

1 XAVIER BECERRA
 Attorney General of California
 2 GARY E. TAVETIAN
 DAVID A. ZONANA
 3 Supervising Deputy Attorneys General
 TIMOTHY E. SULLIVAN, SBN 197054
 4 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
 Attorneys for the State of California, by and through
 10 Attorney General Xavier Becerra and the California
 Air Resources Board

11
 12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 14 OAKLAND DIVISION

15
 16 **STATE OF CALIFORNIA, et al.,**

17 **Plaintiffs,**

18 **v.**

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

21 **Defendants**
 22

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

**STATE PLAINTIFFS' MOTION TO
 SHORTEN TIME FOR THE COURT TO
 HEAR DEFENDANT EPA'S MOTION TO
 STAY**

[Civil L.R. 6-3(a)(4)]

Judge: Hon Haywood S. Gilliam, Jr.

23
 24
 25
 26
 27
 28

1 **MOTION**

2 Pursuant to Civil Local Rule 6-3(a)(4), the undersigned Plaintiff States and state agencies
 3 (together, States)¹ respectfully request that the Court shorten time for the hearing on Defendants
 4 U.S. Environmental Protection Agency's and Acting Administrator Andrew Wheeler's (EPA)
 5 motion to stay this case (Dkt. No. 70, Nov. 5, 2018). EPA's stay motion is currently set to be
 6 heard on February 14, 2019. The States request that the hearing be held as soon as possible, or,
 7 alternatively, that the Court decide EPA's stay motion on the papers submitted by the parties,
 8 without a hearing. The basis for the States' motion is the significant prejudice and harm that will
 9 befall their citizens from not resolving EPA's stay motion for more than three months, and which
 10 would effectively grant EPA's meritless request.

11 **BACKGROUND**

12 Pursuant to its obligations under section 111(d) of the Clean Air Act, EPA finalized
 13 emission guidelines (Guidelines) for the control of methane and other harmful pollutants from
 14 existing municipal solid waste landfills on August 29, 2016.² The Guidelines require states to
 15 submit compliance plans by May 30, 2017, 40 C.F.R. § 60.30f(b), and require EPA to approve or
 16 disapprove these plans within four months of state submission—by September 30, 2017. 40
 17 C.F.R. § 60.27(b). For states that failed to submit an approvable implementation plan, the
 18 regulations provide EPA up to six months from the state submission deadline, until November 30,
 19 2017, to promulgate an adequate federal plan. 40 C.F.R. § 60.27(d). EPA acknowledges it failed
 20 to comply with its deadlines.

21 On March 23, 2018, the States provided EPA 60 days' notice of their intent to sue under
 22 the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604(a)(2). They filed their complaint on
 23 May 31, 2018, alleging that, by failing to comply with the above deadlines, EPA failed to perform
 24 non-discretionary duties. The States seek a declaratory judgment that EPA violated its obligations
 25 under the Clean Air Act and seek a mandatory injunction compelling EPA to comply with its

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).

1 mandatory duties and implement the Guidelines. EPA filed a motion to dismiss the States'
2 complaint on August 7, 2018. (Dkt. No. 28.)

3 On October 25, 2018, the Court heard argument on EPA's motion to dismiss the States'
4 complaint, as well as on the motion of proposed-intervenor Environmental Defense Fund (EDF)
5 to intervene in the matter (Dkt. No. 36), and took the motions under submission. (Dkt. No. 69.)
6 During the October 25 hearing, EPA for the first time informed the parties and the Court that it
7 would seek a stay of the litigation due to a proposed rule it had released for comment two days
8 earlier³ that would extend the deadlines it had already flouted. The Court directed EPA's counsel
9 to file the motion as soon as possible. *See* Decl. of Elizabeth B. Rumsey, attached hereto (Rumsey
10 Decl.) ¶ 8.

11 On November 5, 2018, EPA filed a motion to stay the case until April 30, 2019, when it
12 estimates it will conclude the rulemaking to extend its missed deadlines. (Dkt. No. 70.) EPA
13 contends that when it finalizes the rule, this case will become moot. EPA selected a hearing date
14 for the motion of February 14, 2019, which was the earliest law and motion date available
15 according to the Court's online calendaring notices. The States requested EPA to agree to jointly
16 ask the Court to decide the stay motion on the papers and/or to stipulate to a joint request to the
17 Court for an earlier hearing date. EPA did not agree to these proposals. (Rumsey Decl. ¶¶ 10-12.)
18 Proposed-intervenor EDF supports this motion, and further states that it joins the arguments made
19 by the States herein, and that its members throughout the country are also harmed by delay in
20 deciding EPA's motion. (Rumsey Decl. ¶ 23.)

21 ARGUMENT

22 **I. WAITING UNTIL FEBRUARY TO DECIDE EPA'S MERITLESS REQUEST WOULD** 23 **EFFECTIVELY GRANT EPA OVER HALF OF THE RELIEF REQUESTED**

24 If the Court does not hear EPA's stay motion until February 14, 2019, EPA will in effect
25 have obtained the benefit of a stay for over three months—the majority of the length of stay EPA

26 _____
27 ³ *See* Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste
28 Landfills, 83 Fed. Reg. 54,527, 54, 532 (Oct. 30, 2018) (as signed by Acting Administrator Wheeler on Oct. 23, 2018).

1 seeks—regardless of whether EPA ultimately prevails on the merits of the motion.⁴ This delay is
2 procedurally unfair to the States.

3 When EPA first raised the possibility of moving for a stay of the case at the conclusion of
4 the October 25, 2018, argument on its motion to dismiss, the Court directed EPA to file its motion
5 as soon as possible. The States, for their part, responded to EPA’s motion within four days, to
6 ensure that this motion is resolved as quickly as possible (Dkt. No. 73, Nov. 9, 2018), and EPA’s
7 reply is due November 16, 2018. Thus, the matter will be fully briefed in short order. But the
8 hearing on the motion is not calendared until February 14, 2019. The States will be significantly
9 prejudiced if the matter is not heard until then. Not only will the stay have been effectively
10 granted by that time, but the passage of time will unjustly ease EPA’s burden on the motion—
11 reducing the duration of the requested stay from six months to two and a half months.

12 **II. THE STATES WILL BE HARMED BY EPA’S UNRESOLVED STAY MOTION**
13 **REMAINING PENDING FOR THREE MONTHS**

14 A three-month delay in deciding this motion will also work substantive harm on the States
15 and their citizens, because EPA’s violations—and the harms associated with those inactions—
16 will go unchecked during that time. As set out in the States’ opposition to EPA’s stay motion, the
17 States and their citizens are harmed by every day of EPA’s delay in failing to act on its duty to
18 implement the Guidelines. Opp. at 7-8. Landfills emit dangerous air pollutants including volatile
19 organic compounds (VOC) and nearly 30 organic hazardous air pollutants. 81 Fed. Reg. 59,276,
20 59,281. These pollutants are associated with serious health consequences in the short-term.
21 Among other serious public health harms, citizens may suffer adverse respiratory and
22 cardiovascular effects even from short-term exposure to ground-level ozone formation caused by
23 VOC emissions. *Id.* Similarly, hazardous air pollutants, such as benzene, “can lead to a variety of
24 health concerns such as cancer and noncancer illnesses (e.g., respiratory, neurological).”⁵

25 ⁴ The length of the stay EPA requested on November 5, 2018, is 176 days (until April 30, 2019).
26 The time between November 5, 2018, and the February 14, 2019, hearing is 101 days. Thus,
27 even if the Court denies the stay from the bench at the February 14, 2019, hearing, EPA will
28 have effectively stayed the case for more than half the length of stay it sought, even while losing
the stay motion.

⁵ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,
81 Fed. Reg. 35,823, 35,837 (June 3, 2016).

1 Landfills are the nation's third largest source of methane, accounting for almost twenty percent of
2 domestic methane emissions. 81 Fed. Reg. at 59,281. Methane emissions harm States and their
3 citizens by significantly contributing to air pollution that causes climate change. *See*
4 *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). Indeed, methane is the second leading climate-
5 forcing agent after carbon dioxide globally. Pound for pound, it warms the climate roughly 28-36
6 times more over a 100-year time frame than carbon dioxide. 81 Fed. Reg. at 59,281.⁶

7 Thus, during the more than three months between now and the hearing on EPA's stay
8 motion, the States and their residents will continue to be harmed by EPA's failure to carry out its
9 mandatory obligations to control landfill emissions, and yet the States will be unable to seek
10 injunctive relief while those harms continue. Without an earlier hearing—or a prompt decision by
11 the Court on the papers—EPA will have succeeded in continuing to evade its mandatory duties
12 while also evading judicial review of its unlawful conduct.

13 EPA, in contrast, will not be prejudiced by the Court hearing or otherwise deciding the
14 stay motion prior to February 14, 2019. A litigant does not have the right to a stay without the
15 Court's consent, and it therefore cannot be said to be harmed by being denied that consent sooner
16 rather than later.

17 **III. AN EARLIER HEARING ON THE STAY MOTION WILL ALLOW THIS CASE TO** 18 **PROCEED NORMALLY**

19 The practical effect of the Court's request for briefing on EPA's suggestion that it might
20 seek a stay is that litigation in this matter is on hold until that stay motion is resolved. That
21 resolution will not occur until February 14, 2019, at the earliest, unless the Court schedules an
22 earlier hearing or decides the motion on the papers, as the States request.

23 Prior to EPA filing its stay motion on November 5, 2018, there were two fully briefed and

24 ⁶ Citing United Nations Intergovernmental Panel on Climate Change (IPCC), *Climate Change*
25 *2014: Fifth Assessment Report (AR5)*. Methane's relative global warming potential is even more
26 potent (84 times that of carbon dioxide) over a 20-year timeframe. *See* AR5 Synthesis Report at
27 87, available at <https://www.ipcc.ch/report/ar5/syr/>. Only last month, the IPCC highlighted the
28 immediate and pressing need to curb pollutants like methane in the short term to avoid the most
devastating effects of climate change. IPCC, *Summary for Policymakers of IPCC Special Report*
on Global Warming of 1.5 C Approved by Governments, Press Release (Oct. 8, 2018) available at
http://www.ipcc.ch/pdf/session48/pr_181008_P48_spm_en.pdf; Special Report available at
<http://www.ipcc.ch/>.

1 argued motions pending before the Court: EPA’s motion to dismiss and Environmental Defense
 2 Fund’s motion to intervene. (The States are not aware of any impediment to the Court ruling on
 3 these two submitted motions prior to ruling on EPA’s stay motion.) EPA has not yet answered the
 4 States’ complaint as its motion to dismiss is still pending. No case management deadlines have
 5 been set in this case.

6 A timely ruling on EPA’s stay motion is likely to expedite resolution of this case. If the
 7 court denies EPA’s motion, as the States have urged, doing so in the near term—rather than three
 8 or more months from now—will allow the parties to promptly resolve this matter, and enable the
 9 States to realize the benefits conferred by the statute and duly enacted regulations. By contrast,
 10 just as the stay motion itself—calculated to evade EPA’s mandatory obligations and this Court’s
 11 review—harms and prejudices the States and their citizens, so, too, does waiting several months
 12 to decide it.

13 CONCLUSION

14 For the foregoing reasons, the States respectfully request that the Court either shorten the
 15 time to hear EPA’s stay motion—from the current February 14, 2019, hearing—to the Court’s
 16 earliest convenience or, in the event the Court decides a hearing is not necessary, decide the
 17 motion on the papers.

18 Dated: November 14, 2018

Respectfully Submitted,

19
 20 XAVIER BECERRA
 Attorney General of California
 GARY E. TAVETIAN
 21 DAVID A. ZONANA
 Supervising Deputy Attorneys General
 22 TIMOTHY E. SULLIVAN
 23 JULIA K. FORGIE
 Deputy Attorneys General

24 /s/ Elizabeth B. Rumsey
 ELIZABETH B. RUMSEY
 25 Deputy Attorney General
 26 *Attorneys for the State of California, by and*
 27 *through Attorney General Xavier Becerra and the*
 28 *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
(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
(505) 717-3520
13 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
Strawberry Square
20 Harrisburg, PA 17120
(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