facilities, the Methane Tax is charged off "the reported metric tons of methane emissions that exceed 0.11 percent of the natural gas sent to sale from or through such facility." *Id.*

C. Calculating the Tax

With the thresholds and applicable facilities laid out, the statute turns to the Methane Tax's actual "[c]harge amount." 42 U.S.C. § 7436(e). To get this number, an owner or operator must calculate "the number of metric tons of methane emissions reported pursuant to subpart W … that exceed[s] the" second threshold "listed in subsection (f) during the previous reporting period." *Id.* § 7436(e)(1). That number is then multiplied by a set dollar amount that changes in the coming years: $900 for 2024, $1,200 for 2025, and $1,500 for 2026 on. *Id.* §§ 7436(e)(2)(A)-(C). At long last, the resulting product is the amount owed.

D. Netting and Exemptions

The statute also includes a few ways that owners and operators can reduce their liability for the Methane Tax.

The first of these is tax netting. This concept applies to "facilities under common ownership or control." 42 U.S.C. § 7436(f)(4). Such an owner may "net[]" those facilities "emissions by reducing the total obligation to account for facility emissions levels that are below the applicable thresholds within and across all applicable segments identified in subsection (d)." *Id.* In other words, this "tax netting" enables the owner of multiple facilities to use exceptional performance at one facility to reduce the liability of another facility, essentially treating them as a single reporting unit.

Beyond tax netting, the statute provides for three exemptions from the Methane Tax.

The first exemption applies to facilities that are attempting to install new "gathering or transmission infrastructure necessary for offtake of increased volume as a result of methane emissions mitigation implementation." 42 U.S.C. § 7436(f)(5). The statute understands that such installations require the owner or operator to seek EPA permitting for this new infrastructure. Thus, the Methane Tax does not apply to emissions "caused by unreasonable delay, as determined by the Administrator, in environmental permitting" of this equipment. *Id.*

The second exemption concerns "regulatory compliance." 42 U.S.C. § 7436(f)(6). This exemption is available for any "applicable facility that is subject to and in compliance with methane emissions requirements" set by EPA. *Id.* § 7436(f)(6)(A). As long as such facilities meet two requirements, they are not subject to the Methane Tax. First, "methane emissions standards and plans pursuant to [EPA regulations must] have been approved and [be] in effect in all States with respect to the applicable facilities." *Id.* § 7436(f)(6)(A)(i). And second, "compliance with [EPA regulations] will result in equivalent or greater emissions reductions as would be achieved by the proposed rule … 'Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review' (86 Fed. Reg. 63,110 (November 15, 2021))." *Id.* § 7436(f)(6)(A)(ii). This latter requirement is only mandated if that rule "had been finalized and implemented." *Id.*

Finally, the third exemption covers "[p]lugged wells." 42 U.S.C. § 7436(f)(7). It simply provides that the Methane Tax will not "be imposed with respect to the emissions rate from any well that has been permanently shut-in and plugged in the previous year." *Id.* As long as a plugged well meets "all applicable closure requirements, as determined by the Administrator," it is not taxed. *Id.*

DISCUSSION

EPA should not issue any rule right now. As the Proposed Rule itself concedes, the proposed structure rests on other EPA initiatives that are themselves subject to ongoing legal challenges. By failing to account for that regulatory landscape, EPA is acting prematurely—and arbitrarily.

If EPA does insist on moving forward now, it still must respect the limits that Congress has imposed. Section 136 gives EPA little leeway in many regards. It lays out simple rules and instructions for EPA when administering the Methane Tax. These directives include how to charge it, how to tax net, how to apply exemptions, and more. But even with all of that, EPA has still proposed to go beyond what the statute instructs. The Proposed Rule is fraught with extra limitations and requirements that are found nowhere in the statute. Because the statute does not authorize these additions, the Proposed Rule is illegal.

And in the places where EPA is arguably given some discretion in the Methane Tax's administration, the agency goes too far in a different sense. EPA abuses what little wiggle room it has and makes several choices in the Proposed Rule that are arbitrary and capricious. In fact, many of the gap-filling decisions in the Proposed Rule actively work against Section 136's text and purpose.

On top of all that, the Proposed Rule also fails to sufficiently account for costs and benefits. It assumes huge benefits with little evidence and disregards a major potential cost. EPA cannot just take the credit for Congress's work in passing the Methane Tax. Rather, it should show how the Proposed Rule itself is beneficial.

We take each of these problems in turn.

I. The Proposed Rule Is Premature.

As EPA well knows, "an agency must … acknowledge and account for a changed regulatory posture the agency creates," particularly when that change pertains to a "contemporaneous and closely related rulemaking." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011). Among other things, if an agency fails to adequately consider the "combined impact" of "numerous intertwined proposed rules … promulgated at different times," then "the true impact of the [rule can be] obscured and the public [can be] deprived of a meaningful opportunity to comment." *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 962 (N.D. Cal. 2021). And if some part of this intertwined structure is under fire, then the agency should account for that, too—after all, the agency must adjust when trends reveal that its underlying assumptions are wrong. *Zen Magnets, LLC v. CPSC*, 841 F.3d 1141, 1150 (10th Cir. 2016).

Here, EPA at least acknowledges that it has recently promulgated and proposed rules that are directly related to this one. We discuss one of these actions—proposed revisions to subpart W—below. But more importantly here, EPA observes that the Proposed Rule pertains directly to a recent final rule 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. at 5,322. Among other things, the methane-related Section 111 rule will affect how and when certain facilities can benefit from Section 136's compliance exemption. *Id.* at 5,323. EPA has proposed this Section 136 rule based on the assumption that its recent Section 111 rule will remain good law.

Yet the Section 111 methane rule is already in an unsettled state. Several of our States have filed petitions for review challenging it. *See Oklahoma v. EPA*, No. 24-1059 (D.C. Cir. filed Mar. 12, 2024); *Texas v. EPA*, No. 24-1054 (D.C. Cir. filed Mar. 8, 2024). These immediate legal problems should come as no surprise: even EPA supporters noted before the rule was published that it was "likely [to] face legal challenges on specific issues despite [purportedly] being a 'conventional' EPA regulation." Maydeen Merino, *EPA Methane Rule Likely to Face Legal Challenges Despite Being 'Conventional' Rule*, NAT'L L. J. (Dec. 11, 2023, 7:03 PM), https://bit.ly/4aHPFRh. Given the breadth and irrationality inherent in the methane rule, we expect these challenges to be successful. Even if they aren't, they "complicate compliance dates and assessments of what owners and operators will need to do to comply with new regulations." Vinson & Elkins, *A Heavy Lift: EPA Bulks Up Oil and Gas Methane Requirements in New Quad Ob/c Regulations*, V&E ENV'T UPDATE (Mar. 8, 2024), https://bit.ly/3TNPm1B.

Given that it's not clear whether a centerpiece of the Methane Tax regime will be much longer for this world (or how it will be implemented in the meantime), we fail to understand why the agency has insisted on moving forward anyway. If and when the Section 111 methane rule falls, EPA will be forced to reissue a new proposed rule and start anew. If it tries to backdoor a new approach through the Final Rule, then the agency will deprive parties of any real opportunity to comment—just as the D.C. Circuit has warned. Either result is a bad one. It would be far more reasonable for the agency to simply wait to see how those challenges shake out before piling on with the Methane Tax.

II. The Proposed Rule Exceeds EPA's Statutory Authority.

EPA—like all agencies—cannot confer power upon itself. Instead, EPA can regulate only if "Congress authorizes it to do so by statute." *FEC v. Cruz*, 596 U.S. 289, 301 (2022). Without this authorization, the agency "literally has no power to act." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). So the Proposed Rule implementing the Methane Tax cannot "operate independently of" Section 136. *California v. Texas*, 593 U.S. 659, 679 (2021). Yet EPA goes beyond the statutory text in at least four ways.

A. The Proposed Rule Exceeds EPA's Authority By Putting Additional Requirements In The Regulatory-Compliance Exemption.

The Proposed Rule severely restricts the regulatory-compliance exemption. Per the statute, that exemption should apply to any facility that is "in compliance with methane emissions requirements pursuant to" EPA regulations. 42 U.S.C. § 7436(f)(6). To meet that test, facilities must show (among other things) that "methane emissions standards and plans pursuant to [EPA regulations] have been approved and are in effect in all States with respect to the applicable facilities." *Id.* § 7436(f)(6)(A)(i).

EPA has significantly heightened the requirements for reaching the relevant plan-approval status. Under the Proposed Rule, "determinations for the regulatory compliance exemption would be made after *all* state and Federal plans pursuant to [EPA regulations under CAA Section 111(d)] are approved and in effect." 89 Fed. Reg. at 5,337 (emphasis added). In other words, a facility that is in a State with an approved plan and is complying with that plan would *still* not receive the exemption until EPA had approved every other State's plan, too. This requirement is found nowhere in the statute.

And in fact, the statute is against this interpretation. The regulatory-compliance exemption is available when plans are "approved" and "in effect in all States *with respect to the applicable facilities*." 42 U.S.C. § 7436(f)(6)(i) (emphasis added). EPA ignores the "with respect to the applicable facilities" language by requiring nationwide, total compliance. We think Congress meant for the regulatory-compliance exemption to be available on a case-by-case basis to applicable facilities who meet the requirements.

EPA says it has rewritten the statute because it hopes to "incentiv[ize]" all "states to move promptly in adopting their plans." 89 Fed. Reg. at 5,336. Yet the Proposed Rule imposes the

Methane Tax on applicable facility owners, not States. EPA thus openly admits that its extra-textual requirement serves an ulterior purpose beyond Section 136's regulatory-compliance exemption. More importantly, timelines for submitting state plans are set by Congress, not EPA; the agency cannot unilaterally curb state discretion just because it might prefer States to move faster. Worse still, *EPA* has shown itself to be the foot-dragger, not the States—witness, for example, the EPA's years-long delay in addressing state plan submissions under the good-neighbor provisions of the ozone National Ambient Air Quality Standard.

This change is beyond EPA's authority and should be discarded.

B. The Proposed Rule Illegally Adds Criteria To The Permitting-Delay Exemption That Are Not Found In The Statute.

EPA takes a similar tack with the permitting-delay exemption. The statutory version of this exemption applies to any emissions "caused by unreasonable delay" in environmental permitting. 42 U.S.C. § 7436(f)(5). And again, this exemption is meant to be awarded on a case-by-case basis, as shown by the statute's directive that "unreasonable delay[s]" be "determined by the Administrator." *Id.* But instead of holistically evaluating delays as the statute seems to envision, EPA has decided it can just tell owners right now what is "unreasonable."

Although the statute has only a single requirement of unreasonable delay to qualify, the Proposed Rule provides that a delay is "unreasonable" only if it meets four newly created criteria. *See* 89 Fed. Reg. at 5,333-34.

We see serious problems with at least three of the four new criteria. One says that, to receive the exemption, "neither the entity potentially eligible for the exemption … nor the entity seeking the environmental permit … [may have] contributed to the delay." 89 Fed. Reg. at 5,333. A contribution here would relate to "the timeliness of response to requests" and be an amount of time either specified in in the request or fixed at 30 days if no specific response time is requested. *Id.* This hardline stance is not in the statute. Further, this criterion is inappropriate and battles against a true determination of when a delay is "unreasonable." After all, if the Proposed Rule keeps this requirement, EPA could make all the mistakes and errors in the world and still determine that a single slip-up in response time by the requestor (as determined by the EPA) disqualifies them outright. In another criterion, the Proposed Rule says that the permitting-delay exemption applies *only* to emissions "resulting from the flaring of gas that would have been mitigated without the permit delay" and only if the emissions are "in compliance with all applicable local, state, and Federal regulations regarding flaring emissions." *Id.* Yet the statute says nothing about flaring, let alone a requirement that they be the only kind of emissions exempted—it exempts *all* "emissions that exceed the waste emissions threshold … if such emissions are caused by unreasonable delay … in environmental permitting." 42 U.S.C. § 7436(f)(5). EPA cannot deny the exemption for venting emissions—another way of burning off excess gas—merely because "venting emissions is widely restricted," as the exemption shows no concern for that purported fact. 89 Fed. Reg. at 5,333. Lastly, EPA has flatly concluded that "unreasonable delay" means "somewhere between 30 and 42 months." *Id.* But here again, the statute contains no such timeline.

Instead, it says simply "unreasonable delay." 42 U.S.C. § 7436(f)(5). Putting a timeframe on that—especially one so long as over three years—contradicts the text.

We think the better approach is a case-by-case assessment, just as the statute contemplates. *See*, *e.g.*, *Fruit Indus. v. Bisceglia Bros. Corp.*, 101 F.2d 752, 754 (3d Cir. 1939) ("No arbitrary rule can be stated with reference to the time which will constitute an unreasonable delay."); *Ahmadi v. Chertoff*, 522 F. Supp. 2d 816, 822 (N.D. Tex. 2007) (explaining that unreasonable delay "depends to a great extent on the facts of the particular case"). "Unreasonable," for instance, is not necessarily a temporal descriptor. A delay could be unreasonable simply because it was absurd or unfair. For example, EPA could arbitrarily hold onto an application for 41 months and then grant it just before the deadline. The Proposed Rule would say this is reasonable. Good sense says otherwise.

The Proposed Rule should drop this—and all the other—added requirements for the permitting-delay exemption.

C. EPA Has No Authority To Limit The Plugged-Well Exemption.

The seemingly straightforward exemption for plugged wells gets an atextual overhaul in the Proposed Rule, too. Look first at the statute: "Charges shall not be imposed with respect to the emissions rate from any well that has been permanently shut-in and plugged in the previous year in accordance with all applicable closure requirements, as determined by the Administrator." 42 U.S.C. § 7436(f)(7). This exemption is a simple one. If a well is plugged in accordance with closure requirements, it's exempt, full stop.

But we see a totally different and inconsistent formulation in the Proposed Rule. Instead of an exemption for "any" plugged well, EPA eliminates *seven* of the nine industry segments from eligibility. 89 Fed. Reg. at 5,347. EPA explains that it is "interpret[ing] th[e] exemption to apply to the production industry segments only." *Id.* But that reading has no basis in Section 136's text. EPA seemingly recognizes this reality; rather than provide textual support for its "interpretation," the agency says that the exemption does not apply to wells in the other segments because they "are distinctly different in purpose and emissions profile than underground storage wells." *Id.* The Proposed Rule makes no attempt to ground this finding on anything in Section 136.

Once more, because it fails to show fidelity to Section 136, this added requirement exceeds the agency's authority and must be dropped.

D. EPA Misapplies Sections Incorporating Subpart W By Reference.

Section 136 incorporates parts of subpart W of part 98 of title 40, Code of Federal Regulations in two places. In one place, the Methane Tax's actual reporting method is based exclusively on calculations made there. *See* 42 U.S.C. §§ 7436(c), (e)(1). In another, the statute defines "applicable facility" as a "facility within the [nine enumerated] industry segments" and then defines industry segments as those "defined in subpart W of part 98 of title 40, Code of Federal Regulations." 42 U.S.C. § 7436(d).

Understanding these provisions requires an understanding of the "reference canon." "[T]he reference canon" explains that "a statute's reference to a general subject indicates dynamic meaning as it exists whenever a question under the statute arises, while a statute's reference to another statute by specific title or section takes the statute as it exists at the time of adoption, without any subsequent amendments unless by express intent." *United States v. Ho*, 984 F.3d 191, 201 (2d Cir. 2020) (cleaned up). In other words, "a statute that refers to another statute"—or in this case, a regulation—"by specific title or section number in effect cuts and pastes the referenced statute [or regulation] as it existed when the referring statute was enacted, without any subsequent amendments." *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209-10 (2019).

Here, Section 136 refers to the specific subpart of the regulations to be incorporated, making it a specific (not a general) incorporation. Nothing in the statute expressly says that Congress intended to incorporate subsequent amendments to those regulations. So Section 136 has incorporated the definitions and calculations from subpart W as of the day that Section 136 was enacted, August 16, 2022.

Even so, EPA has announced that it intends to "update" the subpart W incorporation after the fact in a way that directly contravenes the reference canon. In particular, it is "EPA's intention in this proposed rulemaking … that the final WEC rule would update the proposed cross-references to subpart W to be consistent with the final Subpart W rule resulting from [an ongoing] 2023 Subpart W Proposal." 89 Fed. Reg. at 5,322. EPA has no power to do that. It must apply subpart W as Congress found it.

Indeed, were the rule otherwise, serious constitutional concerns could arise. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008) ("[T]he canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due."). "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019). It says that Congress must be specific when it "confers decisionmaking authority upon agencies." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). This requirement compels Congress to provide an agency with "an intelligible principle to which [the agency] authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Without an intelligible principle, a grant of decisionmaking power is an "unconstitutionally standardless delegation." *Whitman*, 531 U.S. at 473.

If the incorporated version of subpart W is not assumed to be the version as of August 16, 2022, then the IRA will have left EPA free to craft calculation methodologies and even the statute's reach with no real direction from Congress, all through the backdoor of later amendments to subpart W. The statute would not provide any criteria or guidelines in these two places. In other words, Congress would have "failed to articulate any policy or standard" by which to calculate emissions or define industry segments. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). Even if subpart W sufficiently cabined EPA's discretion as to the Methane Tax *now*, nothing in Section 136 would supply anything like the necessary "definite" standards to determine who the Methane Tax applies to and how to calculate it down the road. *Am. Power & Light Co. v. SEC*,

329 U.S. 90, 105 (1946). Without congressionally imposed guardrails, EPA could change the subpart W regulations and thereby expand the Methane Tax's reach in entirely unexpected ways.

We think it better to apply the reference canon in the usual way. EPA must not tweak Section 136 by later changes to subpart W.

III. The Proposed Rule Is Arbitrary And Capricious.

The Administrative Procedure Act "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). "It requires agencies to engage in reasoned decisionmaking." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). Then it directs courts to "set aside" any agency actions that are "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). In making that decision, a court will ask whether the Proposed Rule is "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 410 U.S. 402, 416 (1971).

To determine whether the Proposed Rule is arbitrary and capricious, we look to "the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015). EPA must show that it "examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (cleaned up). Many of the Proposed Rule's provisions would likely fail to meet this standard.

But even though subsequent amendments to subpart W should *not* be incorporated into Section 136 or its implementing regulations, EPA has announced that it intends to do exactly that.

A. The Proposed Rule's Definition For Common Ownership Or Control Is Arbitrarily And Capriciously Narrow.

EPA's first arbitrary and capricious decision comes from the Proposed Rule's definition of "common ownership or control." Section 136(f)(4) allows tax netting "for facilities under common ownership or control." This definition seems like a clear statement. If multiple applicable facilities are owned or controlled by the same entity, then they can net their emissions. The reason for this tax netting is just as clear: It gives jointly owned or operated facilities the ability to "reduc[e] [their] total obligation to account for facility emissions levels that are below the applicable thresholds." 42 U.S.C. § 7436(f)(4). Congress intended the provision to encompass as many facilities as possible, as evinced by the fact that netting applies "within and across all applicable segments." *Id.*

Despite the statute's obvious intent, the Proposed Rule reinterprets "common ownership or control" much more narrowly. To EPA, a common owner or operator means the Methane Tax "obligated party for that facility." 89 Fed. Reg. at 5,328. This reinterpretation is a zoomed-in view of what it means to be an owner, though, and EPA specifically says it would exclude "parent compan[ies]." *Id.* We fail to see how that choice is anything but arbitrary. A parent company that

owns multiple smaller companies also owns the facilities they operate. EPA itself concedes that a "parent company" has "an ownership interest in [a] facility."[*] *Id.* at 5,329.

More importantly, the Proposed Rule's limited definition would minimize the amount of tax netting that can be achieved. Yet the Methane Tax itself is best served by *broad* netting. Defining "common ownership" to embrace parent companies would encourage those companies to achieve low emissions in as many facilities as possible to make up for facilities where such reduction is less feasible. And given that the statute is principally about emissions reduction and not revenue generation, EPA should consider that a good thing. *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (noting that the agency must show that "its interpretation is rationally related to the goals of the statute" (cleaned up)).

EPA recognizes that the potential for netting would likely be "higher when the parent company is used," but the Proposed Rule still declines to use that definition. 89 Fed. Reg. at 5,329. EPA's only reason for this is that "subpart W regulations" "refer[red] to the owner or operator, not to the parent company." *Id.* But Section 136 does not incorporate those definitions into its tax-netting scheme in any way—a marked contrast from the places where Congress *did* incorporate subpart W. *See Dean v. United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Thus, EPA bases its decision on nothing advancing the statute's text or purpose. EPA should not adopt this arbitrary-and-capricious approach.

B. The Proposed Rule's Tax Netting Scheme Discourages Emissions Reduction.

The arbitrary definition of ownership and control isn't the only problem with the Proposed Rule's tax-netting implementation, though. As discussed, tax netting under Section 136 is intended to "reduc[e] the total obligation" of owners and operations by "account[ing] for facility emissions levels that are below the applicable thresholds." In other words, an owner who has multiple facilities can use emissions levels below the Methane Tax's thresholds to balance out the emissions above those thresholds from other facilities.

Again: Tax netting would encourage owners and operators to maximize emissions reductions in the most efficient and feasible way possible. This reduction would save them money on the Methane Tax. In turn, it would reduce overall emissions. Why then does the Proposed Rule allow netting of only Methane Tax "applicable emissions"? 89 Fed. Reg. at 5,329. That is, the Proposed Rule would only allow owners to net emissions *above* 25,000 metric tons of carbon dioxide equivalent.

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[*] Although the Supreme Court has held that parent companies should not be liable for certain liabilities under environmental laws where the parent companies are not themselves directly operators or alter egos of the subsidiary, *United States v. Bestfoods*, 524 U.S. 51, 63 (1998), we see a distinction between carefully guarding against parental liability (a classic concern of corporate law) and inappropriately refusing to recognize a parent's ownership interest for purposes of assigning a *de facto* benefit.

EPA's approach here is arbitrary and capricious. If an owner has multiple facilities, some of which are above 25,000, and some below, it does not make sense to only allow netting at those above. For one thing, the statute does not seem to contemplate such a scheme, as it says netting is meant to "account for facility emissions levels that are below the applicable *thresholds*." 42 U.S.C. § 7436(f)(4) (emphasis added). "Thresholds" here is plural, indicating that both the initial Methane Tax threshold and the charge-calculating threshold are to be considered.

Additionally, the decision to reward emissions reduction only above 25,000 metric tons goes against the very purpose of tax netting, the Methane Tax, and environmental regulation generally. Under the Proposed Rule, owners would be incentivized to reduce emissions to only 25,000 exactly. Any lower, they would see no benefit. This upside-down incentive structure is bad enough. But even worse, an owner with close to but below 25,000 metric tons in emissions at a facility now potentially has a perverse incentive to *raise* their emissions so that they might be able to reap the benefits of netting with other facilities.

If the Methane Tax is meant to be "an incentive for the early adoption of methane emission reduction practices and technologies," 89 Fed. Reg. at 5,321, then the Proposed Rule should try to reduce methane emissions wherever legally allowed. EPA's choice to do otherwise is arbitrary and capricious because "the regulation[] [is not] consistent with and in furtherance of the purposes and policies embodied in the congressional statutes that authorize [it]." *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1126 (9th Cir. 1983).

C. The Proposed Rule's "No Deviations" Standard For The Compliance Exemption Is Counterproductive.

The Proposed Rule takes an arbitrary and capricious stance on the regulatory-compliance exemption as well. The regulatory-compliance exemption applies to all facilities "subject to and in compliance with" EPA regulations and methane reduction plans. 42 U.S.C. § 7436(f)(6)(A). The Proposed Rule says that this compliance must mean the "facility has no deviations or violations" of the EPA's regulations. 89 Fed. Reg. at 5,344. So, a facility would lose the exemption entirely "in a reporting year" if it had even a single "deviation or violation in that reporting year." *Id.*

Like the problem with tax netting, EPA's no-deviations demand actively works against Section 136's overall purpose of reducing methane emissions. Although achieving perfect compliance might be the goal, cutting off the regulatory exemption entirely for even slight errors is counterproductive. A company could be perfect for 364 days, only to have a single wisp of leaking methane cause a deviation. Under this zero-tolerance structure, that company has lost the right to benefit from the regulatory-compliance exemption altogether. Because of harsh results like this scenario, the Proposed Rule's strict implementation method would likely discourage owners from even trying to meet compliance requirements in the first place—at least with regards to meeting those requirements *for* the exemption. And if an owner has an accidental violation early in the year, then it certainly would no longer strive for perfect compliance as far as this exemption is concerned. In short, the incentives that the exemption is designed to produce are erased.

Rather the unduly punitive approach found in the Proposed Rule, EPA should simply exclude relevant emissions from the reach of the exemption (namely, those emissions either linked to that violation or those coming within a short time before or after the violation). This strategy would encourage compliance and give owners a reason to fix any noncompliance. As it stands, the Proposed Rule's "no deviation" standard has no reasoned purpose or support. It should be dropped.

IV. The Proposed Rule's Cost-Benefit Analysis Is Insufficient.

If—despite all these deficiencies—EPA continues down the Proposed Rule's previewed path, it should do so only after a more fulsome cost-benefit analysis. Currently, EPA estimates that the Proposed Rule will have a net benefit of 1.6 billion dollars over the next decade. 89 Fed. Reg. at 5,362. But this calculation relies heavily on flawed methodology. "And when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

For one thing, the estimate grossly over-relies on the hypothetical value of "Climate Benefits." 89 Fed. Reg. at 5,362. These "benefits" account for the entirety of the Proposed Rule's 1.9 billion dollar of beneficial outcome. Yet, as we have repeatedly reminded various agencies, the monetary value of so-called "climate benefits" is of dubious value. *See* State of W. Va., *et al.*, Comment Letter on Proposed Rule Setting Corporate Average Fuel Economy Standards (Oct. 16, 2023), https://tinyurl.com/46jb4aku. At the very least, the manner of analyzing the impact of GHG emissions for their impact has been disputed, *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022), *vacated for lack of standing*, 64 F.4th 674 (5th Cir. 2023), so EPA shouldn't be placing a multi-billion-dollar thumb on the scale premised on that impact.

Even assuming the value of climate benefits, those benefits are still not necessarily the product of the Proposed Rule's implementation. They might just reflect the value of the Methane Tax itself. As a result, EPA has not really provided a calculation of the *Proposed Rule's* benefit, only of the Methane Tax's. EPA should revise its analysis to focus more on the value of *its* implementation, and not on *Congress's* passage of the Methane Tax in the first place. If there's little or no marginal benefit, then there's less need for any extensive rulemaking.

And finally, the Proposed Rule does not consider owner and operator's Methane Tax payments as a cost at all. This omission is strange given that the program will likely cost millions of dollars across thousands of companies. EPA justifies this by describing the Methane Tax as a "transfer[]" that "do[es] no[t] affect total net benefits to society as a whole." 89 Fed. Reg. at 5,362. In that way, EPA says, the Methane Tax "do[es] not affect total resources available to society." *Id.* That cost-blind approach (save a nominal "cost of energy market impacts" figure) ignores the obvious consequences for consumers, including less reliability in our energy grids and higher energy prices for consumers all around. And at an absolute minimum, and even putting aside any absolute deadweight loss, it overlooks the inefficiencies that result from any new tax—a reality even proponents of similar measures have recognized in the past. *See*, *e.g.*, Michael Waggoner,

Why and How to Tax Carbon, 20 COLO. J. INT'L ENVTL. L. & POL'Y 1, 7 (2008) ("[A]ny tax has ill effects. There will always be inefficiencies in collecting taxes.").

It is inappropriate to omit this cost when most—if not all—of the Proposed Rule's provisions will affect the amount collected under Section 136. The amount collected from the Methane Tax could have been calculated *without* rulemaking by just going to the reporting numbers and seeing what qualifies. Thus, it is imperative to consider the costs from owners' and operators' payments, so that the Proposed Rule itself—and not merely the Methane Tax—can be properly assessed. Put simply, how much cost did EPA add to the Methane Tax that it is passing on to owners and operators? The Proposed Rule does not tell us, but it should.

* * *

The Methane Tax is a misguided burden on our nation's energy industry. It is just the latest attack in what seems to be this administration's all-out war on that sector. But even putting aside the Methane Tax's central policy failures, the Proposed Rule is legally deficient. It disregards numerous provisions of its own enabling statute while warping others. It reflects numerous arbitrary and capricious decisions. And the supposed economic reasoning behind it rests on a house of cards.

We therefore urge EPA to reconsider this rule and return with a focus on following the text and purpose of the law.

Sincerely,

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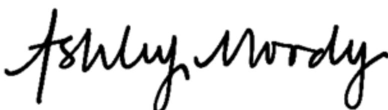

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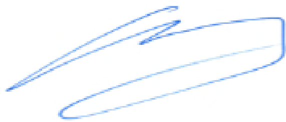

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