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

15 STATE OF CALIFORNIA, *et al.*

16 Plaintiffs,

17 v.

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

20 Defendants.

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

**REPLY IN SUPPORT OF EPA'S
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

1 Pursuant to Civil L.R. 7-3 and the Court’s Order of November 7, 2018 (Dkt. No. 72),
 2 Defendants the United States Environmental Protection Agency and Andrew R. Wheeler, in his
 3 official capacity as Acting Administrator of the United States Environmental Protection Agency
 4 (collectively, “EPA” or, the “Agency”),” file this reply in support of EPA’s motion to stay this
 5 case until April 30, 2019 to allow EPA time to conclude a related proposed rulemaking,
 6 *Proposed Rule*, 83 Fed. Reg. 54,527 (Oct. 30, 2018) (hereinafter, the “Landfills Proposal”)
 7 (Dkt. No. 70, “EPA Mot.”).¹

8 **I. ARGUMENT**

9 The States do not appear to challenge the fact that if EPA finalizes the rulemaking as
 10 proposed, their claims—even if authorized and cognizable—would be extinguished and that this
 11 would occur by or before the time the Court hears argument on the summary judgment motions.
 12 The main points of the States raise in opposing a stay are: (1) in some other wholly unrelated
 13 circumstances, courts have ruled against EPA in cases involving regulatory delays; (2) EPA
 14 may not finalize the proposed rule by April 30, 2019; and (3) an allegation of some harm
 15 suffices to tip the balance against a stay. None of these arguments are reasons to deny EPA’s
 16 motion for stay.

17 **A. The Court Rulings on Other Agency Actions Are Not Relevant to EPA’s** 18 **Request for a Stay in This Matter**

19 The issue presented by EPA’s motion is whether the Court should use its discretionary
 20 power to stay this matter for several months pending conclusion of a rulemaking that would
 21 extinguish the claims in this litigation. *See Landis v. North Am. Co.*, 299 U.S. 248, 254-55
 22 (1936); *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (“The District Court has broad discretion
 23 to stay proceedings as an incident to its power to control its own docket.” (citing *Landis*, 299
 24

25 ¹ Plaintiffs the State of California, by and through the Attorney General and the California Air
 26 Resources Board; the State of Illinois; the State of Maryland; the State of New Mexico; the State
 27 of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; and the State of
 28 Vermont (“States”) oppose EPA’s motion to stay (Dkt. No. 73). Proposed Plaintiff-Intervenor
 Environmental Defense Fund joined the States in opposing EPA’s motion “[f]or all of the
 reasons detailed in Plaintiff States[’] Opposition to EPA’s Motion to Stay.” (Dkt. No. 74).

1 U.S. at 254)); *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (“A
2 trial court may, with propriety, find it is efficient for its own docket and the fairest course for
3 the parties to enter a stay of an action before it, pending resolution of independent proceedings
4 which bear upon the case.”) (internal citations omitted).

5 None of the cases cited by the States relate to whether, in the peculiar situation presented
6 in this case, a court should stay litigation to allow an agency time to conclude a rulemaking that
7 would dispose of a plaintiff’s claims. Instead, the States rely upon a number of unrelated cases
8 in opposition to EPA’s motion, mistakenly claiming that these cases are “similar” to the
9 situation before this Court. States’ Opp. at 11. They are not. As discussed below, each of these
10 cases involve challenges to agency actions delaying effectiveness of the substantive
11 requirements of a rule. The issue before the court here is whether the Court should use its
12 inherent authority to stay the current litigation “pending resolution of independent proceedings
13 which bear upon the case.” *Leyva*, 593 F.2d at 863-64.

14 The States’ reliance on *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018) is
15 misplaced because that case does not bear on the stay of litigation requested here and is most
16 certainly not -- as the States incorrectly state -- a “similar bid[] for delay.” States’ Opp. at 2
17 (Dkt. No. 73); *id.* at 12. The issue before the D.C. Circuit in *Air Alliance Houston* was whether
18 EPA had authority under section 307(d)(7)(B) of the Clean Air Act (“CAA”), 42 U.S.C.
19 § 7607(d)(7)(B), to stay the effectiveness of a final rule for more than 90 days during
20 reconsideration. 906 F.3d at 1060. The D.C. Circuit concluded that EPA had no such authority.

21 The D.C. Circuit’s decision in *Air Alliance Houston* has no bearing on the stay of
22 litigation requested here by EPA. Here, EPA is not seeking to stay any of its rules through any
23 mechanism. Rather, it has proposed a notice-and-comment rule to revise the procedures by
24 which states submit plans to implement section 111(d) generally and the landfills emissions
25 guidelines specifically. This rulemaking is a standard exercise of EPA’s discretionary,
26 substantive regulatory authority to which cases regarding administrative stays pending
27 reconsideration are simply inapposite.

1 Like *Air Alliance Houston, Clean Air Council v. Pruitt* relates to whether an EPA action
2 staying a CAA rule comported with the requirements of section 307(d)(7)(B), 42 U.S.C.
3 § 7607(d)(7)(B). 862 F.3d 1,8-14 (D.C. Cir. 2017). The court found that the mandatory
4 reconsideration criteria under CAA section 307(d)(7)(B) had not been met and thus did not
5 authorize the administrative stay pending reconsideration. *Id.* at 14. As with *Air Alliance*, the
6 D.C. Circuit’s decision in *Clean Air Council v. Pruitt* concerns a unique CAA mechanism for
7 administrative action to stay a substantive rule pending reconsideration. It has no bearing on the
8 requested stay of litigation or the proposed substantive rule.

9 In *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, the court held that EPA violated
10 the APA in delaying the effective date of a pesticide rule by failing to provide notice and
11 comment without any showing of good cause to forego those procedures. 293 F. Supp. 3d
12 1062, 1066-67 (N.D. Cal. 2018). This case has no bearing on whether this Court should
13 exercise its discretion and stay the matter for several months to allow EPA to receive comments
14 and hold a hearing on its proposed rule, consider those comments, and take final action.
15 Likewise, in *Natural Resources Defense Council v. National Highway Traffic Safety*
16 *Administration* (“*NRDC v. NHTSA*”), the Second Circuit held that a NHTSA rule indefinitely
17 delaying the effective date of an earlier rule that adjusted civil penalties for inflation was not
18 authorized by the Improvements Act and violated the APA for failure to undergo notice and
19 comment. 894 F.3d 95, 109, 113 (2d Cir. 2018). Thus, *NRDC v. NHTSA* dealt with whether
20 another statute authorized an indefinite suspension of a rule’s effectiveness and whether the
21 agency followed the required APA procedure in suspending the rule. The present case and the
22 instant motion do not place before the Court for review an indefinite stay of another rule passed
23 without notice and comment nor whether there is a statutory basis for delay of an effective date
24 as *Pineros y Campesinos Unidos del Noroeste* and *NRDC v. NHTSA* do; rather, EPA asks the
25 court to stay its proceedings so that it may expeditiously conclude a substantive notice-and-
26 comment rulemaking that may render this lawsuit moot.

27 In *California v. Bureau of Land Management*, the district court considered whether the
28 Bureau of Land Management violated the APA by postponing compliance dates pending

1 litigation and while the Agency “reviews and reconsiders the Rule.” 277 F. Supp. 3d 1106,
2 1121 (N.D. Cal. 2017). The court invalidated the stay as the agency had failed to provide notice
3 or make the required determination that to ‘justice so requires,’” the stay. *Id.* at 1125. This
4 case, which turned on the statutory requirements for postponement of substantive requirements
5 of a rule pursuant to section 705 of the APA is not relevant to the analysis of whether it is
6 appropriate to stay this litigation. Similarly, *California v. Bureau of Land Management*, also
7 involved a rule delaying the effectiveness of the substantive provisions of a rule while the
8 agency considered revising the rule. 286 F. Supp. 3d 1054, 1058-59 (N.D. Cal. 2018).

9 Indeed, contrary to the States’ inference, it is not unusual for courts to stay matters for
10 periods that allow time for agency or other action that could cause the pending claims to
11 become moot. *See, e.g., Ass’n of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d
12 1081, 1093-96 (E.D. Cal. 2008) (granting stay pending conclusion of a proposed rulemaking);
13 *Oceana, Inc. v. Bryson*, No. 08-1881, 2012 WL 13060013, at *1-2 (D.D.C. Mar. 22, 2018)
14 (granting stay pending revision to the biological opinion at issue that could resolve all or part of
15 the dispute).

16 In sum, none of the cases relied on by the States speak to the question of a judicial stay
17 of litigation in light of a rulemaking process that, if finalized as proposed, would likely
18 extinguish the claims at issue.²

19 **B. A Stay of a Reasonable Duration Until April 30, 2019 Is Appropriate with**
20 **Monthly Status Reports to Ensure EPA Remains on Schedule.**

21 The States claim that “EPA cannot say with *any* certainty ‘when, if, or in what form, the
22 final rule will become effective.’” States’ Opp. at 10 (emphasis added). That does not mean
23 that statements regarding the Agency’s rulemaking progress and anticipated timing, made under
24 oath in a declaration by an agency official, do not establish a compelling reason to grant the
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27 ² To the extent that Plaintiffs believe that any of these cases demonstrate infirmity in the
28 finalized rule, such claims would properly lie under the exclusive jurisdiction of the United
States Court of Appeals for the District of Columbia Circuit and should be taken up with that
court once the rule is finalized. 42 U.S.C. § 7607(b).

1 proposed stay. The States' reliance on *Andrews v. Montewalle of Scotts Valley, Inc.*, is
 2 misplaced, as that case is wholly inapposite. No. 93-cv-20560, 1995 WL 274305 at *3 (N.D.
 3 Cal. May 9, 1995). In *Andrews v. Montewalle*, the court considered whether a preliminary
 4 injunction should issue in a private matter not involving a federal agency. There, the plaintiff
 5 alleged that the defendant had violated the Fair Housing Act ("FHA"). An exemption to the
 6 FHA could provide an affirmative defense to the claim for the non-governmental defendant. *Id.*
 7 at *3. The defendant presented a "novel" argument that a preliminary injunction should not
 8 issue because "anticipated changes to the FHA and [Housing and Urban Development]
 9 regulations" could exempt defendant's conduct from the FHA at some point in the future. *Id.*
 10 With no evidence apparently presented regarding when or if FHA would finalized the proposed
 11 changes to its regulation; the court issued the preliminary injunction. *Id.*

12 In *Andrews*, the federal agency was not a party and there was no uncontroverted
 13 declaration from the responsible federal agency regarding the date by which it expected to
 14 finalize the proposed rule at issue in the litigation, nor was the proposal there a rulemaking to
 15 address the very subject of the litigation.³ The present situation is markedly different. Here,
 16 EPA submitted a declaration from the responsible EPA official stating that EPA expects to
 17 finalize the Landfills Proposal no later than April 2019. Declaration of David A. Cozzie ¶ 12
 18 (Dkt. No. 70-1) ("Cozzie Decl."). Unlike the situation in *Andrews*, to the extent that the Court
 19 is concerned that EPA will not conclude the proposed rulemaking by the end of the requested
 20 stay, i.e., April 30, 2019, EPA has requested that the stay order include a requirement that EPA
 21 provide monthly status reports to ensure that the Court is regularly informed of the progress of
 22 the ongoing rulemaking (a point that the States fail to acknowledge). To that end, EPA provides
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24 ³ The States emphasize that EPA may not "irrevocably prejudice the outcome of a rulemaking."
 25 States' Opp. at 10. EPA's motion and the Cozzie Declaration make clear that EPA is estimating
 26 the timing of the conclusion of the rulemaking based on the assumption that the rule would be
 27 finalized as proposed. EPA Mot. at 7-8; Cozzie Decl. ¶ 10. In the event that, in response to
 28 public comments, EPA declines to finalize either Subpart Ba or the Landfills Proposal,
 proceedings in this case would resume at the cessation of the stay. EPA Mot. at 9 n.11. That
 would result in – at most – a four-month delay in resolution of this matter.

1 the Supplemental Declaration of David Cozzie (attached as Exhibit A) to update the Court on
2 the status of the rulemaking since EPA filed its motion to stay.⁴

3 The States' claim—that the “uncertainly over whether this proposal will ultimately
4 become final is even greater here than in the typical proposed rulemaking”—is also misguided.
5 States' Opp. at 11. As EPA explained in its motion, the proposal to adjust the timing
6 requirements in the Emission Guidelines is predicated on EPA finalizing (prior to or
7 concurrently with) a separate proposal to revise and update its 1975 implementing regulations,
8 including the timing for taking action on state plans and promulgating federal plans.⁵ EPA Mot.
9 at 5; Cozzie Decl. ¶ 5. EPA proposed the establishment of new timing requirements under
10 Subpart Ba of Title 40 in August 2018. *Proposed Rule*, 83 Fed. Reg. 44,746 (Aug. 31, 2018)
11 (referred to as the “ACE Rule proposal”); *see also* Cozzie Decl. ¶¶ 5, 7 (Dkt. No. 70-1). The
12 ACE Rule proposal encompasses multiple subjects: a reinterpretation of certain provisions of
13 CAA section 111(a) and (d), a proposal of new regulations to govern greenhouse gas emissions
14 from power plants and a new framework for states to submit plans establishing standards for
15 existing power plants, a proposal of reforms to the New Source Review program for power
16 plants, *and* the proposal of new Subpart Ba, which would set new general procedures and
17 timelines for the implementation of state plans for all existing-source rules under 111(d) going
18 forward. *Only the last aspect is relevant* to the October 23, 2018 proposed rule and to this
19 litigation. Thus, the States' emphasis on the complexity and number of comments related to the
20 portion of the proposed ACE Rule addressing power plants is misplaced. States' Opp. at 11.
21 Indeed, the States' 150 pages of comments on the ACE Rule proposal, *id.*, contain only 20
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24 ⁴ The supplemental Cozzie Declaration is not intended as reply evidence within the meaning of
25 Civil L.R. 7-3(d). It is meant to satisfy EPA's commitment to update the Court if its analysis of
26 the public comments for the Landfills Proposal affects EPA's anticipated deadlines for finalizing
27 the rule. Cozzie Decl. ¶13.

28 ⁵ The fact that EPA can adjust the timing requirements at issue here highlights the difference
between this challenge and those brought under CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2),
for alleged failure to comply with statutory obligations.

1 pages related to the changes to Subpart Ba.⁶ The States’ comments are largely directed at the
2 power plant portion of the rule, not Subpart Ba. Moreover, even if EPA does not finalize the
3 power plant portion of the ACE Rule proposal on the anticipated timeline, that does not
4 preclude EPA from finalizing the potential changes to Subpart Ba separately by April 2019.

5 Likewise, the States’ suggestion that “legal challenges are almost certain to follow” final
6 agency action on both the Landfills Proposal and the ACE Rule proposal is irrelevant. States’
7 Opp. at 11. If the Landfills Proposal is finalized as proposed, the States’ claim here will
8 become moot because the regulatory deadlines to which plaintiffs point in their allegations that
9 EPA has failed to perform a mandatory duty will have been revised. The possibility of future
10 challenges to a final Landfills rule will not change affect that conclusion. Moreover, such
11 challenges will be within the exclusive jurisdiction of the D.C. Circuit, not this court. 42 U.S.C.
12 § 7607(b)(1); *see* EPA Mot. at 8 n.10.

13 The States also seem to suggest that because EPA has revised estimated timeframes for
14 completion of rulemakings in other, unrelated rulemakings, the Court should not give credence
15 to the declaration of the responsible agency official presented in this matter. States’ Opp. at 10.
16 The States also point to several rulemakings in which EPA decided to reconsider substantive
17 rules under the Clean Air Act and proposed revised rules, but ultimately decided not to finalize
18 those proposals. *Id.* at 10 and 10 n.18. EPA is not aware of any instances in which a court
19 disregarded statements in a declaration of an agency official because agencies occasionally
20 deviate from their plan for rulemaking. The States have offered no explanation as to why
21 EPA’s action in other rulemakings would bear on its intention to conclude the Landfills
22 Proposal rulemaking by April 2019 – five months from the date of this filing. Further, as noted
23 above, EPA’s proposed order includes a requirement that EPA provide monthly status reports to
24 allay any concerns related to EPA’s progress or timing with respect to the anticipated schedule

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28 ⁶ EPA assumes that the States are referring to comments submitted by the Plaintiff States and
others on October 31, 2018, to the public docket for the proposed rule, 82 Fed. Reg. 44,746,
<https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24817>. Only pages 60
through 80 relate to the Subpart Ba proposal.

1 for concluding the rulemaking process by April 30, 2019. Should the Court grant EPA's motion
2 for a stay of proceedings of reasonable duration, it would of course retain full discretion to
3 terminate that stay at any time.

4 **B. An Evaluation of the Competing Interests under *Lockyer* Weighs in Favor of**
5 **Granting a Stay**

6 In the Ninth Circuit, requests for a stay pending the outcome of a related proceeding must
7 be evaluated under the framework set forth in *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir.
8 2005):

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

14 *Id.* at 1110 (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). The competing
15 interests are weighed and each is considered in the context of the requested stay and the how it
16 impacts the progress of the litigation.

17 As EPA explained in its motion, a stay until April 30, 2019 would allow EPA to
18 conclude the Landfills Proposal rulemaking. If the proposal is finalized, that would extinguish
19 the claims at issue here. EPA Mot. at 6-9. With regard to the orderly course of justice, that
20 would not just simplify the issues in this matter – it would dispose of the matter altogether. The
21 potential to avoid the need for the Court to rule on the pending motion to dismiss and to
22 consider the parties' cross-motions for summary judgment on remedy and hear argument on
23 those motions weighs in favor of a stay.

24 And, as EPA noted in its motion, in the event that the Court denies EPA's motion to
25 dismiss, the court will likely consider the impact of the requested stay against a conservative
26 estimate of how the case might proceed to a remedy order absent imposition of a stay. EPA Mot.
27 at 6-7. If a stay is not granted, and the Court rules quickly on the pending motion to dismiss, it
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1 is possible that the parties will have completed briefing on cross-motions for summary
2 judgment and the Court might or might not have held argument on those motions when EPA
3 anticipates finalizing the Landfill Proposal.⁷ Presumably, EPA would then need to engage in
4 additional motions practice to halt the progress of the matter based on mootness.

5 The States claim harm from “each additional day of delay,” but fail to mention that they
6 allowed several months to pass between the time their claims accrued and providing their notice
7 of intent to sue. The States brought this action under CAA section 304(a)(2) and argued both
8 that this action *is* a proper suit to compel performance of a nondiscretionary duty under section
9 304(a)(2) and is *not* a claim for unreasonable delay in performing an action. Compl. ¶ 8 (Dkt.
10 No. 1); States’ Opp. to EPA’s Mot. to Dismiss at 17 (Dkt. No. 48). Under that theory, the
11 States’ claim that EPA failed to take final action on submitted plans accrued on September 30,
12 2017. Compl. ¶ 4 (alleging that “by September 30, 2017, EPA was legally required to respond
13 to states that had timely submitted plans (40 C.F.R. § 60.27(b)”)); States’ Opp. to EPA’s Mot. to
14 Dismiss at 19-20. The States’ claim that EPA failed to issue a federal plan accrued on
15 November 30, 2017. Compl. ¶ 4 (alleging that “by November 30, 2017, EPA was legally
16 required to impose a federal plan on noncomplying states. 40 C.F.R. § 60.27(d)”); States’ Opp.
17 to EPA’s Mot. to Dismiss at 19-20. Yet the States waited until March 23, 2018 to send a notice
18 of intent to sue. Compl. ¶ 8. Having themselves delayed several months in asserting their
19 claims, the States can hardly now complain about the alleged harm that could occur from a stay
20 of less than six months.⁸ On balance, weighing the competing interests here tilts in favor of a
21 brief stay to allow EPA to conclude the proposed rulemaking.

22 **II. CONCLUSION**

23 For the foregoing reasons, the Court should grant EPA’s motion to stay
24 proceedings until April 30, 2019.

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26 ⁷ EPA notes that it has made no final decision on either the ACE Rule proposal or the Landfills
27 proposal at this time and is not pre-judging the outcome of either rulemaking, but presents the
28 potential impact of such if final rules were issued consistent with the proposals.

⁸ Similarly, proposed Plaintiff-Intervenor EDF waited several more months before providing its
notice of intent to sue on June 19, 2018.

1 Date: November 16, 2018
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