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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
15 **OAKLAND DIVISION**

16 STATE OF CALIFORNIA, *et al.*

17 Plaintiffs,

18 v.

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

21 Defendants.

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

**MOTION TO STAY CASE PENDING  
CONCLUSION OF RULEMAKING**

Hearing Date: February 14, 2019

Time: 2:00pm

Courtroom: 2, 4th Floor, 1301 Clay Street,  
Oakland, CA

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE that, on February 14, 2019, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Haywood S. Gilliam, Jr., Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, California, Defendants the United States Environmental Protection Agency and Andrew R. Wheeler, in his official capacity as Acting Administrator of the United States Environmental Protection Agency (collectively, "EPA"), will and do respectfully move to stay this matter pending resolution of a related proposed rulemaking.

**RELIEF REQUESTED**

10 The relief EPA seeks is a stay of all proceedings until April 30, 2019, to allow EPA to  
11 conclude a related proposed rulemaking.  
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1 Pursuant to Civil L.R. 7-2, EPA seeks a stay of this litigation, until April 30, 2019, to  
2 allow EPA to conclude a rulemaking that is likely to moot the claims at issue in this litigation.

### 3 **I. INTRODUCTION**

4 In 2016, EPA issued revised emission guidelines for emissions from existing municipal  
5 solid waste landfills, *Final Rule*, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (codified at 40 C.F.R. Part  
6 60, Subpart Cf, §§ 60.30f-60.41f) (the “Emission Guidelines”). Under section 60.30f(a)-(b) of  
7 the Emission Guidelines, any state with one or more existing municipal solid waste landfills that  
8 commenced construction, modification, or reconstruction on or before July 17, 2014, was  
9 required to submit a plan to EPA by May 30, 2017, that established standards of performance for  
10 those existing landfills in conformity with the Emission Guidelines. 40 C.F.R. § 60.30f(a)-(b).

11 On May 31, 2018, Plaintiffs the State of California, by and through the Attorney  
12 General and the California Air Resources Board; the State of Illinois; the State of Maryland;  
13 the State of New Mexico; the State of Oregon; the Commonwealth of Pennsylvania; the State  
14 of Rhode Island; and the State of Vermont (“States”), brought a complaint alleging that:

- 15 (1) pursuant to 40 C.F.R. § 60.27(b), EPA was required to approve or  
16 disapprove “state plan submissions within four months of the submission  
17 deadline” set forth at 40 C.F.R. § 60.30f(a), i.e. by September 30, 2017  
18 (alleging that as of the submission deadline, California and New Mexico  
had submitted state plans by the submission deadline); and
- 19 (2) pursuant to 40 C.F.R. § 60.27(d), EPA was required “to promulgate a  
20 federal plan for states that did not timely submit state plans within six  
21 months of the submission deadline, set forth at 40 C.F.R. § 60.30f(a), i.e.,  
by November 30, 2017.”

22 Pls.’ Compl. ¶¶ 63, 64; *see also id.* ¶¶ 1, 4, 8, 24, 49.<sup>1</sup> EPA moved to dismiss the States’  
23 complaint for lack of subject matter jurisdiction and also to dismiss a portion of the complaint  
24 because the States fail to state a claim to the extent that they do not identify the states for which  
25 they allege EPA is required to issue a federal plan. EPA’s Mot. to Dismiss (Dkt. No. 28). That  
26 motion is pending before the Court.

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28 <sup>1</sup> On September 13, 2018, the Environmental Defense Fund (“EDF”) moved to intervene as a  
Plaintiff-Intervenor (Dkt. No. 36). The Court has not yet acted on EDF’s motion to intervene.

## 1 II. REGULATORY BACKGROUND

2 The States' claims are based upon dates for state and EPA actions set forth in two  
3 subparts of 40 C.F.R. Part 60 that are the subject of proposed rulemakings to amend those  
4 deadlines. First, Subpart Cf currently provides that states with "one or more existing municipal  
5 solid waste landfills that commenced construction, modification, or reconstruction on or before  
6 July 17, 2014, must submit to [EPA a state plan] that implements the Emission Guidelines" by  
7 the submission deadline of *May 30, 2017*. 40 C.F.R. § 60.30f(a)-(b) (emphasis added).  
8 Second, EPA's 1975 regulations implementing section 111(d) of the Clean Air Act ("CAA"),  
9 42 U.S.C. § 7411(d), the statutory provision that governs state submission to EPA of plans  
10 establishing performance standards for existing sources, are set forth in Subpart B and establish  
11 additional timeframes for EPA actions at issue here. Specifically, Section 60.27(b) of Subpart  
12 B provides that "within four months after the date required for submission of a plan or plan  
13 revision," in the case of the 2016 Emission Guidelines, four months after *May 30, 2017* (*i.e.*,  
14 by September 30, 2017), EPA will "approve or disapprove such plan." 40 C.F.R. § 60.27(b);  
15 *see also* 81 Fed. Reg. at 59,304. Sections 60.27(c) and (d) of Subpart B provide that "within  
16 six months after the date required for submission of a plan or plan revision," in this case, six  
17 months after *May 30, 2017* (*i.e.*, by November 30, 2017), EPA will promulgate a federal plan if  
18 a state fails to submit a plan by the required date. 40 C.F.R. § 60.27(c)-(d); *see also* 81 Fed.  
19 Reg. at 59,304.

20 In August 2018, EPA proposed to revise and update its 1975 implementing regulations,  
21 including the timing for taking action on state plans and promulgating federal plans,<sup>2</sup> under a  
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23 <sup>2</sup> The timing provisions of the Subpart B regulations promulgated in 1975 were originally based  
24 on and patterned after the provisions governing state submittal and EPA review of state  
25 implementation plans ("SIPs") set forth in the Clean Air Act of 1970. *See Final Rule*, 40 Fed.  
26 Reg. 53,340, 53,341 (Nov. 17, 1975) ("The plan submittal, approval/ disapproval, and  
27 promulgation procedures are basically patterned after section 110 of the Act and 40 CFR Part 51  
28 (concerning adoption and submittal of State implementation plans under section 110)."). In the  
Clean Air Act Amendments of 1990, Congress significantly expanded the timing requirements  
related to state submittal and EPA review of SIPs – *i.e.*, from nine months to up to three years for  
SIP submittal and from four months to up to 18 months for EPA review. Pub. L. 101-547, § 110,  
104 Stat. 2399, 2406-9 (1990).

1 new Subpart Ba. *Proposed Rule*, 83 Fed. Reg. 44,746 (Aug. 31, 2018) (referred to as the “ACE  
2 Rule proposal”).<sup>3</sup> *See also* Declaration of David A. Cozzie ¶ 7 (attached as Exhibit A,  
3 hereinafter, the “Cozzie Decl.”). Relevant provisions of proposed new Subpart Ba include:

- 4 (1) “Within 60 days of the [EPA’s] receipt of a state submission, but no later  
5 than *6 months* after the date, if any, by which a State is required to submit  
6 the plan or revision, the [EPA] shall determine whether the minimum  
7 criteria for completeness have been met. Any plan or plan revision that a  
8 State submits to the EPA, and that has not been determined by the EPA by  
9 the date *6 months* after receipt of the submission to have failed to meet the  
10 minimum criteria, shall on that date be deemed by operation of law to  
11 meet such minimum criteria.” 83 Fed. Reg. at 44,806-07 (emphasis  
12 added) (proposed to be codified at 40 C.F.R. § 60.27a(g)(1));<sup>4</sup>
- 13 (2) EPA “will, within *twelve months* of finding that a plan or plan revision is  
14 complete, approve or disapprove such plan or revision,” 83 Fed. Reg. at  
15 44,806 (emphasis added) (proposed to be codified at 40 C.F.R.  
16 § 60.27a(b));<sup>5</sup> and
- 17 (3) EPA “will, at any time within *two years* after the finding of failure to  
18 submit a complete plan or disapproval [of a plan] . . . promulgate a final  
19 federal plan,” 83 Fed. Reg. at 44,806 (emphasis added) (proposed to be  
20 codified at 40 C.F.R. § 60.27a(d)).<sup>6</sup>

21 The public comment period on this proposed rule closed October 31, 2018. Cozzie Decl. ¶ 7.

22 In the ACE Rule proposal, EPA proposed to apply these new timing requirements to all  
23 “ongoing” emission guidelines already published under CAA section 111(d), 42 U.S.C. §  
24 7411(d). 83 Fed. Reg. at 44,769. EPA recognized, however, that without further action, the  
25 promulgation of the proposed new implementing regulations at Subpart Ba would not be  
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27 <sup>3</sup> On March 28, 2017, the President, issued an Executive Order directing EPA to review the 2015  
28 Clean Power Plan in accordance with certain new policies and instructing the Agency to  
conclude any appropriate rulemaking to repeal or revise the 2015 Clean Power Plan “as soon as  
practicable.” Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017). On August  
31, 2018, EPA proposed the Affordable Clean Energy (“ACE”) Rule, including Subpart Ba, to  
replace the 2015 Clean Power Plan. Cozzie Decl. ¶¶ 6-7.

<sup>4</sup> Subpart B does not include a comparable review for completeness. The completeness review is  
consistent with similar requirements that apply to state implementation plans pursuant to  
42 U.S.C. § 7410(k)(1).

<sup>5</sup> Compare 40 C.F.R. § 60.27(b) (providing four months).

<sup>6</sup> Compare 40 C.F.R. § 60.27(d) (providing six months).

1 sufficient to change the timing requirements for the Emission Guidelines at issue in this matter  
2 even though it is an ongoing CAA section 111(d) action. *Proposed Rule*, 83 Fed. Reg. 54,527-  
3 29 (Oct. 30, 2018) (“Landfills Proposal”). This is because the Emission Guidelines include a  
4 cross-reference to the old implementing regulations in Subpart B, as well as a specific deadline  
5 for the submission of state plans that was based on the timing requirements in Subpart B. *See* 40  
6 C.F.R. § 60.30f(a)-(b).

7 Consequently, on October 23, 2018, EPA proposed to amend the Emission Guidelines at  
8 issue here by updating the cross-reference to Subpart B and the deadline for state plan  
9 submissions to align them with the proposed timing requirements for state and federal plans in  
10 the new Subpart Ba described above. 83 Fed. Reg. at 54,527; *see also* Cozzie Decl. ¶ 4.  
11 Specifically, EPA proposed to extend the state plan submission deadline to August 29, 2019. 83  
12 Fed. Reg. at 54,529-30 (proposed to be codified at 40 C.F.R. § 60.30f(b)). Under the proposal,  
13 EPA would review state plans for completeness within six months of the submission deadline  
14 and review them for approval or disapproval within twelve months of the completeness review.  
15 *Id.* at 54,530. The proposal would also provide EPA with two years to promulgate a federal plan  
16 after finding that a state plan is incomplete or disapproving a state plan. *Id.*; *see also* Cozzie  
17 Decl. ¶ 10.

18 With regard to state plans submitted prior to the promulgation of these amendments,<sup>7</sup>  
19 EPA is taking comment on whether to amend the Emission Guidelines to require those states to  
20 resubmit their plans in accordance with the provisions of proposed Subpart Ba. 83 Fed. Reg. at  
21 54,530. EPA stated that “[t]his would ensure consistent treatment of all states and state plans,  
22 avoid confusion regarding deadlines, and allow the EPA to undertake a completeness review for  
23 state plans already submitted to the EPA.” *Id.* In the alternative, “EPA solicit[ed] comment on  
24 whether the Agency should not require the resubmission of state plans submitted prior to  
25 promulgation of these amendments, and, if not, whether the EPA should still evaluate the  
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27 <sup>7</sup> At the present, only California, Arizona, and New Mexico have submitted a state plan to the  
28 EPA. 83 Fed. Reg. at 54,530; *see also* Joint Stipulation Regarding Undisputed Facts (Dkt. No.  
58).

1 already-submitted plans for compliance with the proposed new completeness criteria.” *Id.*; see  
2 *also* Cozzie Decl. ¶ 10.

3 Because the proposal to adjust the timing requirements in the Emission Guidelines is  
4 predicated on the proposed timing requirements in Subpart Ba, EPA will have to finalize Subpart  
5 Ba either prior to or concurrently with finalizing the Landfills Proposal. *Id.* at 54,529; *see also*  
6 Cozzie Decl. ¶ 5. The public comment period on the Landfills Proposal closes on December 14,  
7 2018. *Id.* ¶ 9.

### 8 **III. STANDARD OF REVIEW**

9 It is well-established that a district court has the discretionary power to stay proceedings  
10 in its own court. *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936); *Clinton v. Jones*, 520  
11 U.S. 681, 706-07 (1997) (“The District Court has broad discretion to stay proceedings as an  
12 incident to its power to control its own docket.”). Further, courts have recognized that when  
13 there is another proceeding – even an independent proceeding – which bears upon the case, a  
14 stay may be the most efficient way forward:

15 A trial court may, with propriety, find it is efficient for its own docket and the  
16 fairest course for the parties to enter a stay of an action before it, pending  
17 resolution of independent proceedings which bear upon the case. This rule applies  
18 whether the separate proceedings are judicial, administrative, or arbitral in  
19 character, and does not require that the issues in such proceedings are necessarily  
20 controlling of the action before the court. \* \* \* In such cases the court may order  
a stay of the action pursuant to its power to control its docket and calendar and to  
provide for a just determination of the cases pending before it.

21 *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (internal citations  
22 omitted); *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983);  
23 *Lindell v. Synthes, USA*, No. 11-cv-2053, 2012 WL 1657197, at \*3 (E.D. Cal. May 10, 2012)  
24 (recognizing that “the existence of another proceeding that may have a substantial impact on a  
25 pending case is a particularly compelling reason to grant a stay”).  
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1 The Court of Appeals for the Ninth Circuit has set out the following evaluative  
2 framework for stays pending the outcome of related proceedings:

3 Where it is proposed that a pending proceeding be stayed, the competing interests  
4 which will be affected by the granting or refusal to grant a stay must be weighed.  
5 Among those competing interests are the possible damage which may result from  
6 the granting of a stay, the hardship or inequity which a party may suffer in being  
7 required to go forward, and the orderly course of justice measured in terms of the  
8 simplifying or complicating of issues, proof, and questions of law which could be  
9 expected to result from a stay.

10 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX, Inc. v. Hall*, 300  
11 F.2d 265, 268 (9th Cir. 1962)).

#### 12 **IV. ARGUMENT**

13 Consistent with the Ninth Circuit's guidance in *Leyva*, 593 F.2d at 864, EPA requests a  
14 stay of a reasonable duration. EPA does not request an indefinite abeyance of this litigation.  
15 Rather, as explained in the Cozzie Declaration, concluding the ACE rulemaking (including  
16 Subpart Ba) to replace the 2015 Clean Power Plan is a high priority for the Agency, and EPA is  
17 committed to completing the rulemaking as expeditiously as practicable. Cozzie Decl. ¶ 8.  
18 Likewise, finalizing the Landfills Rule to align state and federal plan timing requirements in the  
19 Emission Guidelines with the changes EPA recently proposed in Subpart Ba is a high priority for  
20 EPA, and EPA is committed to completing the rulemaking as expeditiously as practicable. *Id.* ¶  
21 11. EPA expects to finalize the ACE Rule in March of 2019 and the Landfills Rule in April of  
22 2019. *Id.* ¶ 12. The Cozzie Declaration thus demonstrates that it is "likely the other proceedings  
23 [the ACE Rule proposal and Landfills Proposal] will be concluded within a reasonable time."  
24 *Leyva*, 593 F.2d at 864.<sup>8</sup>

25 In the event that the Court denies EPA's motion to dismiss, the court will likely consider  
26 the impact of the requested stay against a conservative estimate of how the case might proceed to

27 <sup>8</sup> Compare *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066-67 (9th  
28 Cir. 2007) (reversing a stay order with no termination deadline); *Yong v. INS*, 208 F.3d 1116,  
1119 (9th Cir. 2000) (noting that a greater showing is required for indefinite stays); *Edwards v.*  
*Oportun, Inc.*, 193 F. Supp. 3d 1096, 1101-02 (N.D. Cal. 2016) (denying an indefinite stay).



1 a remedy order absent imposition of a stay. Absent the requested stay, the timing of the  
2 remainder of the case is contingent upon the timing of the Court's action on the pending motion  
3 to dismiss. Although the Court has not yet set a schedule for briefing motions for summary  
4 judgment, the States and EPA stipulated to a schedule for briefing cross-motions. Joint Case  
5 Mgmt. Stmt. § 17 (Dkt. No. 57). The briefing schedule duration is approximately four months  
6 from the date that the States move to the earliest possible hearing date. *Id.* Therefore, assuming  
7 *arguendo* that the Court were to issue a ruling denying EPA's motion to dismiss in mid-  
8 December, summary judgment briefing and a hearing would not be complete until the end of  
9 April 2019, at the earliest, with a ruling issuing sometime in May or later.

10 That would mean that EPA would likely be concluding its rulemaking efforts that could  
11 moot the claims at issue in this litigation at the same time that the Court hears argument on the  
12 summary judgment motions. The deadline EPA set for the submission of state plans  
13 implementing the Emission Guidelines is and will continue to be subject to EPA's discretion.  
14 *See* 40 C.F.R. § 60.27(a) ("The Administrator may, whenever he determines necessary, extend  
15 the period for submission of any plan or plan revision or portion thereof."). If EPA finalizes the  
16 Landfills Proposal, the deadline for the submission of state plans will become August 29, 2019.  
17 The requirement for EPA to issue a federal plan for states that fail to submit approvable state  
18 plans would then not arise until 2021 at the earliest. Therefore, finalization of the Landfills  
19 Proposal would render the States' claim that EPA has a nondiscretionary duty to promulgate a  
20 federal plan moot. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) ("It has long  
21 been settled that a federal court has no authority 'to give opinions upon moot questions or  
22 abstract propositions, or to declare principles or rules of law which cannot affect the matter in  
23 issue in the case before it.'") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *Chang v.*  
24 *United States*, 327 F.3d 911, 918-919 (9th Cir. 2003) (holding that a case properly brought in the  
25 first instance is rendered moot when "interim relief or events have completely and irrevocably  
26 eradicated the effects of the alleged violation.") (quoting *Cty. of Los Angeles v. Davis*, 440 U.S.  
27 625, 631 (1979)).

1 EPA is seeking to achieve consistency among all states by reviewing all state plans,  
 2 including already-submitted plans, for completeness. With regard to states that have already  
 3 submitted plans, EPA in the Landfills Proposal is taking comment on two potential approaches:  
 4 (1) amending the Emission Guidelines to require those states to resubmit their plans in  
 5 accordance with the provisions of proposed Subpart Ba; or (2) not requiring resubmission, but  
 6 providing EPA with additional time to review the already submitted plans for compliance with  
 7 the new completeness criteria. 83 Fed. Reg. at 54,530. Cozzie Decl. ¶ 10. Either approach  
 8 would moot the claim that EPA has failed to act on the plans submitted by California and New  
 9 Mexico. Under the first proposed approach, the claim would be moot because California and  
 10 New Mexico would be required to resubmit their plans by August 29, 2019, and EPA's deadline  
 11 for acting on any resubmitted plans would be 12 months after the plans are deemed complete,  
 12 either by an EPA finding or by operation of law. Under the second proposed approach, the claim  
 13 would be moot because EPA would have 60 days from the effective date of the final rule to  
 14 review the already-submitted plans for completeness and an additional 12 months to approve or  
 15 disapprove any complete plans.<sup>9</sup> *Church of Scientology*, 506 U.S. at 12; *Chang*, 327 F.3d at 918-  
 16 919.<sup>10</sup>

17 If the Court grants a stay until April 31, 2019, and EPA finalizes Subpart Ba and the  
 18 Landfills Proposal as proposed, a significant saving in judicial and party resources will result.  
 19 The Court will not need to rule on the issue of first impression presented in the motion to  
 20 dismiss, the parties will not need to expend the effort required to brief summary judgment, and  
 21 the Court will not have to consider those briefs or hold a hearing. These considerations surely  
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23 <sup>9</sup> Plaintiffs would only have a cause of action in April 2019 if EPA were to decide *both* not to  
 24 require resubmission *and* to forgo any completeness review of the already-submitted plans. In  
 25 that case, the dispute here would be substantially narrowed to briefing on a deadline for EPA to  
 26 take final action on two state plans (California and New Mexico). Any potential harm from the  
 requested stay is outweighed by the simplification of issues that would result from the requested  
 stay.

27 <sup>10</sup> Any substantive challenge to that nationally applicable rulemaking would be within the  
 28 exclusive jurisdiction of the D.C. Circuit. 42 U.S.C. § 7607(b)(1). This Court would have  
 jurisdiction only to determine the impact of the rulemaking on the present claims, but not the  
 validity of EPA's revision to the Emission Guidelines. *Id.*

1 outweigh the only conceivable harm that could potentially result from the stay, which is a four-  
2 month delay in the resolution of the States' claims.<sup>11</sup>

3 Further, EPA will provide monthly status reports to advise the Court and parties of the  
4 progress of the rulemakings. Cozzie Decl. ¶¶ 13-14. Thus, a stay of all proceedings in this  
5 matter pending resolution of EPA's rulemakings will promote judicial economy while ensuring a  
6 just and efficient determination of the case.

7 **V. CONCLUSION**

8 For the foregoing reasons, EPA's motion to stay all proceedings until April 30,  
9 2019, should be granted.

10 Date: November 5, 2018

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<sup>11</sup> In the unlikely event that, in response to public comments, EPA declines to finalize either Subpart Ba or the Landfills Proposal, briefing on remedy would resume at the cessation of the stay.