ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1157 and consolidated cases

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

STATE OF UTAH,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

PETITION FOR REVIEW OF A FINAL AGENCY ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL AND PUBLIC HEALTH RESPONDENT-INTERVENORS' COMBINED RESPONSE IN OPPOSITION TO THE MOTIONS FOR STAY

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GLOSSARY

EPA	U.S. Environmental Protection Agency
INGAA	Interstate Natural Gas Association of America
Joint Movants	American Forest & Paper Association, America's Power, Associated Electric Cooperative, Inc., Deseret Power Electric Cooperative, Midwest Ozone Group, National Mining Association, The National Rural Electric Cooperative Association, Ohio Valley Electric Corporation, The Portland Cement Association, Wabash Valley Power Alliance
NOx	Nitrogen oxides
RIA	EPA, *Regulatory Impact Analysis for Final Federal Good Neighbor Plan* (2023), EPA-HQ-OAR-2021-0668-1115
Rule	Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023)

INTRODUCTION

Power plants and other large industrial facilities are massive emitters of nitrogen oxides or "NOx"—a dangerous and pervasive air pollutant. The wind blows NOx pollution long distances across state borders. *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014) ("*Homer II*"). Along the way, it reacts with sunlight to form ozone, or smog, which can cause immediate breathing problems, disease, other serious health harms, and premature death in downwind states. Tens of millions of Americans, including children and older people, are forced to breathe unhealthy air in smog-choked communities across the country. *See infra* III-A.

The Clean Air Act's "Good Neighbor Provision" requires upwind states to eliminate emissions that significantly contribute to air quality problems in other states. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). But states too often fail in this duty to their neighbors; and when they fail, the Act requires EPA to step in to protect downwind communities. *See id.* § 7410(c)(1).

The rule under review implements EPA's statutory responsibility to ensure polluting upwind facilities take reasonable measures to limit emissions that are unfairly harming people downwind. 88 Fed. Reg. 36,654 (June 5, 2023) ("Rule") (Ex. A). The Rule follows a well-worn, judicially-confirmed path. EPA used the same framework it has employed for decades in prior Good Neighbor rules to

identify cost-effective pollution controls and define upwind sources' obligations. *See id.* at 36,659; *see also, e.g.*, *Homer II*, 572 U.S. at 524; *Midwest Ozone Grp. v. EPA*, 61 F.4th 187, 189-90 (D.C. Cir. 2023). The Rule's full range of requirements does not phase in until 2026 or later, with *no* emissions-reduction obligations for sources other than power plants before 2026. *See* Rule at 36,755, 36,758. Near-term requirements for power plants are minimal, reflecting better use of pollution controls that plants *have already installed* and modest upgrades. And the Rule's compliance pathways are flexible and familiar.

The Rule is overdue and still short of what is needed to address unhealthy ozone pollution levels—but it is an urgently necessary step. It will save thousands of lives, make it easier for millions of Americans to breathe, and provide near-immediate relief to communities across the country, with benefits far exceeding costs every year. *See id.* at 36,851.

Nonetheless, some states and industries covered by the Rule would prefer that upwind polluters not do their fair share to reduce out-of-state harms—or at least to have "the associated costs … borne instead by the downwind States" for a while longer. *Homer II*, 572 U.S. at 496. There are six pending motions to stay the Rule's public health protections in whole or in part. The Court should deny all of them. None meets the high bar for such extraordinary relief. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Any stay would prolong the health and

economic burdens on downwind communities of uncontrolled ozone pollution. Every American breathing air downwind of regulated polluters has a strong interest in continued implementation of this life-saving Rule.

BACKGROUND

The statutory and regulatory background are set forth in EPA's response.

ARGUMENT

Movants have failed to meet their high burden to justify the Court's awarding extraordinary relief. All four factors this Court examines in considering whether to grant a stay—(1) likelihood of success on the merits, (2) irreparable injury absent a stay, (3) injury to other parties from a stay, and (4) the public interest—weigh strongly against issuance here. *See Nken*, 556 U.S. at 434.

I. MOVANTS ARE UNLIKELY TO SUCCEED ON THE MERITS.

"Generally, a reviewing court must affirm ... EPA's rules if the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Midwest Ozone Grp.*, 61 F.4th at 192 (cleaned up). And the Court "must [defer] to ... EPA's evaluation of scientific data within its technical expertise, especially" in "EPA's administration of the complicated provisions of the Clean Air Act." *Maryland v. EPA*, 958 F.3d 1185, 1196 (D.C. Cir. 2020) (cleaned up). None of the movants is likely to satisfy that high standard. *See Nken*, 556 U.S. at 434.

A. Requirements for Industrial Polluters Are Lawful.

The Rule's standards for industrial polluters are statutorily authorized, based on proven control measures, and well supported by the record.

1. There Is No Major Question.

Enbridge claims the Rule violates the major questions doctrine by regulating industrial polluters, and pipeline engines specifically. ECF#2011121 at 10-13. But none of the "indicators from … previous major questions cases are present here." *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (cleaned up). EPA has included controls for pipeline engines in prior Good Neighbor rulemakings. *See, e.g.*, 63 Fed. Reg. 57,356, 57,418 (Oct. 27, 1998); 69 Fed. Reg. 21,604, 21,618 (Apr. 21, 2004). And this Court has affirmed that EPA not only *may* "develop[] a rule … cover[ing] additional sectors" beyond power plants but *must* do so where necessary to ensure upwind states meet Good Neighbor obligations. *Wisconsin v. EPA*, 938 F.3d 303, 319 (D.C. Cir. 2019).[1] Indeed, the Good Neighbor Provision requires EPA to regulate "*any* source or other type of emissions activity" that contributes significantly to prohibited pollution downwind. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). The approach Congress chose is not limited by type or size, and plainly encompasses large industrial polluters. *See*

[1] For these same reasons, Ohio's claim that EPA did not justify regulation of industrial polluters fails. *See* ECF#2008555 at 15.

Homer II, 572 U.S. at 499; S. Rep. No. 101-228, at 21 (1989) (broad text "makes the provision effective in prohibiting emissions from, for example, multiple sources, mobile sources, and area sources"). Enbridge fails to show its dispute over regulation of pipeline engines is anything "extraordinary." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

2. Requirements for Industrial Polluters Are Feasible and Well Supported.

Movants allege various technical flaws in EPA's analysis supporting requirements for industrial polluters. None augurs merits success.

Pipeline Engines: Contrary to movants' claims (ECF#2009932 at 7-12 (INGAA); ECF#2011451 at 8-13 (TransCanada)), EPA adequately explained its decision to regulate all pipeline engines with 1,000 or more brake horsepower. All such engines have the potential to emit over 100 tons per year if they have not previously installed NOx controls. *See* EPA, *Final Non-EGU Sectors TSD* 4-5 (2023), EPA-HQ-OAR-2021-0668-1110 (Ex. B). While infrequently-used engines historically may have emitted less than that, EPA reasonably explained that uniform regulation based on a unit's emissions potential was "appropriate" to prevent operators from "shifting production." Rule at 36,747.

In addition, several movants argue that EPA's cost-effectiveness analysis for pipeline engines was unlawful. *See* ECF#2009932 at 13-20; ECF#2011451 at 13-18; ECF#2011121 at 14-15 (Enbridge); ECF#2009836 at 10-14 (Kinder Morgan).

But EPA's approach to engines was consistent with its treatment of other sources under this and previous Good Neighbor rules. *Cf. Wisconsin*, 938 F.3d at 311. EPA used a marginal cost threshold of $7,500 per ton as a "proxy to identify cost-effective emissions control opportunities." Rule at 36,746. That value was "not intended to represent the maximum cost any facility may need to expend," but instead to identify controls that are cost-effective *on average*. *Id*. Indeed, movants do not dispute that the average cost of the engine controls is $4,981 per ton—well *below* EPA's $7,500 threshold. *See id.* at 36,739 tbl.V.C.2-3.

Finally, Kinder Morgan (ECF#2009836 at 17-20), Enbridge (ECF#2022221 at 17-19), and TransCanada (ECF#2011451 at 18-19) wrongly claim the Rule's compliance timeline is unreasonable. The record amply demonstrates that far fewer engines need to retrofit with pollution controls than movants allege and that the three-year timeline is generous—particularly given the option for a one-year extension and other flexibilities. *See infra* II-B.

Cement Kilns: Joint Movants complain that EPA "falsely assumed cement kilns are not currently controlling their emissions," but fail to identify any enforceable requirement that they operate controls. ECF#2010655 at 11-12. If most kilns are already equipped to comply with the Rule, as movants allege, required emissions reductions are readily achievable.

Paper Industry: Joint Movants argue that regulating paper-industry boilers is arbitrary because associated pollution reductions, considered alone, will be small. *See* ECF#2010655 at 13. But "it is often impossible to say that any single source or group of sources is the one which actually prevents attainment downwind," *Homer II*, 572 U.S. at 498-99 (cleaned up), and EPA reasonably determined that the collective impact of industrial polluters, including boilers, was significant. *See* Rule at 36,739 tbl.V.C.2-1.

Nor is there any flaw in EPA's determination that selective catalytic reduction is feasible for paper-industry boilers. *Cf.* ECF#2010655 at 13. In comments (at 22-23), movant American Forest & Paper Association acknowledged that "[selective catalytic reduction] is a well-demonstrated NOx control technology" that most paper-industry boilers can employ. ECF#2010655, Ex. E. EPA adequately addressed industry concerns by exempting certain boilers (Rule at 36,833) and authorizing requests for alternative emissions limits in cases of "technical impossibility." 40 C.F.R. § 52.40(e)(1).

Steel Industry: Joint Movants claim that certain steel units cannot "install [controls] by 2024." ECF#2010655 at 12-13. The pollution-control deadline, though, is in *2026*; units need only submit a *work plan* in 2024. 40 C.F.R. § 52.43(d).

B. Partial Judicial Stays of Distinct Agency Actions Do Not Render the Rule Arbitrary.

Joint Movants (ECF#2010655 at 14-17) and Ohio et al. (ECF#2008555 at 13-15) raise various arguments regarding partial judicial stays of EPA's action disapproving 21 Good Neighbor state plans, 88 Fed. Reg. 9336 (Feb. 13, 2023), and EPA's interim action to implement some of those orders, 88 Fed. Reg. 49,295 (July 31, 2023). But partial judicial stays in challenges to a separate action do not transform this well-supported Rule into an arbitrary one.

First, movants have failed to justify their reliance on extra-record materials. Under the Clean Air Act's exhaustion requirement, 42 U.S.C. § 7607(d)(7)(B), if parties have an objection that "arose after the period for public comment (but within the time specified for judicial review)," *id.*, they normally "must [still] petition EPA for administrative reconsideration before raising the issue before this Court." *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015) ("*Homer III*"); *see also Heating, Air Conditioning & Refrigeration Distributors Int'l v. EPA*, 71 F.4th 59, 65 (D.C. Cir. 2023). "Objections raised for the first time in a petition for reconsideration must [then] await EPA's action on that petition." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015) (citation omitted). Movants can also raise concerns regarding partial stays in comments on or challenges to EPA's interim stay action, or in ongoing cases where partial stays have issued; but not here. *See id.*

Second, movants cite no authority for their remarkable proposition that post-hoc, inherently provisional judicial stay orders (or an agency's compliance therewith) could render arbitrary or "eliminate the bases for" well-supported EPA action. ECF#2010655 at 14 (Joint Movants); *see also* ECF#2008555 at 13-14 (Ohio et al.). EPA's analysis of the efficacy and cost-effectiveness of the program did not rely on assumptions of maximum market liquidity (*see* ECF#2010655 at 17) or "imposition of emissions controls to all the States concerned" (ECF#2008555 at 14), as movants suggest. Emissions budgets reflect the cost-effective pollution-control strategies EPA identified—not expectations of interstate trading. *See* Rule at 36,777. Regardless, movants' claims regarding the impacts of partial stays on compliance are false. *See infra* II-C-1; Celebi Decl. ¶¶ 4-9 (Ex. C).

Third, movants allege that the Rule is no longer "equitable" due to the partial stays. ECF#2008555 at 14; ECF#2011121 at 21-22 (Enbridge). But their argument that the obligation to reduce dangerous pollution is not fair because some other states' sources do not yet have to clean up *their* mess fares no better in the courtroom than in the playroom. "Each State must eliminate its own significant contribution to downwind pollution." *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008); *see also* 42 U.S.C. § 7410(a)(2)(D)(i) ("prohibiting … any source" from violating Good Neighbor requirements).

Finally, it cannot be the case, as Joint Movants maintain, that the standard for reasoned decision-making requires EPA to analyze as a "likely scenario" the impacts to regulated industry in the event a regulation is partially stayed. ECF#2010655 at 17. Such a standard would perversely incentivize regulated parties to seek stays in hopes of manufacturing grounds for claims of arbitrariness and would trap agencies in a bizarre analytical loop of presuming their own actions unlawful.[2]

The Court should reject all movants' arguments regarding the partial judicial stays.

II. MOVANTS WILL NOT SUFFER IRREPARABLE HARM.

To justify a stay, movants must demonstrate harm that is "imminen[t]," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006), "certain and great," and "directly result[ing] from the [Rule]." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). No movant meets this high bar.

[2] EPA has argued, and intervenors here maintain, that this Court is the proper venue for challenges to EPA's state-plan disapproval action and that stays are unwarranted. *See, e.g.*, Sierra Club & Appalachian Mountain Club Amicus Br., *West Virginia v. EPA*, No. 23-1418 (4th Cir. Aug. 2, 2023), #32-2. Movants' efforts now to deploy the smattering of partial stays by other courts to obtain from this Court a stay of the Rule itself only highlights how challengers' multi-circuit campaign defies Congress' intent that this Court be the exclusive venue for review of such actions. *See* 42 U.S.C. § 7607(b)(1).

A. The Rule Does Not Threaten Power Reliability.

The Court should reject movants' attempt to invoke the specter of reliability threats to delay and evade regulation. EPA carefully considered reliability during rulemaking, and the Rule does not jeopardize reliability. Movants' contrary claims are unfounded and speculative and cannot justify a stay. *See Wisconsin Gas*, 758 F.2d at 674.

First, movants fail to show the Rule threatens reliability, let alone within the time period relevant for stay purposes. Requirements for power plants phase in gradually and are minimal in the near term. *See* Rule at 36,657. Emissions budgets for 2023-2024 reflect plants' fully operating existing post-combustion controls (which they do not always activate) and taking "very modest" steps to install or update combustion controls. Celebi Decl. ¶ 8 (costs typically less than $1 per megawatt-hour for coal plants); *see also* Rule at 36,720, 36,724. Budgets do not reflect retrofitting with new post-combustion controls until 2026-2027—and most plants have already installed such controls. *Id.* at 36,657; Sahu Decl. ¶¶ 9-10, 15, 24 (Ex. D). Plants "have substantial flexibility in choosing among various low-cost options to comply." Celebi Decl. ¶ 4; *see also* Silva Decl. ¶ 19 (Ex. E); Sahu Decl. ¶ 14.

Joint Movants' claims that the Rule's very modest near-term requirements will cause "immediate" threats to reliability strain credulity. Alban Decl. ¶¶ 24-25.

Recent emissions data show the vast majority of plants likely can meet those near-term requirements with *no changes*, and others can feasibly comply through purchasing allowances, optimizing existing controls, and/or modest upgrades that "are not likely to adversely affect the [plant's] overall economics." Sahu Decl. ¶¶ 17-37; *see also* Silva Decl. ¶¶ 12-17. State movants' claims that people "potentially" may be "unable to heat or cool their homes" is speculation unsupported even by movants' own declarations. ECF#2008555 at 20-21. No movant offers a credible claim of imminent reliability harm from the Rule because there is none.

Second, even looking ahead to 2026-2027 compliance, movants fail to show nonspeculative reliability threats. Movants claim that the Rule's longer-term requirements will be burdensome, so some plants may instead retire; that unspecified premature retirements will be disruptive; and that replacement resources will be less reliable. *See, e.g.*, ECF#2010655 at 21 (Joint Movants); Alban Decl. ¶ 27; Lane Decl. ¶¶ 9-18. That string of assumptions is speculative at best. In fact, EPA thoroughly analyzed reliability impacts, Rule at 36,770-75, "worked extensively with affected regional transmission organizations," Silva Decl. ¶ 18, consulted with the Department of Energy, *id.* ¶ 20, and implemented changes to "ensure[] that [the Rule] will not create electric reliability concerns," Rule at 36,679. The resulting Rule is not expected to cause significant plant

retirements; indeed, the few coal plants that EPA assumed would retire likely will do so "regardless of the Final Rule" for economic reasons. Silva Decl. ¶¶ 18, 21; *see also* Susan Tierney, *U.S. Coal-Fired Power Generation: Market Fundamentals as of 2023 and Transitions Ahead* (2023) (Ex. F) (trend away from coal-fired power will likely accelerate). Even assuming *arguendo* that a company does decide to retire a plant, a transition away from coal "will improve overall system reliability, energy security, and resiliency." Silva Decl. ¶ 18; *see also id.* ¶¶ 21-23. And while highly unlikely, if a reliability emergency does occur, appropriate federal and regional mechanisms are in place to ensure that emissions limits do not impede reliability. *Id.* ¶ 20.

State movants attempt to bolster their claims with reference to challenges associated with the industry's broader transition away from coal-fired power (*see* Lane Decl. ¶¶ 13-15) but fail to show the Rule would cause such phenomena.[3] Movants' description of a recent reliability emergency is equally irrelevant. *See* ECF#2008555 at 20-21. Movants' own evidence shows that emergency was principally due to fossil-fuel plants' "operating difficulties due to

[3] Ohio cites a PJM Interconnection report discussing possible low-reliability scenarios between now and 2030. *See* ECF#2008555 at 20. But PJM's analysis is flawed. *See* James F. Wilson, Wilson Energy Econ., *Maintaining the PJM Region's Robust Reserve Margins* (2023) (Ex. G).

cold weather or fuel limitations"—not pollution-control requirements. Hodanbosi Decl., Ex. A at 1.

B. The Rule Does Not Threaten Gas Reliability.

Movants speculate that pipeline engines "may" not meet the Rule's "impossible" 2026 compliance deadline without disruptions in gas supply. ECF#2011121 at 8, 20 (Enbridge); *see also* ECF#2009932 at 21-22 (INGAA); Grubb Decl. ¶ 48. But those claims are groundless. The Rule's compliance timeline is reasonable, and the Rule's precautionary one-year extension option and other flexibilities alleviate any remaining concerns. *See* Staudt Decl. ¶¶ 22-33 (Ex. H); Stamper Decl. ¶ 13 (Ex. I).

First, the Rule's compliance deadline is well supported by EPA's extensive review—including interviews with state permitting authorities and technology vendors—demonstrating the feasibility of completing necessary retrofits on time. Stamper Decl. ¶ 22. Experience in Colorado and other states further supports EPA's determination that operators can retrofit a substantial percentage of their engines over several years. *See id.* ¶ 23. Movants' claims regarding infeasibility are based on a false assertion that EPA "vastly undercounted" the engines that will need controls. ECF#2009836 at 17 (Kinder Morgan); *see also* ECF#2011121 at 17-19. In fact, EPA's determination that only about one-third of the engines covered by the Rule will need to retrofit is well supported, and potentially an

overestimate. Stamper Decl. ¶¶ 17-21. Operators can, if necessary, request extensions (potentially until 2029), 40 C.F.R. § 52.40(d), and/or a less-stringent limit, *id.* § 52.40(e).

Second, claims of "significant [service] interruptions" that "may" occur during retrofitting, ECF#2011121 at 20 (Enbridge), are contradicted by movants' own assertions that many of the "engines affected by the … Rule operate as backup units and are not needed to operate." Yager Decl. ¶ 14. Those backup engines could be used while other engines are offline to retrofit. Stamper Decl. ¶ 25. Similarly, INGAA indicated in its comments that compressor stations are required to have "significant over-capacity," ECF#2009932 at 605a, and the record confirms capacity utilization is about 40%. *See id.* ¶ 26.

Finally, alleged supply chain and logistical challenges are vastly overstated. *See id.* ¶ 24. Experience shows that control installations can "be completed well within three years" even assuming "supply chain delay." Staudt Decl. ¶ 25. If anything, EPA's ultra-conservative timeline estimates, with pandemic-related assumptions, "will prove to be far too long." *Id.* ¶ 27. Control-technology vendors have proven "ab[ility] to respond very quickly to a rapid increase in demand" generated by new regulations. *Id.*; *see also id.* ¶ 22 ("Experience has shown that, while industry commonly claims that resources will not be available, it is consistently the case that they are.").

In sum, "there is absolutely no reason why any operator should have trouble complying with the Rule." Stamper Decl. ¶ 24.

C. Movants Fail to Show Irreparable Economic Harm.

"Where the injuries alleged are purely financial …, the barrier to proving irreparable injury is higher still." *Mexichem*, 787 F.3d at 555. To overcome the Court's presumption that economic loss does not constitute irreparable harm, movants must "make[] a strong showing that the loss would significantly damage its business above and beyond a simple diminution in profits, or demonstrate[] that the loss would cause extreme hardship to the business, or even threaten destruction of the business" during the pendency of litigation. *Air Transport Ass'n of Am., Inc. v. Export-Import Bank of the U.S.*, 840 F.Supp.2d 327, 336 (D.D.C. 2012) ("*ATA*"); *see also Wisconsin Gas*, 758 F.2d at 674. Even unrecoverable costs still must be "great," *Chaplaincy*, 454 F.3d at 297, or "very significant," *In re NTE Connecticut, LLC*, 26 F.4th 980, 991 (D.C. Cir. 2022) ("*NTE*").[4] None of the movants demonstrate losses that are imminent, certain, and severe, so their motions

[4] Most of the movants misstate the legal standard, suggesting that any financial harms demonstrated in a suit against the United States are *per se* irreparable. *See, e.g.*, ECF#2010655 at 18 (Joint Movants). *But see, e.g.*, *Save Jobs USA v. United States Dep't of Homeland Sec.*, 105 F.Supp.3d 108, 114 (D.D.C. 2015) (rejecting argument that any harms are sufficient because "even as little as $1 … would satisfy the standard").

must fail, even before considering the substantial harms their proposed relief would cause to public health and downwind states.[5]

1. Power Companies

Joint Movants fail to support their claims that power companies will incur substantial near-term costs absent a stay. *See* ECF#2010655 at 18-20. Obligations from the Rule during this litigation are very modest. *See supra* II-A. And movants fail to show that costs associated with planning now to comply several years down the road constitute both great and imminent harm justifying a stay. *See Wisconsin Gas*, 758 F.2d at 674. *Cf.* ECF#2010655 at 18; Farah Decl. ¶ 12. While sources that choose to install controls likely need to make some plans before 2026-2027, "every such unit has or should have, at one time or another, seriously evaluated the implementation of [those controls]" before choosing, likely for economic reasons, not to implement them. Sahu Decl. ¶ 12. "[G]iven the pre-planning … and other basic evaluations that have likely already been conducted," implementation could

[5] Ohio et al. allege potential costs to in-state polluters. *See* Hodanbosi Decl. ¶¶ 12, 23; Farah Decl. ¶¶ 12, 15; Lane Decl. ¶ 9. But state movants cannot rely on costs to private businesses as a basis for their harm. *Cf. Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 183 (D.C. Cir. 2019) ("State[s] in general lack[] *parens patriae* standing to sue the federal government"). Even if they could, alleged costs fail to justify a stay for the reasons discussed here. And state movants' other irreparable harm claims are meritless for the reasons discussed in New York et al.'s opposition.

be even easier than EPA presumed—certainly not rising to the level of imminent, irreparable harm. *Id.*

Even if *long-term* compliance costs were relevant to imminent harm, which they are not, movants fail to show these are "certain," *Wisconsin Gas*, 758 F.2d at 673, and "very significant," *NTE*, 26 F.4th at 991. Joint Movants allege that controls required by 2026-2027 are "prohibitively expensive." ECF#2010655 at 18. But that cannot be so, at least as a general matter, since *most of the industry is already using those controls*. *See* Sahu Decl. ¶ 9-10, 15. Furthermore, movants have not demonstrated that alleged near-term costs constitute severe hardship to regulated entities, many of which are profitable corporations with billions of dollars in annual revenues. *See* Prull Decl. ¶¶ 6-11 (Ex. J) ("Compliance costs are a very small fraction of overall revenues."). *Cf. ATA*, 840 F.Supp.2d at 338 (denying motion where "lost revenue would represent less than 7% of ... business").

Joint Movants further allege that partial judicial stays will increase allowance costs and impact the viability of trading markets. *See* ECF#2010655 at 19. But those claims are dubious. "[I]mplementation of the … Rule for the remaining states in the program during the pendency of this litigation would not cause significant economic harm to … affected [power companies] or the states in which they are located." Celebi Decl. ¶ 9. In the wake of partial stays, allowance

prices have "in fact decreased sharply." *Id.* ¶ 6. Allowance prices plummeted after judicial orders disrupting a prior Good Neighbor rule, too, and rebounded to lower levels, which "suggests that [any] regulatory uncertainty … may in fact depress allowance prices, which would lower the cost of compliance." *Id.* ¶ 7; *see also* Silva Decl. ¶ 26. In any event, movants fail to show that any marginal increase in allowance costs could constitute severe harm. Power plants have a variety of compliance pathways available even if they opt to rely on little or no allowance trading. *See* Silva Decl. ¶ 19; Celebi Decl. ¶ 8.

2. Industrial Polluters

Alleged compliance costs for industrial polluters are also likely exaggerated (*see, e.g.*, ECF#2010655 at 20 (Joint Movants)) and in any event fail to meet the threshold of severe and imminent harm.

Crucially, the Rule's emissions-reduction requirements for industrial polluters do not phase in for several years—and even then, polluters facing hardship can seek extensions. *See* Staudt Decl. ¶¶ 20-21, 33. Polluters simply "will not experience significant expenses in the first year after promulgation of the [R]ule." *Id.* ¶ 21. Allegations of significant compliance burdens are also suspect because the relevant control technologies "have been commercially available and … deployed in these applications for decades," *id.* ¶ 5, and the Rule provides

ample compliance time and flexibilities. *Id.* ¶¶ 10-12, 22-29; Stamper Decl. ¶¶ 22-24.

Even if alleged costs were imminent and not exaggerated, tens of millions of dollars over 18 months (*see* ECF#2011121 at 19 (Enbridge); ECF#2009836 at 2, 20 (Kinder Morgan); ECF#2011451 at 20 (TransCanada); ECF#2009932 at 22 (INGAA)) is not "extreme hardship" for movants. *ATA*, 840 F.Supp.2d at 336. Movants are "[some] of the largest energy infrastructure companies and transporters of natural gas in North America" (ECF#2009836 at 1), with annual revenues totaling *billions* of dollars. *See* Prull Decl. ¶¶ 6-11.

III. A STAY WOULD SUBSTANTIALLY HARM OTHER PARTIES AND IS NOT IN THE PUBLIC INTEREST.

Any stay of the Rule would result in more dangerous pollution in nearby and downwind communities and therefore would be contrary to the public interest and intervenors' members' interests. *See Nken*, 556 U.S. at 434; Southerland Decl. ¶ 43 (Ex. K). The Rule's critical and time-sensitive health protections are already long overdue and should not be delayed even a single day.

A. A Stay Would Eliminate Substantial Near-Term Health Benefits.

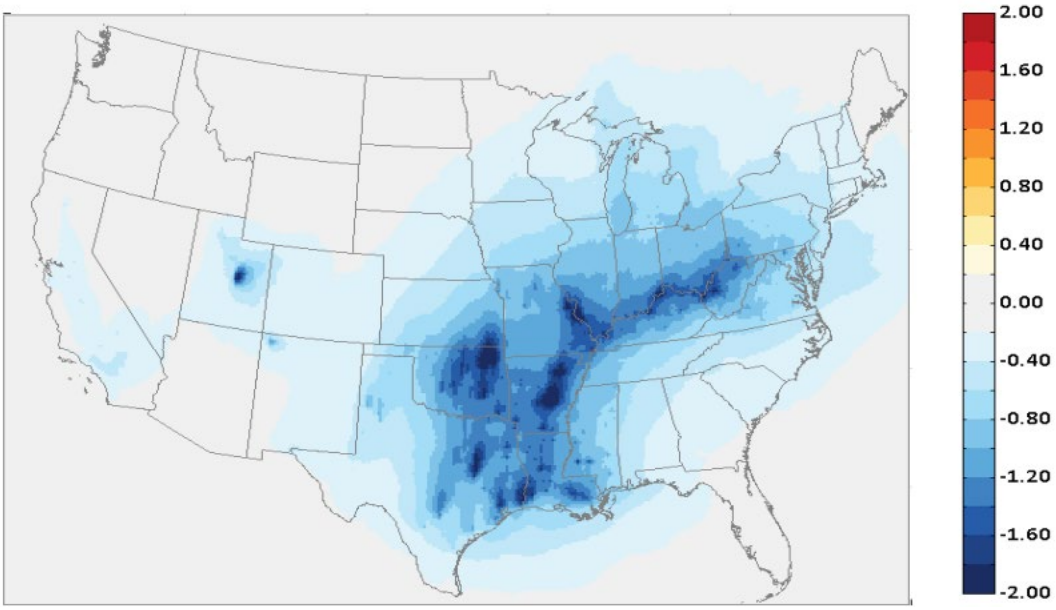
Movants are wrong that "a stay will not harm any other parties." ECF#2010655 at 20 (Joint Movants). The near-immediate pollution reductions the Rule will achieve, simply by incentivizing upwind power plants to utilize already-

existing controls and make modest updates, are hugely important for public health, including for intervenors' members. *See* Southerland Decl. ¶¶ 41-44; Silva Decl. ¶¶ 30-34 (portion of health benefits in 2023 alone have net-present-value of up to $987 million). Those benefits would be lost if a stay were granted.

Most importantly, the Rule will reduce ambient levels of ozone—a corrosive pollutant that irritates the lungs, constricts breathing, exacerbates asthma, and can cause a variety of serious respiratory and cardiovascular illnesses, even premature death. Southerland Decl. ¶¶ 9-25. Tens of millions of people across the country are subjected to unhealthy levels of ozone. *Id*. ¶ 10. Children, people with lung disease, and older people have heightened vulnerability. *Id*. ¶¶ 20-21, 24. The Rule also will result in reductions of other dangerous air pollutants with additional substantial health benefits. *Id.* ¶¶ 26-40; Silva Decl. ¶¶ 30-34.

In the first year of implementation, EPA estimated the Rule would prevent approximately 110,000 asthma attacks, 640 cases of asthma onset, 200 emergency room visits, and 80 premature deaths. Southerland Decl. ¶ 43. By 2026, when requirements are phased in, annual health benefits will increase by an order of magnitude. *See id*. A stay would injure both people downwind, who will continue to suffer from dangerous smog, and people upwind—including in all petitioner states—who will continue to be harmed as sources spew pollution into nearby communities. *See id.* ¶¶ 9-40, 44.

Figure 1: Expected Ozone Reduction Due to Rule in 2026 (parts per billion)[6]



Movants invoke compliance costs, *see, e.g.*, ECF#2010655 at 21 (Joint Movants), but do not impeach EPA's conclusion that the Rule's massive benefits, totaling an estimated $200 billion through 2042, dwarf compliance costs each year. *See* RIA at 214-17; Silva Decl. ¶¶ 30-34. The substantial public interest in the benefits of the Rule far outweighs modest compliance and planning expenditures.

Some movants argue too that because EPA missed its statutory deadline for acting on states' proposed plans, that delay cancels out any harm from a stay. *See* ECF#2020655 at 20; ECF#2008555 at 22 (Ohio et al.); ECF#2011121 at 21 (Enbridge); ECF#2009836 at 21 (Kinder Morgan); ECF#2011451 at 22

[6] EPA, *Regulatory Impact Analysis for Final Federal Good Neighbor Plan* 108 fig.3-14 (2023), EPA-HQ-OAR-2021-0668-1115 ("RIA") (Ex. L).

(TransCanada). EPA's delay should not be held against intervenors, their pollution-exposed members, or the public. Intervenors have been pushing EPA to adopt ozone pollution protections for years, with several even filing lawsuits to compel EPA to take the overdue actions that movants cite here. *See, e.g.*, Compl., *Sierra Club v. Regan*, No. 3:22-cv-01992-JD (N.D. Cal. Mar. 29, 2022). And EPA's delay in no way alters the conclusion that *further* delay would irreparably harm human health. *See, e.g.*, Southerland Decl. ¶ 44. If EPA's delay has any bearing on the Court's determination of where the public interest lies, it would weigh *against* a stay. *See generally* New York et al. Opposition; *Wisconsin,* 938 F.3d at 318-19 (EPA must ensure upwind states eliminate their significant contributions of pollution by the deadline downwind states face for attaining the standard).

B. A Stay Would Jeopardize Long-Term Benefits.

Although the Rule imposes only modest near-term requirements for power plants—and *no* near-term emissions-reduction requirements for industrial polluters—it is vital that the Rule's deadlines for 2026 and beyond remain in effect, to send a strong signal that sources must plan for compliance. Prior experience suggests that, even if the Rule is ultimately upheld, as it must be,

polluters will claim the need for tolled compliance deadlines based on a stay,[7] which could greatly delay needed pollution controls, including those that would not take effect before 2026. *See, e.g.*, Order, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Oct. 23, 2014), ECF#1518738 (following affirmance of EPA's approach, lifting stay of prior Good Neighbor rule but tolling by three years most compliance deadlines); Order, *Michigan v. EPA*, No. 98-1497 (June 22, 2000), ECF#524995 (lifting stay of prior Good Neighbor rule after ruling mostly for EPA on the merits, but extending compliance deadlines by length of stay). If that occurs here, movants will have succeeded in externalizing the costs of their pollution for additional months or years, while people breathing unhealthy air downwind continue to suffer. *Cf.* Staudt Decl. ¶¶ 34-36 (annual industrial-polluter NOx emissions are more than double those of U.S. coal-power fleet). There is no equity in such an outcome.

C. Movants' Other Arguments Also Fail.

Movants' additional arguments that compliance costs "may" be passed onto ratepayers are speculative. *See, e.g.*, ECF#2010655 at 21 (Joint Movants). An increase in costs for an affected power plant does not *ipso facto* increase rates. *See*

[7] Indeed, INGAA and American Petroleum Institute already argue that compliance deadlines should be tolled for *years* (31 months) even after the stay they seek is lifted—despite not knowing, now, the duration or scope of any such stay or their members' compliance capacity on that unknown future date. *See* ECF#2009932 at 25-26.

Silva Decl. ¶¶ 43-48. Any increase in national average rates from the Rule is expected to be less than 1%. *Id.* ¶ 43. Moreover, if companies do "reduce their reliance on … coal-fired generation" as Joint Movants allege will occur, ECF#2010655 at 21, that shift likely would benefit ratepayers because alternative resources generally are cheaper. *See* Silva Decl. ¶¶ 44, 48. Joint Movants' bald assertion claim that "communities … will lose jobs and tax revenue" is likewise a big "if." ECF#2010655 at 21. Those arguments are also incomplete because they fail to include employment gains resulting from the Rule. *See* Silva Decl. ¶¶ 35-37.

* * * *

Because no movant is irreparably harmed by the Rule, while a stay would cause millions of downwind Americans to suffer air pollution harms, the balance of equities and public interest weigh strongly against any stay. *See Wisconsin*, 938 F.3d at 336-37 (remanding without vacatur); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (same); *Homer III*, 795 F.3d at 132 (same).

CONCLUSION

The Court should deny the stay motions.

Dated: August 18, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Combined Response in Opposition to the Motions for Stay contains 5,421 words, excluding exempted portions, and was composed in Times New Roman font, 14-point. I certify that the foregoing complies with applicable type-volume and typeface requirements, including the Court's August 17, 2023 Order, ECF#2013011, as the combined total of the foregoing and the Opposition of Intervenor-Respondents States is fewer than 10,000 words.

Dated: August 18, 2023

/s/ Megan M. Herzog
Megan M. Herzog

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2023 I have served the foregoing Combined Response in Opposition to the Motions for Stay on all registered parties through the Court's electronic case filing (CM/ECF) system.

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