ORAL ARGUMENT NOT YET SCHEDULED

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

NATIONAL MINING ASSOCIATION, et al.,	)	
Petitioners,	)	
v.	)	No. 23-1275, and consolidated cases
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	
KINDER MORGAN, INC., et al.,	)	
Petitioners,	)	
v.	)	No. 23-1321, and consolidated cases
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, HOLD THESE PETITIONS IN ABEYANCE

Respondents the U.S. Environmental Protection Agency and Michael S. Regan, Administrator (collectively, "EPA"), hereby respectfully request that the

Court dismiss the two sets of above-captioned consolidated cases for lack of jurisdiction, ripeness, and standing. These cases arise from a complicated, and still fluid, administrative situation created by partial judicial stays issued by the regional U.S. courts of appeals in separate litigation over a separate EPA rule, the SIP Disapproval Action. Those stays in turn required that EPA temporarily suspend as to particular states the applicability of a second rule, the Good Neighbor Plan, that depended on the first.

Neither the SIP Disapproval Action nor the Good Neighbor Plan – both of which arise under the Clean Air Act's "Good Neighbor" provision – is challenged here. Instead, Petitioners here challenge the two interim rules EPA issued in order to implement the partial judicial stays. Nonetheless, Petitioners' preliminary filings show that they seek in these challenges to litigate the legality of the two earlier rules and to compel EPA to reconsider those earlier rules outside of the required administrative process. Petitioners' claims are beyond the jurisdiction of this Court and otherwise fall short of the requirements for Article III standing, so these petitions should be dismissed.

In the alternative, EPA requests that these cases be held in abeyance, as the questions purportedly at issue here will be resolved by the conclusion of litigation over the SIP Disapproval Action and the Good Neighbor Plan, and the reinstatement (or not) of those two rules in all applicable states.

BACKGROUND

On February 15, 2023, EPA promulgated the SIP Disapproval Action, which disapproved 21 states' air quality implementation plans under the Clean Air Act. 88 Fed. Reg. 9,336. EPA found those plans violated the Act because they failed to adequately address ozone-causing emissions that are "significantly contributing" to poor air quality in downwind states – an obligation upwind states bear under the Clean Air Act's Good Neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I).[1] 88 Fed. Reg. at 9,336. Where EPA has disapproved a state plan, or a state has failed to submit such a plan, the Act requires that EPA implement the Good Neighbor provision's requirements in the state's place. 42 U.S.C. § 7410(c)(1). Accordingly, in keeping with its duties under the Act, EPA followed the SIP Disapproval Action by finalizing on March 15, 2023, a federal implementation plan covering the 23 states whose plans it disapproved or who failed to submit plans in order to eliminate those "significantly contributing" emissions. 88 Fed. Reg. 36,654 (June 5, 2023). That second rule was called the Good Neighbor Plan, and it establishes necessary reductions of nitrogen oxides ("NOx"), an ozone-forming pollutant, from power plants and other high-emitting industrial sources. *Id.*

[1] The Good Neighbor provision specifically requires upwind states to "prohibit[]" emissions that "contribute significantly to nonattainment" of national air quality

Both rules drew judicial challenges. The SIP Disapproval Action was challenged in seven of the regional federal circuit courts and in the D.C. Circuit.[2] Petitioners in those regional cases also sought stays of EPA's disapproval of 12 of the 23 state plans addressed in the SIP Disapproval Action pending judicial review, which the regional circuit courts granted over a period of months.[3] Consequently, EPA's state plan disapprovals are currently suspended in Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Texas, Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia. Meanwhile, the federal Good Neighbor Plan was challenged in both the regional circuits and the D.C. Circuit. Challenges in the regional circuits were subsequently transferred to the D.C. Circuit or held in

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standards or "interfere with maintenance" of those standards in downwind states. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

[2] The D.C. Circuit granted petitioners' request to hold their SIP Disapproval Action petitions in abeyance while petitioners litigated in the regional circuits. ECF 2005201, *Utah v. EPA*, D.C. Cir. No. 23-1102. EPA maintains that this Court is the proper venue for those challenges.

[3] *Arkansas v. EPA*, 8th Cir. No. 23-1320, ECF 5280996 (Arkansas); *Missouri v. EPA*, 8th Cir. No. 23-1719, ECF 5281126 (Missouri); *Kentucky v. EPA*, 6th Cir. No. 23-3216, ECF 39-2 (Kentucky); *Texas v. EPA*, 5th Cir. No. 23-60069, ECF No. 269-1 (Texas, Louisiana) & ECF No. 359-2 (Mississippi); *Allete, Inc. v. EPA*, 8th Cir. No. 23-1776, ECF 5292580 (Minnesota); *Nevada Cement Co. v. EPA*, 9th Cir. No. 23-682, ECF 27 (Nevada); *Alabama v. EPA*, 11th Cir. No. 23-11173, ECF 33-2 (Alabama); *Utah v. EPA*, 10th Cir. No. 23-9509, ECF 11016742 (Utah and Oklahoma); *West Virginia v. EPA*, 4th Cir. No. 23-1418, ECF 39 (initial stay pending oral argument).

abeyance,[4] so litigation on the Good Neighbor Plan is proceeding only in this Court. This Court denied petitioners' requests for a stay of the Good Neighbor Plan. ECF 2018645 & 2021268, *Utah v. EPA*, D.C. Cir. No. 23-1157.[5]

Even so, the regional circuits' orders staying the effect of the SIP Disapproval Action as to 12 states during the period of judicial review had immediate practical consequences for EPA's implementation of the Good Neighbor Plan. Because EPA's authority to issue a federal plan for eliminating upwind emissions depends on having disapproved a state's own plan (or having found that a state failed to submit a complete plan), 42 U.S.C. § 7410(c)(1), EPA could not implement the Good Neighbor Plan in the states whose underlying state plan disapprovals had been stayed. *See* 88 Fed. Reg. at 49,297. The judicial stays of the SIP Disapproval Action thus required that EPA take immediate action to suspend the effectiveness of the Good Neighbor Plan in the states covered by the stays while those stays are in force.

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[4] *E.g.*, Abeyance Order, *Texas v. EPA*, 5th Cir. No. 23-60300, ECF 125-2; Transfer Order and Opinion, *Kentucky Energy & Environment Cabinet*, 6th Cir. No. 23-3605, ECF 19; Transfer Order, *Energy Transfer LP v. EPA*, 7th Cir. No. 23-2510, ECF 25; Abeyance Order, *Missouri v. EPA*, 8th Cir. No. 23-2771, ECF 5308151; Abeyance Order, *Nevada Cement Co. v. EPA*, 9th Cir. No. 23-1098, ECF 14.1; Abeyance Order, *Oklahoma v. EPA*, 10th Cir. No. 23-9561, ECF 010110897956; Abeyance Order, *Alabama v. EPA*, 11th Cir. No. 23-12528, ECF 20-2.

[5] Some petitioners have submitted applications for stay to the Supreme Court, which remain pending.

The two rules challenged here were issued to do just that. In the first ("First Interim Rule") EPA took "interim final action to stay … the effectiveness" of the Good Neighbor Plan as to sources in six states – Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas – where stay orders from the regional circuits came early on in the litigation process. 88 Fed. Reg. 49,295 (July 31, 2023). The second rule ("Second Interim Rule") took the same action as to an additional six states – Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia – where stay orders were issued later. 88 Fed. Reg. 67,102 (Sep. 29, 2023). To comply with the stay orders, the Interim Rules revised the regulatory text in 40 C.F.R. parts 52 and 97 that had been adopted in the Good Neighbor Plan to implement upwind NO_X reductions in those states. 88 Fed. Reg. at 49,297-98; *id.* at 67,104-05. These changes "ensure that the Good Neighbor Plan's requirements … that apply to either [power plants] or [other] industrial sources in each of the states for which a stay order has been issued will not take effect while the stay of the SIP Disapproval action as to that state remains in place." *Id.* at 49,297; *see id.* at 67,103. The Interim Rules also confirm that following the conclusion of merits litigation in the cases where the SIP Disapproval Action was stayed, EPA will take "further action" to address the Good Neighbor obligations of these states "consistent with the [courts'] final determinations." *Id.* at 49,297; *id.* at 67,103-04. To address questions about how any eventual "further action" would go about

reinstating emission reduction requirements after judicial review, the Second Interim Rule further clarified EPA's expectation that such an action "would phase in the requirements so as to provide lead times [for compliance] … comparable to the lead times" provided in the Good Neighbor Plan. *Id.* at 67,103-04.

The remainder of the Interim Rules functions to return states covered by the stays to the status quo before the Good Neighbor Plan, which, for some of those states, required returning them to pre-existing compliance programs established by earlier Good Neighbor rules. *Id.* at 49,295-96; *id.* at 67,103-04. EPA also made a handful of other unrelated technical corrections. *Id.* at 49,298-99. The same five sets of Petitioners, who are also challenging the Good Neighbor Plan itself, challenged the two Interim Rules, and those challenges are before the Court here.

ARGUMENT

Petitioners' Statements of Issues identify three different bases for challenge here: first, that the Interim Rules "allow" the Good Neighbor Plan to continue to operate, despite the Plan's purported flaws; second, that the Interim Rules failed to reconsider the Good Neighbor Plan in light of the judicial stays; and third, that the Interim Rules did not toll "lead times" for complying with possible future emission reduction obligations under the Good Neighbor Plan. These issues cannot be lawfully raised here – whether because they are untimely collateral attacks, are barred by statute, or are unripe, or because Petitioners lack standing to bring them.

So these petitions must be dismissed. At minimum, though, the circumstances warrant abeyance.

I. Petitioners' claims that the Interim Rules are arbitrary and capricious because they "allow" implementation of the allegedly unlawful Good Neighbor Plan are untimely and impermissible challenges to a separate agency action.

Although Petitioners here purport to challenge the Interim Rules, their filings in this case to date indicate that the majority of Petitioners' objections are to the original design of the Good Neighbor Plan – not to any action taken in the Interim Rules.[6] Petitioners cannot lawfully attack the Good Neighbor Plan in these petitions: such challenges are time-barred collateral attacks and any injury associated with those challenges is neither traceable to the Interim Rules nor redressable by this Court.

A review of Petitioners' Statements of Issues demonstrates that Petitioners' primary focus is not the Interim Rules at all, but EPA's basis for issuing the Good Neighbor Plan in the first place. For example, Petitioner Kinder Morgan says it will brief:

> Whether the [First Interim] Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because it allows the continued implementation of the [Good Neighbor Plan], in which

[6] Petitioners' Statements of Issues in their consolidated challenges to the Second Interim Rule are not due until December 20, 2023, and thereafter. ECF 2027795. But as the petitioners are identical and the two Interim Rules are also functionally identical (apart from the covered states), there is no reason to believe the Statements will diverge between the two cases.

> EPA relied upon an incomplete, unverified, and uncertain data set to inform its decision to regulate NOx emissions from the interstate transportation of natural gas pipeline industry.

Kinder Morgan Statement, ECF 2025147 at 2-3. Petitioner American Forest & Paper Association ("AFPA") says it will brief, *inter alia*:

> Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because it allows the continued implementation of the [Good Neighbor Plan], in which EPA changed the criteria it proposed for including a sector in the rule, including its $7500/ton cost-effectiveness threshold for mandated NOx controls, without providing notice and an opportunity for comment.

AFPA Statement, ECF 2025122 at 3. Likewise, Midwest Ozone Group's ("MOG") Statement of Issues includes such issues as:

> Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because it allows the continued implementation of the [Good Neighbor Plan], in which EPA failed to properly address units with a common stack in establishing emission control and monitoring requirements for those units.

And:

> Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because it allows the continued implementation of the [Good Neighbor Plan], in which EPA's air quality modeling failed to rely on correct emission inventories and failed to account for unique meteorological conditions caused by land-water interface resulting in an erroneous assessment of nonattainment areas and significant contribution as required by the Good Neighbor Provisions [sic] of the Clean Air Act.

MOG Statement, ECF 2025118 at 3-4. These are only a sampling of the twenty different issues Petitioners raise that, like these, claim to challenge the Interim

Rules on the basis that they "allow[] the continued implementation" of the *Good Neighbor Plan* "in which" EPA has made certain purported errors.

Most of Petitioners' challenges thus, on their face, simply seek a second forum in which to raise challenges to the basic lawfulness of the Good Neighbor Plan. Those challenges are plainly barred because they fall outside the Act's sixty-day jurisdictional window for challenging the Good Neighbor Plan. 42 U.S.C. § 7607(b)(1). The Interim Rules do not impose *any* compliance obligations under the Good Neighbor Plan on *any* source – rather, they temporarily suspend them. Petitioners cannot challenge the legal or factual foundation for regulatory obligations that are in no way promulgated by these Interim Rules (not to mention, issues that EPA specifically stated it was not reopening in actions intended only to effectuate the judicial stay orders, 88 Fed. Reg. at 49,300; *id.* at 67,105). Instead, Petitioners' claims "'depend on the [in]validity'" of the Good Neighbor Plan itself, and "expressly 'assum[e]' the illegitimacy" of that action. *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (quoting *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 1584, 1599 (2014)). "That is the hallmark of an improper collateral attack," *id.*, so Petitioners' "untimely arguments" against features of the Good Neighbor Plan "lie beyond [this Court's] jurisdiction." *Id.* at 335.

Petitioners also lack standing to bring these challenges. To have Article III standing, Petitioners must demonstrate that any (purported) injury is "fairly

traceable to the challenged conduct," and "likely to be redressed by a favorable judicial decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). Even assuming that Petitioners could establish that these regulatory requirements harm them (which, at this preliminary stage, they have not), their alleged harms are not traceable to the Interim Rules and would not be redressed by a favorable decision here. Those sources subject to NO_X emission requirements are governed by the Good Neighbor Plan, not the Interim Rules – which only addresses the obligations of sources currently excluded from the Good Neighbor Plan by the effect of the judicial stays. So any harm these Petitioners claim from, for example, EPA's cost-effectiveness thresholds and air quality modeling is traceable to the Good Neighbor Plan alone. Indeed, vacatur of the Interim Rules would necessarily leave the Good Neighbor Plan in place and, if anything, have the effect of temporarily expanding, not minimizing, the Plan's alleged regulatory harms by eliminating the administrative mechanism by which several states' obligations under that action have been suspended.

Accordingly, the Court lacks jurisdiction over Petitioners' impermissible and untimely collateral attacks on the Good Neighbor Plan.

II. Petitioners' claims that the Interim Rules failed to appropriately reconsider the Good Neighbor Plan are impermissible attempts to avoid the Clean Air Act's administrative exhaustion requirements.

Nor can the petitions be saved by Petitioners' second set of anticipated arguments, which assert that the Interim Rules are unlawful because they allow for the continued implementation of the Good Neighbor Plan in some states despite judicial stays in other states. Petitioners claim, for example, that the First Interim Rule is arbitrary and capricious:

- Because it allows "continued implementation" of the Good Neighbor Plan, even though the Plan "is based on disapprovals" of some state plans that have been stayed, Kinder Morgan Statement, ECF 2025147 at 2; AFPA Statement, ECF 2025122 at 1-2; MOG Statement, ECF 2025118 at 1-2; AEC Statement, ECF 2025157 at 2; NMA Statement, ECF 25127 at 3;

- Because EPA did not "examine the effect of removing and altering the requirements of the Federal Good Neighbor Plan," AEC Statement, ECF 2025157 at 2; NMA Statement, ECF 25127 at 2;

- And because the "judicial stays have invalidated EPA's state-plan disapprovals that formed the legal basis for EPA's entire [Good Neighbor Plan]," AEC Statement, ECF 2025157 at 1-2; NMA Statement, ECF 25127 at 2.

As an initial matter, it is unclear how EPA's *mandatory* compliance with court orders could be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Cf. Rancho Vista del Mar v. United States*, 640 F. Supp. 3d 112, 122 (D.D.C. 2022) (concluding that because an agency was following "an unambiguous statutory and executive command … its actions cannot be considered arbitrary and capricious"); ECF 2026767 at 25 (Petitioners' acknowledgement that the First Interim Rule "merely responds to judicial stays

without further analysis"). EPA followed those judicial orders to the letter and was required to do no more.[7] *See* 88 Fed. Reg. at 49,299 ("With respect to the portions of this action that respond to the stay orders, the EPA has no discretion as to the regulatory revisions that stay the effectiveness of the Good Neighbor Plan's requirements for sources in the states covered by stay orders."). In any event, the Court cannot consider this basket of arguments, which baldly seek to compel the invalidation of the Good Neighbor Plan in states *without* any stay order – and, where no one is disputing the lawfulness of EPA's state plan disapprovals – without proper merits adjudication of the Good Neighbor Plan itself.

Petitioners' complaints that the Interim Rules do not reconsider the advisability of the Good Neighbor Plan also run afoul of the statutory requirements in the Clean Air Act concerning administrative exhaustion. Section 7607(d)(7)(B) of the Clean Air Act bars judicial review of objections that were not first raised with reasonable specificity during the Agency's public comment period. 42 U.S.C. § 7607(d)(7)(B). If the grounds for those objections "arose after the period for public comment (but within the time specified for judicial review)" – as all but two of the stays of EPA's SIP Disapproval Action did, *supra* n.3 – or were

[7] Notably, this Court has already rejected petitioners' claims in the *Utah v. EPA* Good Neighbor Plan litigation that the Plan must be stayed in *all* states in light of the judicial stays suspending its application in some states. *See, e.g.*, Enbridge Stay Mot., ECF 2011121 at 21-22; Ohio Stay Mot., ECF 2008555 at 13-15; Order, ECF 2018645 at 1 (denying stay of the Good Neighbor Plan).

"impracticable" to raise during the comment period, 42 U.S.C. § 7607(d)(7)(B), "the party challenging the agency action 'still must petition EPA for administrative reconsideration before raising the issue before this Court.'" *Wisconsin v. EPA*, 938 F.3d 303, 331 (D.C. Cir. 2019) (citing *EME Homer City Generation v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015)). Other Clean Air Act challenges based on "post-rulemaking events" likewise require that parties exhaust those issues before EPA prior to seeking judicial review. *See Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 645 (D.C. Cir. 2019); *Wisconsin*, 938 F.3d at 331.

Petitioners' attempt to use these petitions as a backdoor to secure judicial review of their purported grounds for substantive reconsideration of the Good Neighbor Plan as a whole – without exhausting the administrative process – is foreclosed by statute and precedent. These challenges, no matter how they are styled, assert that EPA should have reconsidered the legal and policy foundation for the Good Neighbor Plan itself. Until EPA acts on administrative petitions for reconsideration presenting information on how and why the judicial stays warrant (discretionary) revisions to the Good Neighbor Plan beyond the scope of the existing stay orders, petitioners may not raise these objections before the Court.

Once again, these legal defects likewise doom Petitioners' Article III standing. Even if this Court were to vacate the Interim Rules (or remand them without vacatur), it could not vacate the Good Neighbor Plan, which is not under

review here. *See* 42 U.S.C. § 7607(d)(9) (identifying the bases on which the Court can reverse "such action" under "review"); *cf.* 88 Fed. Reg. at 49,300; *id.* at 67,105 (explaining that the Interim Rules do not reopen the Good Neighbor Plan). So Petitioners cannot establish that their purported harms from compliance with the Plan are redressable here, meaning that this Court lacks jurisdiction over those arguments and supporting dismissal. *See Lujan v. Defs. of Wildlife*, 504 U.S. at 561.

III. Petitioners lack standing to assert that the Interim Rules fail to ensure adequate lead times for compliance with the Good Neighbor Plan, and those claims are unripe.

Petitioners' initial filings in the *National Mining* cases identify only a single objection they plan to raise to the Interim Rules themselves: that the Rules "fail[] to stay the running of the lead times that are related to the future actions called for by the [Good Neighbor Plan.]" AFPA Statement, ECF 2025122 at 5; MOG Statement, ECF 2025118 at 4-5 (same); Kinder Morgan Statement, ECF 2025147 at 2 (claiming the Rule is unlawful because "it did not expressly extend the compliance date of May 1, 2026" for particular requirements in the Good Neighbor Plan "in states where judicial stays are in effect"). But Petitioners lack standing to bring this claim because they lack any injury-in-fact.

To have Article III standing, Petitioners bear the burden to establish that they have suffered an injury-in-fact that is "concrete and particularized" as well as

"actual and imminent." *Lujan*, 504 U.S. at 560-61; *Carney*, 141 S. Ct. at 498. The Supreme Court has clarified that an injury-in-fact must be concrete in "both a qualitative and temporal sense" and cannot be "abstract." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). While "one does not have to await the consummation of threatened injury to obtain preventive relief," the injury must, at a minimum, be "certainly impending." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). "Conjectural" or "hypothetical" injury does not meet this standard, *Lujan*, 504 U.S. at 560-61; for this reason, even "reasonable fear of *future* harmful government conduct" is insufficient to establish injury-in-fact. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Petitioners' suggestion that they are harmed by the Interim Rules' purported failure to ensure adequate lead time for "future actions called for" by the Good Neighbor Plan falls far short of these standards. To begin, the very purpose of the Interim Rules was to suspend all requirements applicable to Petitioners in the stay states, so those sources are not presently subject to *any* requirements under the Good Neighbor Plan. Whether those obligations will be reimposed, and on what timelines, is, at present, necessarily conjectural. If Petitioners prevail in their suits challenging the SIP Disapproval Action or the Good Neighbor Plan, they may *never* be subject to compliance deadlines under the Plan. And if EPA prevails, the actions it will take to implement the relevant merits decisions – including making

new revisions to the regulatory text amended by the Interim Rules to reset compliance deadlines – and the timeframe(s) on which it will do so are presently unknown. Either way, these theoretical future events are neither concrete nor "certainly impending."

Moreover, Petitioners' fear that, if EPA prevails in litigation, it *may* impose deadlines that provide inadequate lead time – in addition to being impermissibly speculative – is also contrary to the evidence. *Cf. Clapper*, 568 U.S. at 408 (rejecting even "reasonable" fear of future government action). The Interim Rules make clear that no compliance obligations under the Good Neighbor Plan will come into force in stay states without another EPA action setting forth appropriate deadlines. *Id.* at 49,297; *id.* at 67,103-04. EPA explained that it could not reasonably pre-establish how those obligations would be revived in a future rule, *id.*, given the uncertainty associated with the merits rulings guiding its action. But the Agency has also clarified that any potential future rule reviving the Good Neighbor Plan in a stay state will "phase in the requirements so as to provide lead times to implement the Good Neighbor Plan's identified emissions control strategies comparable to the lead times that the Good Neighbor Plan would have provided in the absence of the stay, thereby giving parties sufficient time to prepare for implementation." *Id.* at 67,103-04. Petitioners cannot claim they are imminently and concretely harmed by EPA's failure to "stay the running of lead

times" where EPA has confirmed its intent to provide "comparable" lead times in any future rule. Petitioners must do more than tilt at windmills to establish Article III standing.

For the same reasons, these claims are unripe. The "ripeness analysis 'bears close affinity' to the question of standing," *Weissman v. Nat'l R.R. Passenger Corp.*, 21 F.4th 854, 860 (D.C. Cir. 2021) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)), and asks a court to evaluate "both (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *In re Al-Nashiri*, 47 F.4th 820, 826 (D.C. Cir. 2022) (internal quotation omitted). This Court has thus held that "'[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

For the reasons noted above (and additional reasons of timing noted below), Petitioners cannot establish "hardship" from withholding judicial review of their allegations that a future EPA rule will provide insufficient compliance lead times. And these petitions are plainly unfit for decision for the same reason. This allegation rests entirely on "contingent future events" that EPA's statements show are unlikely to take the shape Petitioners claim, and "indeed may not occur at all." As such, this dispute has not "'crystallized' sufficiently for purposes of judicial

review." *Id.*; *see Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) ("Considerations of hardship that might result from delaying review [based on prudential ripeness] will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions." (quotation omitted)). If and when states are returned to the Good Neighbor Plan and EPA takes final action to establish emission reduction requirements for sources in those states, Petitioners may raise any disputes they have about the new compliance timeframes provided – and the Court may review that dispute on a substantive factual record. Until then, any petition that depends on such an argument must be dismissed as unripe.

IV. Even if the Court has jurisdiction and Petitioners have standing, the circumstances warrant abeyance.

Even if this Court were to deny EPA's request for dismissal, the circumstances here clearly counsel in favor of abeyance.[8] By their express terms, the Interim Rules are stop-gap actions to implement stay orders that will lift at the conclusion of judicial review. As such, the Interim Rules, like the stays themselves, are only temporary and do not purport to establish either the final list of states that will be subject to the Good Neighbor Plan or the ultimate timing of compliance obligations for states whose obligations are presently suspended. As

[8] The United States proposes that consolidation of these cases would also be appropriate, as these rules are practically identical and consolidation will facilitate administration of the proposed abeyance.

the Rules themselves make clear, those determinations will come only upon the conclusion of the state plan litigation: "After the courts have reached final determinations on the merits in [the SIP Disapproval Action] proceedings … the EPA will take further action consistent with the final determinations." 88 Fed Reg. at 67,103; *id.* at 49,297.

As noted above, the interim nature of these ministerial actions undermines the basis for Petitioners' legal claims here. But, at a minimum, it counsels in favor of abeyance, lest the parties and the Court expend significant resources on ephemeral disputes that will be decided or mooted (or at least substantially altered) by final resolution of Petitioners' challenges in the SIP Disapproval Action and Good Neighbor Plan cases. Indeed, it is unlikely that this Court could even render a decision in this matter before the judicial stays in the regional circuits lift, the bases for these Interim Rules dissolve, and EPA is compelled to take new action – one way or another – to replace the Interim Rules with whatever final actions are appropriate to reintegrate states into or remove states from the Good Neighbor Plan. Because only final resolution of the litigation over the SIP Disapproval Action and Good Neighbor Plan will determine what regulatory regime will govern Petitioners, judicial efficiency counsels in favor of holding these challenges in abeyance until those questions are answered.

Abeyance also would not prejudice any party. Nearly all of the issues Petitioners have identified as the focus of their challenges here have also been raised by these Petitioners in the *Utah v. EPA* Good Neighbor Plan litigation (including claims concerning the altered scope of the Plan, though, as noted above, EPA believes those challenges are barred in any judicial forum as they have not been exhausted before the Agency). So Petitioners would not be deprived of judicial review, even if briefing in this matter is abated.

And as noted above, all of Petitioners' concerns will almost certainly be resolved or mooted by the conclusion of litigation over the SIP Disapproval Action and Good Neighbor Plan before this Court could rule in this matter, so abeyance will not alter the overall timeline for resolution of these issues. That is also true of the sole issue Petitioners identified here that was not raised elsewhere: Petitioners' claim that the Interim Rules do not stay "the running of lead times" for possible future compliance with the Good Neighbor Plan. Concerns about the timing of future compliance obligations could be entirely mooted should petitioners secure vacatur of the SIP Disapproval Action or Good Neighbor Plan as to particular states – at which point Petitioners might end up with no obligations at all, pending whatever appropriate rulemaking action EPA takes on remand – so judicial efficiency would be served by abeyance. And if instead EPA were to prevail in those suits, its "future action bringing the Good Neighbor Plan's requirements into

effect after a stay," 88 Fed. Reg. at 67,103, would make any concerns about adequate lead time to comply with the Good Neighbor Plan, if any, concrete controversies that could be addressed by this Court at that future point.

Because the matters at issue here will find their final resolution in other judicial and agency actions, indefinite abeyance is appropriate here – absent dismissal of these petitions – to preserve the Court's and the parties' resources.

* * *

For these reasons, Respondents respectfully request that this Court dismiss these petitions for lack of jurisdiction and standing. In the alternative, Respondents request that this Court place these petitions in abeyance to allow for the resolution of underlying and related litigation that will very likely resolve or moot the challenges raised here.

DATED: December 8, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 5,147 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ *Elisabeth H. Carter*
ELISABETH H. CARTER

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion have been served through the Court's CM/ECF system on all registered counsel this 8th day of December, 2023.

/s/ *Elisabeth H. Carter*
ELISABETH H. CARTER