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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

**STATE OF CALIFORNIA, et al.,**

Plaintiffs,

**v.**

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

Defendants.

Case No. 4:18-cv-03237-HSG

**STATES' OPPOSITION TO EPA'S MOTION TO DISMISS**

Date: October 25, 2018
Time: 2:00 p.m.
Courtroom: 2
Judge: Hon. Haywood S. Gilliam, Jr.

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## INTRODUCTION

The undersigned States and state agencies (together, States)[1] oppose defendant United States Environmental Protection Agency's and Acting Administrator Andrew Wheeler's ("EPA") motion to dismiss. In this action, the States seek an order compelling EPA to perform the mandatory duties set forth in its regulations to implement the standards of performance it adopted to control emissions of methane—a powerful greenhouse gas—from qualifying landfills. The deadlines in those regulations having long passed, EPA must promptly review those state implementation plans that have been submitted and must adopt a federal implementation plan for those states that have not submitted a plan.

EPA's lead argument for dismissal is premised on the erroneous notion that Congress prohibited federal courts from remedying EPA's failure to comply with the very regulations that Congress directed EPA to write to implement Clean Air Act section 111(d). 42 U.S.C. § 7411(d). In a case EPA fails to address in its motion, *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544 (D.D.C. 2005), the District Court for the District of Columbia soundly rejected the precise argument EPA makes here: that the phrase "under this chapter" in 42 U.S.C. § 7604(a)(2) does not waive sovereign immunity for EPA's failure to follow the obligations mandated by its own regulations. So too, this Court should reject the argument and deny EPA's motion.

The authorities that EPA relies on do not support a different result. The Ninth Circuit case EPA cites is inapposite. The case merely determined that a particular statutory provision (different from the one at issue in this case) did not create a mandatory duty, whereas here EPA's motion does not dispute that its regulations implementing section 111(d) create such a duty. And the First Circuit case relied on by EPA offers only dicta that *Leavitt* and other cases declined to stretch beyond its bounds.

Nor is EPA's argument consistent with representations it made earlier this year to the D.C. Circuit about district court jurisdiction under 42 U.S.C. § 7604(a)(2). There, EPA told the court that any remedy for its failure to meet the exact same mandatory deadlines to approve or

[1] Plaintiffs are the states of California, Illinois, Maryland, New Mexico, Oregon, Rhode Island, and Vermont, the Commonwealth of Pennsylvania, and the California Air Resources Board.

disapprove state plans for the 2016 landfill emission guidelines and to issue a federal plan, both alleged in the States' Complaint, could *only* be had in district court:

> Although EPA has neither approved nor disapproved the state plans that were timely submitted, nor has EPA promulgated any federal plans, any remedy for EPA's failure to act in this regard would lie in district court. *See* 42 U.S.C. § 7604(a)(2) (providing district courts with exclusive jurisdiction to review claims that EPA has failed to timely perform nondiscretionary duties).

(Respondents' Initial Brief (ECF #1714147) at 37, *Nat'l Res. Def. Council v. Pruitt*, No. 17-1157 (D.C. Cir. Jan. 22, 2018) (attached as Exhibit A to States' Request for Judicial Notice).)

Finally, EPA's Rule 12(b)(6) motion also misunderstands the level of specificity required in a complaint. The States' Complaint alleges as a fact that some states did not timely submit plans to EPA to implement the 2016 landfill emission guidelines.[2] (Compl. ¶¶ 54, 64.) Further, the Complaint alleges that EPA admitted that it did not promulgate a federal plan "for states that failed to submit a state plan." (Compl. ¶ 52 (citing EPA's February 26, 2018, letter to the California Air Resources Board).) These and other facts pled in the Complaint amply inform EPA of the nature of the allegations against it. A motion to dismiss is not a vehicle for determining the truth or falsity of these allegations. Rather, EPA will have that opportunity in a motion for summary judgment or at trial. Therefore, for the reasons discussed below, the States respectfully request that this court deny EPA's motion to dismiss.

## STATUTORY AND REGULATORY BACKGROUND

### I. HISTORY AND FUNCTION OF EPA'S SECTION 111(d) REGULATIONS

#### A. Congress Created Separate, but Related, Regulatory Systems for New and Existing Sources Under Section 111

Congress amended the Clean Air Act in 1970, adding section 111 to direct the EPA Administrator to list categories of stationary sources that "cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1684 (codified as amended at

[2] Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (codified at 40 CFR pt. 60, subpt. Cf) (hereafter "2016 Emission Guidelines").

1 42 U.S.C. § 7411(b)(1)(A)). EPA must prescribe federal "standards of performance" for
2 emissions of pollutants from *new* sources in each category (that is, those sources newly built or
3 significantly modified after the date the standards of performance are promulgated). 42 U.S.C.
4 § 7411(b)(1)(B). As to *existing* sources, Congress directed EPA to "prescribe regulations which
5 shall establish a procedure similar to that provided by section 7410 of this title [Clean Air Act
6 section 110]" under which states would submit implementation plans to EPA. *Id.* § 7411(d). In
7 keeping with that mandate, EPA promulgates standards of performance for existing sources in
8 "emission guidelines," which it issues "[c]oncurrently upon or after proposal of standards of
9 performance" for new sources. 40 C.F.R. §§ 60.21(e), 60.22(a). The emission guidelines provide
10 procedures for states to submit, and for EPA to approve or disapprove, individualized state plans,
11 which specify the standards applicable to sources within a state, along with implementation
12 measures. If a state elects not to submit a state plan, or does not submit a "satisfactory" plan, EPA
13 must promulgate a federal plan that directly limits emissions from the state's sources. 42 U.S.C.
14 § 7411(d)(2).

15 **B. As Directed by Congress, EPA Promulgated Regulations Implementing the**
16 **State Plan Submission and Approval Procedure Mandated by Section 111 Based on the Procedures Congress Established in Section 110**

17 EPA finalized the regulations implementing section 111(d) in 1975, and they have
18 remained largely unchanged since then. 40 C.F.R. part 60, subpart B (§§ 60.20-60.29).[3] In
19 keeping with Congress's directive, and as illustrated by the table below, EPA based the
20 implementing regulations on the procedures set forth by Congress in section 110. State Plans for
21 the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,341/1 (Nov.
22 17, 1975) ("The plan submittal, approval/disapproval, and promulgation procedures are basically
23 patterned after section 110 of the Act and 40 CFR Part 51 (concerning adoption and submittal of
24 State implementation plans under section 110).")

25

26

27 [3] Although the timeframes in section 110 were changed in the 1990 amendments to the
Clean Air Act, EPA continues to operate under the subpart B timeframes it established in 1975
28 and has not amended those regulations.

| **1970 Clean Air Act, § 110** (emphases added) | **40 C.F.R. pt. 60, subpt. B (1975)** (emphases added) |
|---|---|
| 110(a)(2): Each State shall . . . adopt and submit to the Administrator, *within nine months* . . . a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. . . . | § 60.23(a)(1): Unless otherwise specified in the applicable subpart, *within 9 months* after notice of the availability of a final guideline document . . . each State shall adopt and submit to the Administrator . . . a plan for the control of the designated pollutant to which the guideline document applies. |
| 110(a)(2): The Administrator shall, *within four months* after the date required for submission of a plan under paragraph (1), *approve or disapprove* such plan, or each portion thereof. . . . | 60.27(b): . . . The Administrator will, *within four months* after the date required for submission of a plan or plan revision, *approve or disapprove* such plan or revision or each portion thereof. |
| 110(c): The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—<br>(1) the *State fails to submit an implementation plan* for any national ambient air quality primary or secondary standard *within the time prescribed*, [or]<br>(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or<br>. . . .<br>The Administrator shall, *within six months* after the date required for submission of such plan (or revision thereof), *promulgate any such regulations* unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. | 60.27(c): The Administrator will, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth a plan, or portion thereof, for a State if:<br>(1) The *State fails to submit a plan within the time prescribed*;<br>. . . or<br>(3) The Administrator disapproves the State plan or plan revision or any portion thereof, as unsatisfactory because the requirements of this subpart have not been met.<br><br>60.27(d) The Administrator will, *within six months* after the date required for submission of a plan or plan revision, *promulgate the regulations* proposed under paragraph (c) of this section . . . unless, prior to such promulgation, the State has adopted and submitted a plan or plan revision which the Administrator determines to be approvable. |

Like the directives set forth in section 110, the regulatory directives in subpart B are stated in mandatory terms. When it issued these regulations in 1975, EPA explained that the language of section 111(d) compelled it to promulgate regulations committing the agency to substantively reviewing state plans. In response to comments suggesting that EPA need not create these procedures for 111(d) plans because there was a similar state plan approval process set out in section 110, EPA stated, "By its own terms. . . section 111(d) requires the Administrator to

prescribe regulations for section 111(d) plans." 40 Fed. Reg. at 53,341/3. EPA further explained that "the Administrator must disapprove plans that are not 'satisfactory'" according to section 111(d)(2)(A), which gives the Administrator the same authority to prescribe a federal plan for a state that did not submit a satisfactory plan as he has under section 110(c) for failure to submit an implementation plan.[4] *Id.* at 53,342/1. "EPA believes that its interpretation is essential to the effective implementation of section 111(d)." *Id.* And in recent litigation related to these same 2016 Emission Guidelines, EPA provided the D.C. Circuit a succinct description of the section 111(d) implementing regulations, in which it described the obligations set forth in the regulations in mandatory terms:

> Under EPA's Subpart B regulations, §§ 60.20-60.29, states must submit to EPA an implementation plan within 9 months of the promulgation of an emission guideline, unless the emission guideline specifies a different deadline. 40 C.F.R. § 60.23(a)(1). EPA must approve or disapprove a state's plan within four months after the deadline for the state to submit the plan. 40 C.F.R. § 60.27(b). If a state fails to submit a plan, EPA must promulgate a federal plan within six months after the deadline for the state to submit a plan. *Id.* § 60.27(d).

(Respondents' Initial Brief, 4, No. 17-1157 (D.C. Cir. Jan. 22, 2018).)

## II. HISTORY OF EPA'S SECTION 111(d) LANDFILL EMISSIONS GUIDELINES

### A. EPA Approved State Plans and Issued a Federal Plan to Implement the 1996 Landfill Emission Guidelines

In 1996 EPA listed landfills as a source category that contributes significantly to air pollution that may reasonably be anticipated to endanger public health and welfare under section 111 and concurrently promulgated new source performance standards under section 111(b) and emission guidelines under section 111(d).[5] Pursuant to EPA's regulations, 33 states or

[4] In 1975, the same year that EPA issued the subpart B implementing regulations, explicitly based on the deadlines and procedures Congress mandated in section 110, the Supreme Court explained that Congress took such prescriptive measures in the 1970 Amendments because states had failed to address pollution under the previous, more flexible regulatory regime. "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 . . . . These Amendments sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 64 (1975). While states were still given primary responsibility for air quality in their jurisdiction in the 1970 amendments, "the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time." *Id.* at 64-65.

[5] Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9,905 (Mar. 12, 1996); *see* Compl. ¶ 38.

jurisdictions within states subsequently submitted state plans that were approved by EPA. 40 C.F.R. pt. 62, subpt. GGG, tbl. 1. Four states or jurisdictions within states submitted negative declaration letters stating that they had no existing landfills or no landfills required to implement controls. *Id.* tbl. 2. The federal implementation plan EPA promulgated in 40 C.F.R. part 62, subpart GGG, applied to all areas without an approved state plan, which EPA recently calculated to be 15 states and territories. 81 Fed. Reg. at 59,287/1.

**B. EPA Issued New Emission Guidelines in 2016, Legally Triggering State and Federal Obligations with Respect to 1,851 Existing Landfills**

EPA announced it was considering changes to both the new source and existing source standards for landfills on July 17, 2014.[6] The final revised new source performance standards and 2016 Emission Guidelines were published two years later, on August 29, 2016. 81 Fed. Reg. 59,276.

The 2016 Emission Guidelines apply to any landfill that accepted waste after 1987 and that commenced construction, reconstruction, or modification on or before July 17, 2014 (the date the new source standards were proposed). The 2016 Emission Guidelines retain the same basic regulatory structure as the prior guidelines: Landfills with a design capacity of at least 2.5 million megagrams (Mg) of waste by mass (or 2.5 million cubic meters of waste by volume) must monitor their emissions of non-methane organic compounds (NMOC), as a proxy for monitoring methane emissions directly. 81 Fed. Reg. at 59,278; Compl. ¶ 39. The main change between the original emission guidelines and the 2016 version is that, while previously landfills whose NMOC emissions were more than 50 Mg per year had to install and operate a gas collection and control system (which reduces emissions of all pollutants of concern, including methane) within 30 months, the 2016 Emission Guidelines lowered the threshold at which a landfill must install emission controls to 34 Mg per year. *Id.* at 59,278.

EPA estimates that 1,851 landfills are potentially subject to the requirements of the 2016 Emission Guidelines because they meet the time criterion of having accepted waste after 1987

[6] Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 79 Fed. Reg. 41,772 (July 17, 2014); Standards of Performance for Municipal Solid Waste Landfills, 79 Fed. Reg. 41,796 (July 17, 2014); *see also* Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, Proposed Rule, 80 Fed. Reg. 52,100 (Aug. 27, 2015).

and having commenced construction before July 17, 2014. 81 Fed. Reg. at 59,304/3-59,305/1; Compl. ¶ 39. Of these, EPA believes 1,014 landfills meet the 2.5 million megagrams/cubic-meters design capacity criterion (which remains unchanged from the 1996 emission guidelines). Of those 1,014 existing landfills meeting the design criterion, EPA believes that 638 were already required to install and operate a gas collection and control system at the previous 50-Mg-per-year emission threshold. With the new lower 34-Mg-per-year threshold, an additional 93 landfills will be required to install and operate these controls by 2025. The remainder of the 1,014 landfills meeting the 2.5 million megagrams/cubic-meters design capacity criterion either (1) fall below the 34-Mg-per-year emissions threshold and would continue to monitor and report on their emissions but would not have to install emission controls so long as they stayed below that emission threshold, or (2) would be closing within a year and were below the previous 50-Mg-per-year emission threshold, in which case they were exempted from the new emission guidelines. 81 Fed. Reg. at 59,304-59,305, tbl. 2 & n.b.

The 2016 Emission Guidelines require each state with one or more of the 1,851 landfills subject to the rule to submit a state plan to EPA to implement the guidelines by May 30, 2017. 40 C.F.R. § 60.30f(a) & (b). Based on that submission deadline, EPA's 40 C.F.R. part 60, subpart B, implementing regulations automatically supply other mandatory deadlines. 81 Fed. Reg. at 59,286/3-59,287/1 ("The EPA will approve or disapprove the plan or plan revision according to the schedule in 40 CFR part 60, subpart B."). In the final rule, EPA calculated those upcoming subpart B deadlines as follows:

> [S]tates have 9 months to prepare a state plan implementing the guidelines (May 2017); the EPA has 4 months to review the plan (September 2017); and if necessary, the state has an additional 2 months to revise and submit a corrected plan based on any comments from the EPA (November 2017). Concurrently, the EPA must promulgate a federal plan within 6 months after the state plan is due, consistent with 40 CFR 60.27(d), or November 2017. Thus, the EPA-approved state plan and updated federal plan implementing the Emission Guidelines are expected to become effective in November 2017.

81 Fed. Reg. 59,304/2-3. Contrary to these commitments, however—and as EPA itself has admitted—EPA did not approve or disapprove state plan submissions within four months of the submission deadline (40 C.F.R. § 60.27(b); *see* Compl. ¶¶ 52, 63), nor did it promulgate

a federal plan for states that did not timely submit state plans within six months of the submission deadline (40 C.F.R. § 60.27(d); *see* Compl. ¶¶ 52, 64).

### C. EPA Informed the D.C. Circuit That District Courts Have Jurisdiction over Claims That It Failed to Approve State Plans or Issue a Federal Plan

In litigation related to these same 2016 Emission Guidelines, EPA told the D.C. Circuit that under 42 U.S.C. § 7604(a)(2)—the same statutory waiver of sovereign immunity at issue here—a district court was the proper forum to hear claims that it had failed to act by the deadlines established by the subpart B regulations, which it admitted had passed. On June 15, 2017, various environmental organizations filed a challenge in the D.C. Circuit to EPA's issuance of a stay of the new source performance standards and 2016 Emission Guidelines.[7] *Nat. Res. Def. Council v. Pruitt*, No. 17-1157 (D.C. Cir.). EPA's January 22, 2018, responsive brief in that matter argued that the case was moot because the stay, which began May 31, 2017, did not affect the states' obligation to submit plans by May 30, 2017,[8] nor did it change EPA's obligations to approve or disapprove those plans or to promulgate a federal plan for those states without an approved plan. EPA explained to the D.C. Circuit that:

> [N]otwithstanding the stay, EPA had four months, until September 31, 2017, to approve or disapprove any state plans that were timely submitted by May 30, and six months, until November 30, 2017, to promulgate a federal plan for the other states that did not timely submit state plans. . . [T]hese deadlines were not pushed back. They have come and gone, and the Stay Decision had no effect on them.

(Respondents' Initial Brief, 36, No. 17-1157 (D.C. Cir. Jan. 22, 2018); *see also id.* at 15 ("[T]he deadline for EPA to take action, either on submitted state plans or in the absence of a timely submitted state plan, is determined under a different set of EPA procedural regulations that were not affected by the Stay Decision. *See* 40 C.F.R. §§ 60.20 – 60.29 (EPA's Subpart B regulations).").) EPA told the D.C. Circuit that although the petition to review the stay was moot, any remedy for its admitted violations of the subpart B deadlines

[7] Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31, 2017); Compl. ¶ 43.

[8] EPA told the D.C. Circuit: "The Stay Decision has no effect whatsoever on existing landfills regulated under subpart Cf. As the parties agree, state plans were due by May 30, 2017. . . . Notwithstanding the subsequent stay, state plans were still due on May 30 and EPA did not purport to retroactively extend that date." (Respondents' Initial Brief, 35, No. 17-1157 (D.C. Cir. Jan. 22, 2018); *see* Compl. ¶ 46.)

"would lie in district court. *See* 42 U.S.C. § 7604(a)(2) (providing district courts with exclusive jurisdiction to review claims that EPA has failed to timely perform nondiscretionary duties)." (Respondents' Initial Brief, 37, No. 17-1157 (D.C. Cir. Jan. 22, 2018); Compl. ¶ 47.) In reliance on those representations, the parties in that case stipulated to voluntary dismissal of the case, explicitly reiterating in their stipulation that EPA had not acted by the relevant deadlines.[9]

Now that it has been sued in district court—where earlier this year it told the D.C. Circuit jurisdiction lies—EPA argues that this court has no jurisdiction to remedy its failure to follow these same subpart B implementing regulations. For the reasons below, the Court should reject that argument.

## ARGUMENT

### I. THE CLEAN AIR ACT WAIVES SOVEREIGN IMMUNITY TO REMEDY EPA'S FAILURE TO PERFORM THE MANDATORY DUTIES ESTABLISHED IN THE IMPLEMENTING REGULATIONS AT ISSUE HERE

#### A. The Clean Air Act's Waiver of Sovereign Immunity for Failure to Perform a Nondiscretionary Duty "Under This Chapter" Encompasses Duties Specified in Regulations, Particularly Those That Congress Specifically Commanded EPA to Promulgate

By giving district courts jurisdiction over citizen suits alleging "a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator," 42 U.S.C. § 7604(a)(2), Congress waived sovereign immunity for suits alleging that EPA failed to act in accordance with specific timelines and procedures spelled out not just in the statute, but also in regulations that implement the statute. (*See* Compl. ¶¶ 63, 64.) EPA argues that the phrase "under this chapter" refers only to nondiscretionary acts or duties listed in the text of the statute, not those explicit obligations found in duly promulgated regulations that were necessary to implement the statute. This position is unsupported by the language of the statute, case law, and common sense.

[9] Stipulation for Voluntary Dismissal (ECF #1715796) at 2, *Nat'l Res. Def. Council v. Pruitt*, No. 17-1157 (D.C. Cir. Jan. 31, 2018) (quoting Respondents' Initial Brief) (attached as Exhibit B to States' Request for Judicial Notice).

In *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544 (D.D.C. 2005), the District Court for the District of Columbia rejected the precise argument EPA makes here: that the phrase "under this chapter" in 42 U.S.C. § 7604(a)(2) does not waive sovereign immunity for EPA's failure to follow the obligations mandated by its own regulations. The case is directly on point, and the States cited it for this proposition in their Complaint (¶ 4), but EPA fails to address the case in its motion to dismiss. This Court should follow the well-reasoned analysis of *Leavitt* and deny the motion to dismiss.

The plaintiffs in *Leavitt* sued under the Clean Air Act's citizen suit provision to compel EPA to propose requirements to control hazardous air pollutants from motor vehicles and fuels by the deadline specified in EPA's regulations. *Leavitt*, 355 F. Supp. 2d at 546. As in this case, the plaintiffs alleged that EPA's failure to comply with the deadline in its own regulations constituted "a failure of the Administrator to perform any act or duty under this chapter which is non [sic] discretionary with the Administrator" within the meaning of 42 U.S.C. § 7604(a)(2). *Id.* And just as in this case, EPA moved to dismiss the complaint under Rule 12(b)(1) on the ground that the district court lacked subject matter jurisdiction because "an alleged failure to perform a duty prescribed in a regulation, as opposed to the statute itself, does not fall within the scope of the phrase, 'duty under this chapter,' and therefore this action cannot be maintained under 42 U.S.C. § 7604(a)(2)."[10] *Id.* at 549.

After "applying the classic tool of statutory construction" of examining the use of that phrase elsewhere in the Clean Air Act, the court concluded that "it is clear that the phrase 'under this chapter' encompasses both the statutory obligations imposed in the Act itself, and the regulatory obligations promulgated under the auspices of the Act." *Id.* at 556. In contrast, the court explained, "when Congress intended to limit the definition of a term to only the Act itself, it used the phrase 'in this chapter,' rather than 'under this chapter.'" *Id.* Thus, the court found that

[10] EPA made a second argument in *Leavitt* that is does not raise here: namely, that EPA had no mandatory duty to take the action required by the regulation. The court in *Leavitt* rejected EPA's interpretation of the procedural aspects of the regulation, finding that they did impose a nondiscretionary duty. *Leavitt*, 355 F. Supp. 2d at 549-50. Here, EPA is not challenging the States' allegation that the deadlines EPA imposed on itself are mandatory. (*See* Compl. ¶¶ 4, 24, 47, 63, 64, 65.)

the action to compel compliance with the regulatory obligation was properly brought in district court under 42 U.S.C. § 7604(a)(2).[11] *Id.*; *cf. Nat. Res. Def. Council, Inc. v. Perry*, 302 F. Supp. 3d 1094, 1097 (N.D. Cal. 2018), *appeal docketed*, No. 18-15380 (9th Cir. Mar. 7, 2018) (applying similar analysis to citizen suit provision of Energy Policy and Conservation Act and concluding that "the term 'under this part' makes clear that Congress did not intend to limit the citizen-suit provision to statutory duties" but also "to include regulatory duties authorized by" the statute).

In this case, the context of the statutory provision provides further support for following the holding in *Leavitt*. Not only did Congress specifically mandate EPA to promulgate the procedural regulations at issue here, it directed EPA to model those regulations after mandatory procedures that Congress itself set out at the same time in section 110. In 1970 Congress—frustrated with state inaction on air quality—(1) imposed mandatory deadlines in section 110 for EPA to review state plans and impose a federal plan where necessary; (2) commanded EPA to promulgate regulations establishing similar procedures for section 111(d) state plans; and (3) waived sovereign immunity for EPA's failure to undertake nondiscretionary duties "under" the Clean Air Act.[12] Given this context, EPA's narrow view of Congress's waiver of sovereign immunity in 42 U.S.C. § 7604(a)(2) is implausible and should be rejected.[13]

### B. Ninth Circuit Case Law Does Not Support EPA's Argument

The Ninth Circuit has not directly spoken to the question before this Court. Nor does the case EPA relies on support its argument. Rather, if anything, the Ninth Circuit has shown a willingness to examine EPA's *regulations* for the existence of an actionable mandatory duty under the Clean Air Act.

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[11] Because it found the suit proper under the Clean Air Act, the court did not address the plaintiffs' argument that it was also proper under the Administrative Procedure Act. *Id.* at 557.

[12] *See* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1680-84 (codified as amended at 42 U.S.C. §§ 7410(a) & 7411(d)); *id.* at § 12, 84 Stat. at 1706 (codified as amended at 42 U.S.C. § 7604(a); *Train*, 421 U.S. at 64-65 (1975).

[13] *See In re DBSI, Inc.*, 869 F.3d 1004, 1013 (9th Cir. 2017) (explaining that, where the government's position is implausible, a court need not find ambiguity in a waiver of sovereign immunity). Furthermore, an agency's position on a court's jurisdiction to review the agency's conduct is not entitled to deference. *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 846 n.3 (9th Cir. 2008).

For example, in *Farmers Union Central Exchange, Inc. v. Thomas*, 881 F.2d 757 (9th Cir. 1989), the Ninth Circuit reviewed the requirements of other EPA Clean Air Act regulations to determine whether they contained a mandatory duty that EPA had failed to perform. *Id.* at 761. EPA had issued regulations to reduce the allowable lead content of gasoline, including regulations for a lead credit banking program. *Id.* at 758. After EPA denied a gasoline refiner's request to recognize its sale of lead credits to another refiner, the refiner sued under 42 U.S.C. § 7604(a)—the citizen suit provision at issue here—alleging that EPA had failed to perform a nondiscretionary duty under the Clean Air Act "and its regulations." *Id.* at 759. The district court rejected EPA's claim of lack of jurisdiction, holding that "'EPA has failed to follow its own adopted regulations . . . .'" *Id.* (quoting district court). The Ninth Circuit reversed because it determined the regulations imposed no mandatory duty at all; it did not hold that the district court lacked jurisdiction over allegations that EPA failed to perform a duty specified in regulations. *Id.* at 761 ("We fail to see in what way EPA ignored its own regulations."). Instead, the court's analysis of regulatory text strongly suggest that violation of such a duty would give rise to jurisdiction.

The Ninth Circuit case EPA relies on, *Wildearth Guardians v. McCarthy*, 772 F.3d 1179 (9th Cir. 2014), does not support its argument. (EPA's Motion to Dismiss, 7 (hereafter "EPA's MTD").) *Wildearth Guardians* does not address, or even consider, the distinction between duties contained in statutory versus regulatory commands. In that case, the only issue on appeal was whether the plaintiffs had adequately alleged the violation of a nondiscretionary duty arising from a specific statutory provision, section 166(a) (not relevant here); whether the agency had violated a nondiscretionary duty arising from a regulation was not at issue. Thus, notwithstanding EPA's extensive italicizing of the words "*from the statute*," *Wildearth Guardians* merely stands for the undisputed proposition that a mandatory duty must be clear-cut and unambiguous to be actionable. *Id.* at 1182 (citing, *inter alia*, *Farmers Union Central Exchange*, 881 F.2d at 760). The case is thus inapposite here, as EPA does not challenge the States' allegation that the specific obligations EPA violated are clear and unambiguous.

### C. As in *Leavitt*, the Dicta in *Maine v. Thomas* Does Not Preclude the Court's Jurisdiction Here

EPA's reliance on dicta in a footnote in *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989), is misplaced. When EPA raised the same argument in *Leavitt*, the court found EPA had overreached, and this court should as well. In *Leavitt*, as here, "the defendant relies heavily on a case from the First Circuit, *Maine v. Thomas*," and specifically "places significant weight on this footnote [number 7], contending that the First Circuit held directly that regulations, such as the one in this case, are not the proper basis for invoking the citizen suit provision in 42 U.S.C. § 7604 of the Clean Air Act." *Leavitt*, 355 F. Supp. 2d at 554. After analyzing the *Maine v. Thomas* case, the *Leavitt* court correctly found that "the First Circuit has made no such pronouncement." *Id.* at 554.

Other courts are in agreement. The D.C. Circuit, as *Leavitt* noted, labeled the *Maine v. Thomas* footnote dicta and said that the issue it raised—whether only an explicit statutory command (and not a mandatory regulatory duty) can provide a basis for a citizen suit under the identical provision of the Clean Water Act—"appears to be an issue of first impression in the federal courts." *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 n.5 (D.C. Cir. 1997). A court in this District also explicitly declined to follow the *Maine v. Thomas* footnote. In *Diné CARE v. EPA*, No. C 12-03987 JSW, 2013 WL 6327530 (N.D. Cal. Dec. 3, 2013), EPA argued, as here, that sovereign immunity had not been waived under 42 U.S.C. § 7604(a)(2) because the alleged non-discretionary duty was found in an EPA regulation, not the text of the statute. The court rejected EPA's argument, which was based on the *Maine v. Thomas* footnote, and went on to evaluate whether the *regulation* in question, not the text of the statute, contained a non-discretionary obligation. *Id.* at *2 & n.1 (citing to *Leavitt* and stating that "The Court does not find persuasive or binding the dicta in the footnote of *Maine v. Thomas* [citation], which indicates that the only non-discretionary duties under the CAA must be statutory and not regulatory"). (The court ultimately ruled for EPA because it found the obligation in the regulation to be discretionary.) Even the First Circuit itself does not seem to follow the broad principle EPA finds in the *Maine v. Thomas* footnote. In *Scarborough Citizens Protecting Resources v. U.S. Fish and*

1 *Wildlife Service*, 674 F.3d 97 (1st Cir. 2012), the First Circuit looked to requirements in agency
2 regulations to determine whether a claim could be brought under the Administrative Procedures
3 Act (APA), explaining "Regulations can, by themselves, not only impose liabilities on non-
4 federal parties but also impose legal duties on federal officers such that their inaction is subject to
5 judicial review under the APA." *Id.* at 100 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55,
6 71 (2004)).

7 **D. No General Sovereign Immunity Principle Deprives a Court of Jurisdiction**
8 **to Review an Agency's Violation of Its Own Regulations**

9 Contrary to EPA's suggestion, there is no general principle that an agency's failure to
10 follow commands in a regulation cannot serve as a basis for a waiver of sovereign immunity.
11 Instead, if the mandatory nature of an agency's legal duty is clear, it is no bar to a lawsuit that the
12 duty is not explicitly set out in statutory text.

13 The Supreme Court made this clear in *Norton v. Southern Utah Wilderness Alliance*, 542
14 U.S. 55, 71 (2004) (hereafter "*SUWA*"). An environmental group sued under the APA's section
15 706(1) citizen suit provision (5 U.S.C. § 706(1)), alleging an agency had failed to act in
16 accordance with its own land use plan. The Supreme Court did not reject the claim at the
17 threshold on a theory that the duty was not in the text of the statute—as EPA would have this
18 Court do—but instead analyzed the land use *plan* itself, recognizing that "an action called for in a
19 plan may be compelled when the plan merely reiterates duties the agency is already obligated to
20 perform, or perhaps when language in the plan itself creates a commitment binding on the
21 agency." *SUWA*, 542 U.S. at 75. The Court ultimately found the plan did not contain an
22 obligation to undertake a discrete agency action, but it explicitly allowed that such an obligation
23 could arise from regulations. *Id* at 64-65 ("The limitation [on APA citizen suits] to *required*
24 agency action rules out judicial direction of even discrete agency action that is not demanded by
25 law (which includes, of course, agency regulations that have the force of law).") (emphasis in
26 original).

27 Similarly, in *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996), a federal agency revoked the
28 security clearance of an individual because she refused to take a polygraph test, and she sued

under the APA in part on the ground that the agency failed to follow its own regulations. *Id.* at 929. The district court dismissed based on sovereign immunity, but the circuit court reversed and reinstated the claim, relying on Supreme Court precedent that "the government could be sued for failure to follow its own regulations." *Id.* at 932. "[W]hether or not security clearance decisions are committed to [its] discretion, the agency must still follow its own regulations and may be sued for failure to do so." *Id.* at 933.

This focus on the nature of the directive (rather than on where the directive is printed) is also evident in "discretionary function" caselaw. Under some statutes, Congress has waived sovereign immunity but created an explicit exception barring challenges to discretionary conduct. *See*, *e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2680(a) (barring any claim pertaining to act or omission of a federal employee "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . ."). However, courts do not dismiss suits under this "discretionary function" exception to the waiver of sovereign immunity as long as the directive governing the employee's conduct is clear. And this is true regardless of whether that directive is set forth in a regulation or other non-statutory authority. *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988) ("[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."). Thus, in *Tobar v. United States*, 731 F.3d 938, 945-46 (9th Cir. 2013), the Ninth Circuit found the discretionary function exception inapplicable where an agency was alleged to have violated a *policy* reflected in a *manual*. There, fishermen sued under the Federal Tort Claims Act for damages arising out of the Coast Guard's search and seizure of their vessel. The district court dismissed based on sovereign immunity. The Ninth Circuit reversed, holding that although the text of the authorizing statute "speaks . . . only in general terms and does not direct mandatory and specific action," the government's own policy manual "does not afford any discretion" and the government's letter seeking permission to board imposed "specific and mandatory" non-contractual obligations rendering the Coast Guard's actions outside of the discretionary function exception. *Id.* at 946-47 & n.7. *See also Graham v. Fed. Emergency Mgmt.*

*Agency*, 149 F.3d 997, 1006 (9th Cir. 1998) (holding discretionary function exception inapplicable to APA suit based on agency's failure to follow its own regulations in withholding grant payments because "the duty of FEMA is clearly prescribed by the . . . applicable regulations").

**E. EPA Uses Out-of-Context Case Citations to Attack Arguments the States Have Not Made**

EPA cites two cases for propositions related in some way to sovereign immunity. (EPA's MTD, 8.) But those cases have nothing to do with either the allegations in the States' Complaint or whether a cause of action can arise from an agency's failure to take action required by a duly promulgated regulation.

The States do not argue that EPA could or did waive sovereign immunity solely of its own volition by issuing regulations, as the plaintiff contended in *Heller v. United States*, 776 F.2d 92 (3d Cir. 1985) (rejecting plaintiff's argument that vague regulations themselves waived sovereign immunity for medical malpractice committed on foreign soil where the statute itself did not contain such a waiver). The waiver of sovereign immunity at issue here, 42 U.S.C. § 7604(a)(2), is an explicit waiver created by Congress, not by the regulation specifying the mandatory duty. EPA's failure to adhere to the requirements of that regulation merely places its inaction within the preexisting sovereign immunity waiver provided by Congress.

EPA also cites *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947), for the proposition that individual government officers cannot waive sovereign immunity. That proposition is undisputed, yet irrelevant. The States do not contend that the Administrator somehow waived immunity when he missed the legal deadlines specified in the subpart B regulations. Instead, it is Congress that waived sovereign immunity for a failure of the Administrator to perform duties that are "not discretionary" under the Clean Air Act, which duties include performing the mandates set forth in the regulations that EPA established to implement section 111(d).[14]

[14] The States also do not contend that the jurisdiction for this suit is based on unreasonable delay by EPA. (EPA's MTD, 8.) EPA has missed specific mandatory deadlines in its 40 C.F.R. part 60, subpart B, implementing regulations. The States also do not contend that 28 U.S.C. § 1331 standing alone waives sovereign immunity.

## II. IF THE CLEAN AIR ACT DOES NOT PROVIDE A REMEDY, THEN EITHER THE ADMINISTRATIVE PROCEDURE ACT OR MANDAMUS PROVIDE A REMEDY

If, as EPA argues, the Clean Air Act does not supply a remedy for EPA's failure to abide by the deadlines in duly promulgated regulations, then the APA does. It is true that the APA does not supply a cause of action if there is another statute that either provides the cause of action, 5 U.S.C. § 703, or prohibits the cause of action, *id.* § 701(a)(1). The Clean Air Act does not *prohibit* the States' cause of action. Thus, if the Court finds that the Clean Air Act does not *provide* a cause of action, then the Clean Air Act cannot displace an APA claim.

There is no question that the APA waives sovereign immunity for an agency's failure to perform a mandatory duty under other statutes and regulations. For example, in *Vietnam Veterans of America v. Central Intelligence Agency*, 811 F.3d 1068 (9th Cir. 2016), the Ninth Circuit held that Army *regulations* setting forth the Army's duty to warn research volunteers of risks involved in their participation were specific, unequivocal commands to take discrete agency action, and thus, a district court could compel the Army to take such action under the APA. *Id.* at 1077-78. *See also SUWA*, 542 U.S. at 75; *Ghafoori v. Napolitano*, 713 F. Supp. 2d 871, 878 (N.D. Cal. 2010) ("The APA also provides an independent basis for reviewing '[a]gency violations of their own regulations,' because such violations 'may well be inconsistent with the standards of agency action which the APA directs the courts to enforce.'") (quoting *United States v. Caceres*, 440 U.S. 741, 754 (1979)).

EPA's argument that the States cannot bring an APA claim because the Clean Air Act provides an adequate remedy for claims that EPA has "unreasonably delayed in undertaking a legally required action" is disingenuous. (EPA's MTD, 11.) First, this is not an "unreasonable delay" case because there are specific dates by which EPA was required to take certain actions. *See Zook v. McCarthy*, 52 F. Supp. 3d 69, 73 (D.D.C. 2014) (explaining that "a failure to perform claim requires a date-certain deadline [citation], while unreasonable delay does not"). Second, EPA's position in this case is that compelling compliance with the duties it failed to perform—approving or disapproving state plans and issuing a federal plan—is outside of any court's jurisdiction, and it is not clear how recasting this as an "unreasonable delay" claim (rather than a

failure to perform a mandatory duty) would cure the alleged defect. If the States were to refile this case as an unreasonable delay claim, there is no reason to think that EPA would concede jurisdiction when the claim would still be based on obligations stated in regulations.

If both Clean Air Act and APA claims are found to be unavailable, then the States would be able to seek mandamus relief from the Court under 28 U.S.C. 1361 because EPA's nondiscretionary obligations are clearly set out in its regulations and no other adequate remedy would then be available for EPA's failure to carry out those obligations. *See In re Freeman*, 489 F.3d 966, 968 (9th Cir. 2007) ("[E]ven in an area generally left to agency discretion, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated."); *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003) ("Mandamus is an extraordinary remedy and is available to compel a federal official to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available.")

The Court need not address the ability of the States' to bring their claims under the APA or mandamus jurisdiction because the Clean Air Act itself authorizes the suit. If the Court grants EPA's motion to dismiss, however, and also concludes that the States' Complaint does not adequately plead a cause of action under either the APA or mandamus for EPA's failure to perform the obligations set out in its regulations (*see* Compl. ¶ 6), the States request permission under Federal Rule of Civil Procedure 15(a)(2) to amend their Complaint to state causes of action under section 706(1) of the APA (granting court power to "compel agency action unlawfully withheld") or, in the alternative, 28 U.S.C. § 1361 (granting court power of mandamus to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff").

### III. THE COMPLAINT ALLEGES A COGNIZABLE LEGAL THEORY AND PROVIDES EPA FAIR NOTICE OF THE BASES OF THE STATES' CLAIMS

EPA argues that the Complaint "fall[s] woefully short of the pleading requirements of Rule 8(a)(2)" because, instead of providing EPA with a list of the states for which it has not received a state plan by the May 30, 2017, deadline, the Complaint makes the factual assertion that "some states" did not timely submit state plans to EPA by the deadline. (EPA's MTD, 12.) But the factual allegations in the Complaint, taken as a whole and assumed to be true, are sufficient to state a claim and provide sufficient notice to EPA of what this case is about. EPA has all the information it needs in order to know which of the 1,851 landfills subject to the rule are located within states that did not submit a plan. EPA's cursory argument has nothing to do with Rule 8(a)(2) pleading standards and should be rejected.

"To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2)." *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the ground upon which it rests." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *see also Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). To survive a motion to dismiss, a complaint must contain sufficient factual allegations to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

Taken as a whole and allowing for reasonable inferences, the Complaint provides EPA fair notice of what the claim is and provides sufficient bases to show it is plausible. The Complaint alleges that:

- "by September 30, 2017, EPA was legally required to respond to states that had timely submitted plans [citation], and by November 30, 2017, EPA was legally required to impose a federal plan on noncomplying states. . . . It failed to do either . . . ." (Compl. ¶ 4);

- "EPA estimates that 1,851 landfills are (and would remain) subject to the Emission Guidelines" (*id.* ¶ 39);

- EPA confirmed that it "did not alter the May 30 deadline for states to submit implementation plans for existing landfills" and that EPA had "until November 30, 2017, to promulgate a federal plan for states that did not timely submit state plans" (*id.* ¶¶ 46-47);

- some states "made the . . . decision not to develop a state plan, and to instead await EPA's federal plan" (*id.* ¶ 54);

- EPA admitted that even after the submission deadline it was not "working to issue a Federal [implementation] Plan *for states that failed to submit a state plan*" (*id.* ¶ 52 (emphasis added)); and

- "Some states did not submit state plans and EPA failed to promulgate a federal plan by the statutory deadline, and to date, has not promulgated a federal plan" (*id.* ¶ 64).

Certainly EPA knows which states have one of the 1,851 landfills subject to the 2016 Emission Guidelines and knows which state plans it has and has not received.[15] EPA will later

[15] For instance, EPA knows that landfills in 33 states (or subjurisdictions) are currently regulated under state plans that EPA approved to implement the pre-2016 emission guidelines. 40 C.F.R. pt. 62, subpt. GGG, tbl. 1. The pre-2016 emission guidelines have same criteria for landfill capacity and opening year (1987) as the 2016 version. EPA also knows that the landfills in 15 states and territories are currently subject to its federal plan, promulgated to implement those pre-2016 emission guidelines. 81 Fed. Reg. at 59,287/1. EPA also has in its possession a wealth of information on the design capacity, years of operation, emissions, and precise geographical location of existing landfills. For example, through its Greenhouse Gas Reporting Program (searchable database available at https://ghgdata.epa.gov/ghgp/main.do#), EPA possesses information on landfill location, capacity, emissions, operating status, and emission controls, and it used that data in part to analyze the impacts of the final rule. *See* 81 Fed. Reg. at 59,304/3 ("The EPA made several significant edits to the dataset since the August 2015 proposal, based on . . . new data made available from the landfills reporting 2014 emissions to GHGRP."). Also, EPA's 2016 *EJ Screening Report for Municipal Solid Waste Landfills* (available at https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0451-0223) lists 1,123 landfills by state, with links to detailed regulatory information about each landfill. *See* 81 Fed. Reg. at 59,312/1-2 ("EPA has conducted a proximity analysis for this final rulemaking that summarizes demographic data on the communities located near landfills. . . . The proximity analysis provides detailed demographic information on the communities located within a 3-mile radius of each affected landfill in the U.S."). Further, EPA's *Landfill and Landfill Gas Energy Project Database* (available at https://www.epa.gov/lmop/landfill-technical-data) "contains information such as physical address, latitude and longitude, owner/operator organization, operational status, year opened, actual or expected closure year, design capacity, amount of waste in place, gas collection system status and landfill gas (LFG) collected amount for more than 2,400 municipal solid waste landfills."

The States request the Court to take judicial notice that EPA is in possession of these sources of information about landfill characteristics and location. Fed. R. Evid. 201; *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (taking judicial notice of information on websites "made publicly available by government entities").

have the opportunity to prove either that it had received a plan from every state in the Union (and thus it has unlawfully failed to timely respond to such plans), or that, among the states for which it has not received a state plan, not one is home to any of those 1,851 existing landfills that are subject to the regulations. If the factual allegations in the Complaint that "some" (*i.e.*, one or more) states failed to submit a timely plan is ultimately proven to be false, then the States will not prevail on their claim that EPA should have issued a federal plan. But a Rule 12(b)(6) motion is not the place to resolve such a factual dispute, if one even exists.

**CONCLUSION**

The Clean Air Act's waiver of sovereign immunity applies to claims that EPA failed to meet mandatory deadlines in regulations that implement the statute, and EPA's Rule 12(b)(1) motion based on lack of jurisdiction thus fails. EPA's Rule 12(b)(6) motion also fails because the Complaint adequately alleges facts supporting the States' cause of action and provides sufficient notice to EPA. The States request that the Court deny EPA's motion to dismiss.

Dated: September 18, 2018

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