

1 XAVIER BECERRA
 Attorney General of California
 2 GARY E. TAVETIAN
 DAVID A. ZONANA
 3 Supervising Deputy Attorneys General
 4 TIMOTHY E. SULLIVAN, SBN 197054
 ELIZABETH B. RUMSEY, SBN 257908
 5 JULIA K. FORGIE, SBN 304701
 Deputy Attorneys General
 6 1515 Clay Street, 20th Floor
 7 P.O. Box 70550
 Oakland, CA 94612-0550
 8 Telephone: (510) 879-0860
 Fax: (510) 622-2270
 9 E-mail: liz.rumsey@doj.ca.gov
 10 *Attorneys for the State of California, by and through*
Attorney General Xavier Becerra and the California Air
 11 *Resources Board*

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

15 **STATE OF CALIFORNIA, et al.,**
 16
 17 **Plaintiffs,**
 18
 19 **UNITED STATES ENVIRONMENTAL**
PROTECTION AGENCY, et al.,
 20
 21 **Defendants**

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

**STATE PLAINTIFFS' OPPOSITION TO
EPA'S MOTION TO STAY CASE**

Date: February 14, 2019
 Time: 2:00 p.m.
 Courtroom: 2, 4th Floor, Oakland Courthouse
 Judge: Hon Haywood S. Gilliam, Jr.

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1 The undersigned States and state agencies (together, the States)¹ oppose defendant U.S.
2 Environmental Protection Agency’s and Acting Administrator Andrew Wheeler’s (EPA) motion
3 to stay this case. The States respectfully request that the Court deny EPA’s stay motion and rule
4 on the pending motion to dismiss and motion for intervention.

5 **I. INTRODUCTION**

6 EPA’s stay motion, although styled as a stay of this litigation, would also stay EPA’s long-
7 overdue mandatory duties to implement regulations protecting public health and welfare,
8 perpetuating EPA’s unlawful effective repeal of the very regulations that the States filed this
9 lawsuit to enforce. EPA does not dispute it has violated those regulations and now asks the Court
10 to let it continue to do so while it considers revising them. The States and their citizens have
11 already been significantly harmed by EPA’s failure to implement the Clean Air Act regulations
12 (Guidelines) at issue in this case, and each additional day of delay exacerbates that harm. Thus,
13 there is far more than a “fair possibility” that a stay of any duration “will work damage to
14 [someone]” other than EPA. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Meanwhile, EPA
15 cannot—although it must—make the “clear case of hardship or inequity” required to justify a stay
16 under these circumstances. *Id.* EPA’s motion falls far short of the showing required for a stay of
17 litigation or a stay of its statutory obligations. Further, denial of the stay motion and a ruling on
18 EPA’s motion to dismiss would clear a path to prompt settlement or summary judgment.

19 EPA’s Guidelines were finalized on August 29, 2016.² Had EPA done nothing more than
20 what it is *legally required to do*, every jurisdiction with a landfill subject to the rules would have
21 had an approved compliance plan—whether state or federal—nearly a year ago, by November 30,
22 2017, and subject landfills across the country would be on their way to collectively reducing
23 significant emissions of volatile organic compounds (VOC), hazardous air pollutants, methane,
24 and other pollutants that EPA has determined may reasonably be anticipated to endanger public
25 health or welfare. 42 U.S.C. § 7411(b)(1)(A). Instead, EPA has taken successive actions to

26 _____
27 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.

28 ² Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg.
59,276 (Aug. 29, 2016) (Guidelines or rules).

1 illegally delay implementing the rules—effectively suspending them indefinitely—such that *not*
2 *one state* has an approved compliance plan, and *no landfills* are under a federal regulatory
3 obligation to reduce health and welfare-endangering emissions beyond the status quo established
4 by the outdated regulations. EPA’s conduct is egregious not only because it shows clear disregard
5 for the law, but also for the seriousness of the harms the Guidelines were designed to address.

6 Against EPA’s clear violation and the substantial harm it causes, EPA does not point to any
7 hardship or inequity in continuing with this litigation. Nor could it. “[B]eing required to defend a
8 suit, without more, does not constitute a ‘clear case of hardship or inequity’ within the meaning of
9 *Landis.*” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005). That is particularly true
10 here where EPA does not dispute liability and its jurisdictional defense has already been briefed
11 and argued. EPA only points to a proposed rule (that it rushed to issue just before the hearing on
12 its motion to dismiss), but if and when that rule will be finalized remains a matter of speculation.
13 And EPA’s conclusory statements that a stay would “promote judicial economy” (EPA’s Mot. to
14 Stay (Mot.) at 9) are unavailing, particularly where neither justice nor judicial efficiency would
15 be served. EPA’s stay motion is consistent with a pattern of conduct by which the agency seeks to
16 avoid implementing the rules and evade judicial review of its illegal conduct. *See Moses H. Cone*
17 *Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 27 (1983) (where the stay applicant “is the one
18 from whom ... performance is sought, a stay of litigation ... leaves the recalcitrant party free to
19 sit and do nothing”).

20 Thus, in attempting to leverage the rushed proposed rule into a stay of this litigation, EPA is
21 asking this Court to extend—for many months—the exact harm that prompted the States to sue in
22 the first place, all without letting the administrative process run its course. This Court should
23 reject EPA’s attempt to coopt this Court’s case management powers to perpetuate EPA’s own
24 illegal actions, deny the stay, rule on the pending motions, and proceed with this case, as federal
25 courts around the country have recently done when faced with similar bids for delay. *See, e.g., Air*
26 *Alliance Houston v. EPA*, — F.3d —, No. 17-1155, 2018 WL 4000490, at *11 (D.C. Cir. Aug.
27 17, 2018) (“EPA may not employ delay tactics to effectively repeal a final rule while sidestepping
28 the statutorily mandated process for revising or repealing that rule on the merits”).

1 II. BACKGROUND

2 EPA first proposed rules regulating landfill emissions in 1991. In 1996, EPA listed landfills
3 as a source category that contributes significantly to air pollution that may reasonably be
4 anticipated to endanger public health and welfare, and concurrently promulgated new source
5 performance standards (NSPS) and existing source emission guidelines for states' development of
6 implementation plans.³ (Notably, this was even before EPA's finding in 2009 that greenhouse
7 gases—the primary constituents of landfill emissions—endanger public health and welfare
8 because of their contribution to climate change. 74 Fed. Reg. 66,496 (Dec. 15, 2009). A review of
9 the 1996 rules was arguably ten years overdue by July 17, 2014, when EPA first noticed the
10 rulemaking that led to the revised Guidelines that are the subject of this action. Among many
11 other significant benefits of the rules, EPA estimated that the Guidelines will reduce emissions of
12 methane—a potent greenhouse gas—by 330,000 metric tons per year by 2025 (equivalent to the
13 annual emissions of 1.8 million cars on the road).⁴

14 The Guidelines require states to submit compliance plans by May 30, 2017, 40 C.F.R.
15 § 60.30f(b), and require EPA to approve or disapprove these plans within four months of state
16 submission—by September 30, 2017. 40 C.F.R. § 60.27(b). For states that failed to submit an
17 approvable implementation plan, the regulations provide EPA up to six months from the state
18 submission deadline, until November 30, 2017, to promulgate an adequate federal plan. 40 C.F.R.
19 § 60.27(d). EPA acknowledges that it failed to comply with its deadlines, violations which are the
20 subject of the States' complaint.

21 The new Administration's plans to scuttle implementation of EPA's regulations began
22 well before EPA missed those deadlines, however. On May 5, 2017—more than three weeks
23 before states were required to submit their plans—EPA sent a letter to industry groups indicating

24 _____
25 ³ Standards of Performance for New Stationary Sources and Guidelines for Control of Existing
Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905 (March 12, 1996).

26 ⁴ This amount of methane has the global-warming potential equivalent to 8.2 million metric tons of
27 carbon dioxide (CO₂e). See EPA's Air Rules for Municipal Solid Waste Landfills, Fact Sheet at
28 1 (July 14, 2016), <https://www.epa.gov/sites/production/files/2016-09/documents/landfills-final-nsp-eg-factsheet.pdf>.

1 its intent to grant their petition to reconsider the Guidelines, and to stay the rule “in [its] entirety”
2 for 90 days while it did so. On May 31, 2017, one day after the deadline, EPA published notice of
3 the 90-day stay in the Federal Register.⁵

4 Two weeks later, various non-governmental organizations (NGO Petitioners) filed a
5 petition for review of the 90-day stay asserting that it was unlawful because the criteria for
6 mandatory reconsideration were not met (and there would have been no other lawful basis for the
7 stay). *Nat. Res. Def. Council v. Pruitt*, No.17-1157 (D.C. Cir. filed June 15, 2017). Shortly after
8 that action was filed, in July 2017, EPA submitted to the Office of Management and Budget
9 (OMB) a proposed rulemaking regarding the Guidelines, publicly stating, “EPA intends to further
10 extend the [90-day] stay in this action. Sources will not need to comply with any requirements
11 under these rules while the stay is in effect.”⁶ (Ultimately, EPA did not issue the proposal—which
12 it would have lacked authority to do.)

13 Notwithstanding EPA’s statement in its rulemaking proposal to the OMB, in EPA’s
14 January 22, 2018 response to NGO Petitioners’ petition, the agency asserted that the lawsuit was
15 moot, because the stay had had “no effect” on the Guidelines’ implementation deadlines. EPA
16 also told the D.C. Circuit that under 42 U.S.C. § 7604(a)(2)—the same statutory waiver of
17 sovereign immunity at issue here—a district court was the proper forum to hear claims that EPA
18 had failed to act by the deadlines in its regulations, which it admitted had passed. Respondents’
19 Initial Brief (ECF No. 1714147) at 37, *Nat. Res. Def. Council v. Pruitt*, No. 17-1157 (D.C. Cir.
20 Jan. 22, 2018).

21 EPA’s disclaimer of any alteration of the regulatory deadlines in federal court did not,
22 however, lead to any action by EPA to implement its obligations. Quite to the contrary, after
23 abandoning its effort to further suspend the Guidelines through the proper rulemaking process,

24 _____
25 ⁵ Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines
26 and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31,
2017).

27 ⁶ See Stay of Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills,
28 RIN 2060-AT64, <https://reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT64> (last visited Nov. 9, 2018).

1 EPA decided simply not to implement them, and telegraphed that intention to the States and
2 regulated community. On October 31, 2017, Waste Dive, an online news outlet for the waste
3 industry, reported, “In an emailed statement, [EPA] told Waste Dive any states that fail to submit
4 plans . . . ‘are not subject to sanctions,’ and should not be concerned regarding any sanctions.”⁷
5 According to Waste Dive, EPA further stated, “we do not plan to prioritize the review of these
6 state plans . . . nor are we working to issue a Federal Plan for states that fail to submit a state
7 plan.” *Id.* After California and New Mexico timely submitted their plans, EPA responded in a
8 February 26, 2018 letter to CARB⁸ (and several other states):

9 Since the agency is reconsidering various issues regarding the
10 landfill regulations, at this time we do not plan to prioritize review
11 of submitted state plans nor are we working to issue a Federal Plan
12 for states that failed to submit a state plan. . . . Additionally, we are
13 currently working to align our reconsideration of certain portions
14 of the [Guidelines] with the risk and technology review (RTR) for
15 this source category. The EPA has a court order to complete the
16 RTR by March 13, 2020 and the reconsideration will be finished
17 on the same timeline.

18 To compel EPA to perform its mandatory duties—and because they are harmed each day
19 it does not—the States sent EPA the required 60-day notice of intent to sue under the citizen suit
20 provision of the Clean Air Act on March 23, 2018, and filed this action on May 31, 2018. Despite
21 having just told the D.C. Circuit in *Nat. Res. Def. Council v. Pruitt* that an action challenging
22 EPA’s failure to implement the Guidelines lay in the district court under section 304(a)(2) of the
23 Act (*supra*, D.C. Cir. No. 17-1157, ECF No. 1714147 at 37), EPA moved to dismiss the States’
24 complaint here, arguing that this Court did not have jurisdiction to hear the States’ claims (Dkt.
25 No. 28).

26 Two days before the scheduled hearing—and after a “very rushed” three-day Office of
27 Management and Budget review process⁹—EPA Administrator Andrew Wheeler signed a

28

⁷ Cody Boteler, *EPA Offers Public Clarification on Timeline for NSPS, EG Landfill Rules Months After Stay Expires*, Waste Dive, Oct. 31, 2017, <https://www.wastedive.com/news/epa-offers-public-clarification-on-timeline-for-nsps-eg-landfill-rules-mon/508484/>.

⁸ See Proposed Intervenor’s Compl. (Dkt. No. 36-3), App. 22, Letter from Matthew Lakin, EPA, to Richard Corey, California Air Resources Board (Feb. 26, 2017).

⁹ Office of Management and Budget, Internal Email from Chad Whiteman, Interagency Discussion and EPA Responses Pertaining to Landfills Subpart Ba NPRM [2060-AU33] at 2 (Oct. 16,

1 proposal to extend the deadlines for state planning and review under the *current* Guidelines such
 2 that EPA would not need to issue a federal plan for states without an approved state plan until the
 3 end of February 2023—effectively proposing to delay the implementation of rules *that should*
 4 *already have been implemented* by more than five years.¹⁰ The proposal is not accompanied by
 5 any regulatory impact analysis, or other analysis of its effects on human health and welfare. *See*
 6 *id.* The proposal for the first time contends that the state planning and review process for the
 7 Guidelines is insufficiently short, misleadingly pointing to the fact that few states submitted plans
 8 timely while omitting that EPA had signaled they did not need to do so. *Id.* at 54,530. The
 9 proposal also claims to “harmonize” the Guidelines with another proposed rule regarding the
 10 timeline for Section 111(d) implementation, the Affordable Clean Energy rule (ACE rule).¹¹
 11 Citing the preamble to the ACE rule, EPA asserts the ACE rule would apply to “ongoing”
 12 guidelines (Mot. at 3), and that the Guidelines at issue here are “ongoing” (*id.* at 4). This is
 13 incorrect. Notwithstanding that the only reason these Guidelines could possibly be construed to
 14 be “ongoing” is because EPA violated the law, the proposed regulatory text in the ACE rule
 15 proposal applies only to *future* guidelines, not “ongoing” ones.¹²

16 At the conclusion of the argument on EPA’s motion to dismiss, with a ruling imminent,
 17 counsel for EPA for the first time notified the Court and parties that EPA would move to halt this

18 _____
 19 2018), Supporting & Related Material Issued by EPA to EPA Docket No. EPA-HQ-OAR-2018-
 20 0696-0003, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0696-0003> (OMB
 21 official describing rushed review process of EPA’s proposal to extend the deadlines). OMB’s
 22 review of the proposal took merely three days, foreclosing the ability of interested parties to
 23 meet with OMB regarding the proposal, as they usually are able to do. The resulting proposal did
 24 not even have the correct docket number. Correction, 83 Fed. Reg. 56,015 (Nov. 9, 2018).

25 ¹⁰ Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste
 26 Landfills, 83 Fed. Reg. 54,527, 54, 532 (Oct. 30, 2018) (as signed by Acting Administrator
 27 Wheeler on Oct. 23, 2018).

28 ¹¹ Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating
 Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source
 Review Program, 83 Fed. Reg. 44,746 (Aug. 31, 2018).

¹² 83 Fed. Reg. at 44,803 (proposed 40 C.F.R. § 60.20a states: “Applicability. (a) The provisions
 of this subpart apply to States upon publication of a final emission guideline under § 60.22a(a), *if
 such final guideline is published after [date of publication of final rule in the Federal
 Register].*”) (emphasis added). Notably, EPA’s declarant, David Cozzie, does not testify that
 ACE would apply to “ongoing” rulemakings. *See* Decl. of David Cozzie (Dkt. No. 70-1).

1 Court's review due to the extension EPA was proposing to give itself. EPA filed this stay motion
2 eleven days later, with a hearing date three months out.¹³

3 **III. STANDARD OF REVIEW**

4 To carry its burden of justifying a stay, EPA must "make out a clear case of hardship or
5 inequity in being required to go forward, if there is even a fair possibility that the stay for which
6 he prays will work damage to [someone] else." *Landis*, 299 U.S. at 255. The *Landis* Court set out
7 competing interests courts must weigh in deciding whether to grant a stay: [1] "possible damage
8 which may result from granting a stay, [2] the hardship or inequity which a party may suffer in
9 being required to go forward, and [3] the orderly course of justice measured in terms of the
10 simplifying or complicating of issues, proof, and questions of law which could be expected to
11 result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299
12 U.S. at 254-55); *see also Lockyer*, 398 F.3d at 1112. "[B]eing required to defend a suit, without
13 more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*."
14 *Lockyer*, 398 F.3d at 1112. Here, those competing interests weigh heavily in favor of denying
15 EPA's motion for stay.

16 **IV. ARGUMENT**

17 **A. A Stay Will Work Severe Damage to the States and their Citizens.**

18 The States and their citizens are harmed by every day of EPA's delay in failing to act on its
19 duty to implement the Guidelines.¹⁴ As discussed in earlier filings in this matter, landfills emit
20 dangerous air pollutants including VOCs and nearly 30 organic hazardous air pollutants. 81 Fed.
21 Reg. 59,276, 59,281. These pollutants are associated with serious health consequences in the
22 short-term. Among other serious public health harms, citizens may suffer adverse respiratory and

23 _____
24 ¹³ State Plaintiffs intend to file a motion to shorten time to hear EPA's stay motion so that it may
25 be heard as soon as possible. The States believe that a hearing is not necessary and that the stay
26 motion should be decided on the papers.

27 ¹⁴ EPA oddly asserts, Mot. at 7, that its deadlines for state plans submission "is and will continue
28 to be subject to EPA's discretion," citing 40 C.F.R. § 60.27(a). But EPA has not invoked that
provision to justify the violation at issue in this case (and did not raise it in the motion to dismiss
briefing), likely because such an extension cannot be considered "necessary" when EPA would
simply prefer not to implement the law.

1 cardiovascular effects even from short-term exposure to ground-level ozone formation caused by
2 VOC emissions. *Id.* Similarly, hazardous air pollutants, such as benzene, “can lead to a variety of
3 health concerns such as cancer and noncancer illnesses (e.g., respiratory, neurological).”¹⁵

4 According to EPA, landfills are also the nation’s third largest source of methane,
5 accounting for almost twenty percent of domestic methane emissions. 81 Fed. Reg. 59,276,
6 59,281. Methane emissions harm the States and their citizens by significantly contributing to air
7 pollution that causes climate change. *See Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).
8 Indeed, methane is the second leading climate-forcing agent after carbon dioxide globally. Pound
9 for pound, it warms the climate roughly 86 times more over a 20-year time frame than carbon
10 dioxide. 81 Fed. Reg. at 59,281. California has prioritized reductions of “short-lived climate
11 pollutants” such as methane because their climate impacts are especially strong over the short
12 term. SB 1383 (Lara, Chapter 395, Statutes of 2016). And the dire report released only last
13 month by the Intergovernmental Panel on Climate Change highlights the immediate and pressing
14 need to curb pollutants like methane in the short term to avoid the most devastating effects of
15 climate change.¹⁶

16 Overall, the pollution reductions at stake in this matter are significant—as are the harms to
17 the States that will occur throughout any delay in deciding this case. At the very least, these
18 harms greatly exceed the “fair possibility of damage” required to trigger EPA’s burden to “make
19 out a clear case of hardship or inequity in being required to go forward.” *Landis*, 299 U.S. at 255.

20 **B. EPA Has Not Demonstrated a Clear Case of Hardship or Inequity.**

21 EPA does not even acknowledge its burden to make out a case of hardship or inequity,
22 much less attempt to meet it.¹⁷ Rather, EPA, in only a conclusory fashion, asserts that the fact that

23 _____
24 ¹⁵ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,
81 Fed. Reg. 35,823, 35,837 (June 3, 2016).

25 ¹⁶ IPCC Press Release, IPCC, Summary for Policymakers of IPCC Special Report on Global
26 Warming of 1.5 C Approved by Governments (Oct. 8, 2018) available at
http://www.ipcc.ch/pdf/session48/pr_181008_P48_spm_en.pdf; Report available at
<http://www.ipcc.ch/>.

27 ¹⁷ EPA cites a number of cases, but it is not clear how they advance its argument. *See Mot.* at 5,
28 citing *Landis*, 299 U.S. 248, *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64

1 the States' claims *may* be moot in six months' time "surely outweigh[s] the only conceivable
2 harm that could potentially result from the stay, which is," in EPA's view "a four-month delay in
3 the resolution of the States' claims." Mot. at 8-9. Even if it were true that a mere four-month
4 delay of justice was the "only conceivable harm that could potentially result" here—and as
5 discussed above, that is emphatically not the case—EPA has still failed to articulate *any*
6 cognizable hardship or inequity that it will suffer that could outweigh such harm. And there is
7 none. *Lockyer*, 398 F.3d at 1112 ("[B]eing required to defend a suit, without more, does not
8 constitute a 'clear case of hardship or inequity' within the meaning of *Landis*."). Nor can EPA
9 claim any hardship or inequity from complying with the law (or any cognizable interest in
10 violating it).

11 Rather than making out a case of hardship or inequity, EPA principally asks this Court to
12 permit it to continue violating the law because it might change that law in the future. EPA relies
13 heavily on that speculative consideration to tip the balance, stating, "[i]f the Court grants a stay
14 until April 31 [sic], 2019, *and* EPA finalizes Subpart Ba *and* the Landfills Proposal as proposed, a
15 significant saving in judicial and party resources will result." Mot. at 8 (emphases added). Here,
16 the "party resources" at issue are just those "required to defend a suit," which are weightless.
17 *Lockyer*, 398 F.3d at 1112. And even if the proposed actions were finalized by April 30, 2019,
18 which is highly unlikely, the actual "savings" in judicial and party resources would be scant; the
19 sole legal issue in this matter is already briefed and argued. (Notably, EPA's appeal to
20 conservation of judicial resources here comes only after this Court prepared for and heard oral
21 argument on EPA's motion to dismiss.)

22
23
24 _____
25 (9th Cir. 1979); *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir.
26 1983); and *Lindell v. Synthes, USA*, No. 11-cv-2053, 2012 WL 1657197, at *3 (E.D. Cal. May
27 10, 2012). For one, the States do not dispute the proposition for which EPA cites those cases—
28 namely that this Court has discretion to stay the action. EPA does not indicate how any of those
cases support its argument that a stay is warranted in the circumstances at issue here, other than
to note that the requested stay would comport with the Ninth Circuit's admonition in *Leyva* that
any stay be of "reasonable" duration. Mot. at 6.

1 The proposed rules underlying EPA’s motion for stay are just that, proposals. EPA cannot
 2 credibly say with any certainty “when, if, or in what form, the final rule will become effective.”
 3 *Andrews v. Monteville of Scotts Valley, Inc.*, No. C 93-20560, 1995 WL 274305, at *3 (N.D. Cal.
 4 May 9, 1995); *see also Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979)
 5 (explaining that an agency official may not irrevocably prejudge the outcome of a rulemaking).
 6 During this Administration alone, EPA has walked away from several similar proposals to change
 7 current regulations, or forecast imminent dates for proposed changes that are still under an
 8 uncertain timeframe for final action, including, but not limited to:

- 9 • Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and
 10 Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16,
 11 2017) (proposing a rule to stay certain oil and gas requirements; originally forecast
 12 to be finalized in August 2017, but more than a year later, EPA has not finalized this
 13 rule);
- 14 • Notice of Proposed Withdrawal of the Control Techniques Guidelines for the Oil
 15 and Natural Gas Industry, 83 Fed. Reg. 10,478 (Mar 9, 2018) (proposing to
 16 withdraw Control Technique Guidelines for existing oil and natural gas sources in
 17 ozone nonattainment areas; originally forecast to be finalized in August 2018, but
 18 not yet finalized);
- 19 • Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider
 20 Kits, 82 Fed. Reg. 53,442 (Nov. 16, 2017) (proposing to relax restrictions on the use
 21 of certain high-emitting diesel engines; originally forecast to be finalized in May
 22 2018, but not yet finalized); and
- 23 • Withdrawal of Extension of Deadline for Promulgating Designations for the 2015
 24 Ozone National Ambient Air Quality Standards, 82 Fed. Reg. 37,318 (August 10,
 25 2017) (EPA withdrawing a 1-year delay action the agency had announced on June
 26 28, 2017).
- 27 • As discussed, *supra*, p. 4, n. 6, EPA also abandoned its regulatory effort to suspend
 28 implementation of the Guidelines at issue here.

Beyond the current administration, examples from prior administrations further
 demonstrate that these abandoned rulemaking proposals are not uncommon for EPA.¹⁸

¹⁸ Examples abound where an agency has declared an intent to revise a rule, even formally
 proposing a new rule, but ultimately (for a host of reasons both policy and practical) decided not
 to change the status quo. *See, e.g., Mississippi v. EPA*, 744 F.3d 1334, 1341-42 (D.C. Cir. 2013)
 (two years after declaring its intent in the near term to initiate a rulemaking to revise a Clean Air
 Act standard for ozone pollution set by a previous administration, EPA decided not to change the
 standard after all); Prevention of Significant Deterioration, Nonattainment New Source Review,
 and New Source Performance Standards: Emissions Test for Electric Generating Units, 70 Fed.

1 The uncertainty over whether this proposal will ultimately become final is even greater
 2 here than in the typical proposed rulemaking given that EPA’s proposal is, in EPA’s own words,
 3 “predicated on” finalization of the ACE, the Trump Administration’s proposed replacement for
 4 the Clean Power Plan. Mot. at 5; 83 Fed. Reg. at 54,529. The ACE proposal is an enormously
 5 complicated and controversial rule that is actually three rulemakings—a revision of the Clean
 6 Power Plan, New Source Review reform, and amendment of the framework regulations—rolled
 7 into one. The comment period on the ACE rule only just closed (October 31, 2018). At the time
 8 EPA filed its motion, it verified receipt of 150,000 comments. *See* Decl. of David Cozzie (Dkt.
 9 No. 70-1) at ¶7. EPA now verifies receipt of hundreds of thousands more (494,535 and
 10 counting¹⁹), and the States’ submission alone is more than 150 pages long. EPA needs to consider
 11 each of these comments in finalizing the rule. Six months to final agency action on the ACE rule
 12 is an unrealistic timeline, and legal challenges are almost certain to follow. Only once the ACE
 13 rule is final can EPA proceed to finalize the proposed rule here. A stay is not warranted in this
 14 case and could well be a long road to nowhere given the circumstances of EPA’s proposal.

15 **C. Courts Have Recently Rejected Similar Efforts by EPA to Avoid**
 16 **Implementing the Law Based on its Desire to Change it.**

17 EPA can seek to change the Guidelines, so long as the agency complies with the substantive
 18 and procedural requirements for doing so. What it cannot do is avoid implementing and enforcing
 19 the existing rules simply because it plans to change them in the future. Courts throughout the
 20 country have rejected EPA’s prior attempts to do so. As the D.C. Circuit said in response to one
 21 of EPA’s first efforts to stay a regulation because the agency wanted to reconsider it, “an agency
 22 issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.” *Clean*
 23

24 Reg. 61,081 (Oct. 20, 2005) (proposed, but never finalized, regulatory amendments to New
 25 Source Review program); Effluent Limitations Guidelines and Pretreatment Standards for the
 26 Industrial Laundries Point Source Category, 62 Fed. Reg. 66,182 (Dec. 17, 1997) (proposing
 27 pretreatment standards for control of certain wastewater pollutants, withdrawn two years later,
 28 Effluent Limitations Guidelines and Pretreatment Standards for the Industrial Laundries Point
 Source Category, 64 Fed. Reg. 45,072 (Aug. 18, 1999)).

¹⁹ *See* <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-21117> (last visited Nov. 9, 2018).

1 *Air Council v. EPA*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Nat’l Family Planning &*
2 *Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)). Since then, court
3 after court, including this Court, have reaffirmed that while agencies are “free [reconsider a rule]
4 so long as ‘the new policy is permissible under the statute, there are good reasons for it, and the
5 agency *believes* it to be better,’” *id.* at 11 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S.
6 502, 515 (2009)), that does not allow the agency to violate the current law in the meantime. *See*
7 *Air Alliance Houston*, 2018 WL 4000490, at *11 (vacating EPA rule to delay compliance with
8 chemical safety regulation despite pendency of proposal to revise regulation, and explaining that
9 “EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the
10 statutorily mandated process for revising or repealing that rule on the merits”); *Pineros y*
11 *Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066–67 (N.D. Cal. 2018)
12 (vacating EPA delay of pesticide standard and rejecting EPA’s argument that its action should be
13 upheld “because more time was needed for ‘further review and consideration of new regulations’
14 and confusion could result if the rule went into effect but was ‘subsequently substantially revised
15 or repealed.”); *see Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95,
16 111-12 (2d Cir. 2018) (“[A] decision to reconsider a rule does not simultaneously convey
17 authority to indefinitely delay the existing rule pending that reconsideration.”); *California v.*
18 *Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018) (enjoining Bureau of Land
19 Management’s (BLM) attempt to suspend regulation despite BLM’s plan to rescind regulation);
20 *California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017) (vacating
21 BLM’s attempt to postpone regulation, and rejecting argument that requiring regulated entities to
22 spend money to comply would be “unnecessarily disruptive and inequitable ... because the
23 Bureau is planning to lawfully suspend the Rule and ultimately revise or rescind it”).

24
25 ///

1 In rejecting agencies' bids for delay, courts have acted promptly—including granting an
2 administrative stay,²⁰ summary vacatur,²¹ preliminary injunction,²² and early summary judgment
3 (prior to completion of the record)²³—all in cases where the agency plans to revise the regulation
4 at issue. In doing so, these courts have ensured that the law is followed until it is duly changed.
5 And those rulings have had significant on-the-ground results. For example, in *Clean Air Council*,
6 862 F.3d 1, the regulations the D.C. Circuit ruled EPA had no authority to stay under the Clean
7 Air Act have now been in effect for the last year and a half, during which time they have reaped
8 significant emissions-reduction benefits.

9 This case is no different. Halting review in this mandatory duty suit because the agency had
10 proposed a new regulation would have precisely the same effect as permitting the agency to
11 suspend or effectively repeal a regulation merely because it had proposed a new one. Without
12 judicial review, and contrary to settled law, the agency would be permitted to ignore the law
13 because it wants to change it. EPA may change the law so long as it complies with the substantive
14 and procedural requirements for doing so, but until it does, EPA should not be permitted to
15 violate the law on the books.

16 **D. Denial of EPA's Stay Motion and a Ruling on EPA's Motion to Dismiss**
17 **Would Resolve the Key Legal Issues and Provide a Clear Path to**
18 **Settlement or Final Judgement.**

19 Denial of EPA's stay motion and issuance of a ruling on the pending motion to dismiss—
20 which is fully briefed and argued—would resolve the core legal dispute in this case. As EPA
21 acknowledges, if the Court denies its motion to dismiss, the sole remaining issue (aside from
22 standing) would be the appropriate deadline for compliance. In the circumstance, States are
23 prepared to promptly discuss resolution of this matter with EPA, and barring that, to move for
24 summary judgment. As the examples discussed above demonstrate, when courts have invalidated

25 ²⁰ Order (ECF No. 1741224), *Env. Def. Fund, et al, v. EPA*, No. 18-1190 (D.C. Cir. July 18, 2018)
26 (granting administrative stay of EPA's no-action assurance, pledging that it would take no action
to enforce valid regulations while it pursued a rulemaking to revise them).

27 ²¹ *Clean Air Council*, 862 F.3d 1.

28 ²² *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054.

²³ *State v. Bureau of Land Mgmt.*, 277 F.Supp.3d 1106.

1 EPA's unlawful action or inaction, the agency has in some instances abandoned further plans for
 2 delay and proceeded to enforce the law. The court should presume that is as likely an outcome
 3 here as EPA finalizing its recently proposed rule, unless and until EPA has taken a final agency
 4 action. By contrast, if the Court were to grant EPA's motion and stay this case, EPA will have
 5 succeeded in continuing to evade its mandatory duties while also evading judicial review of its
 6 unlawful conduct. As discussed above, the harm to States as a result of EPA's failure to
 7 implement the Guidelines is significant and ongoing, and exacerbated with each delay, while EPA
 8 cannot claim hardship from continuing to litigate this case.

9 V. CONCLUSION

10 The requested stay severely harms the States and their residents, while EPA does not even
 11 claim that proceeding with this case will cause it any hardship or is inequitable. Not one day of
 12 EPA's ongoing failure to perform its obligations under the Clean Air Act in this matter has been
 13 lawful, and no legitimate interest is served—not the Court's, not the parties', and not the
 14 public's—by allowing EPA to continue to avoid its legal duties. This Court should deny EPA's
 15 motion for a stay.

16
 17
 18 Dated: November 9, 2018

Respectfully Submitted,

XAVIER BECERRA
 Attorney General of California
 GARY E. TAVETIAN
 DAVID A. ZONANA
 Supervising Deputy Attorneys General
 TIMOTHY E. SULLIVAN
 JULIA K. FORGIE
 Deputy Attorneys General

/s/ Elizabeth B. Rumsey
 ELIZABETH B. RUMSEY
 Deputy Attorney General
*Attorneys for the State of California, by and
 through Attorney General Xavier Becerra
 and the California Air Resources Board*

1 For the STATE OF ILLINOIS
LISA MADIGAN
2 Attorney General of Illinois
DANIEL I. ROTTENBERG*
3 Assistant Attorney General
Environmental Bureau
4 Illinois Attorney General's Office
69 W. Washington St., 18th Floor
5 Chicago, Illinois 60602
6 (312) 814-3816
DRottenberg@atg.state.il.us

8 For the STATE OF NEW MEXICO
HECTOR BALDERAS
9 Attorney General of New Mexico
ARI BIERNOFF (CA SBN 231818)
10 BILL GRANTHAM*
11 Assistant Attorney General
201 Third Street NW, Suite 300
12 Albuquerque, New Mexico 87102
13 (505) 717-3520
wgrantham@nmag.gov

15 For the COMMONWEALTH OF PENNSYLVANIA
JOSH SHAPIRO
16 Attorney General of Pennsylvania
MICHAEL J. FISCHER*
17 Chief Deputy Attorney General
ROBERT A. REILEY
18 Assistant Director, Pennsylvania Department
of Environmental Protection
19 Pennsylvania Office of Attorney General
20 Strawberry Square
21 Harrisburg, PA 17120
22 (215) 560-2171
mfischer@attorneygeneral.gov

26 *Admitted to practice *pro hac vice*.

For the STATE OF MARYLAND
BRIAN E. FROSH
Attorney General of Maryland
LEAH J. TULIN*
Assistant Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6962
ltulin@oag.state.md.us

For the STATE OF OREGON
ELLEN F. ROSENBLUM
Attorney General of Oregon
PAUL GARRAHAN*
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street, N.E.
Salem, Oregon 97301-4096
(503) 947-4342
paul.garrahan@doj.state.or.us

For the STATE OF RHODE ISLAND
PETER F. KILMARTIN
Attorney General of Rhode Island
GREGORY S. SCHULTZ
Special Assistant Attorney General
RI Department of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
gschultz@riag.ri.gov

For the STATE OF VERMONT
THOMAS J. DONOVAN, JR.
Attorney General of Vermont
NICHOLAS F. PERSAMPIERI*
Assistant Attorney General
Office of the Vermont Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186
nick.persampieri@vermont.gov