RELIEF NEEDED BY JANUARY 13, 2020

No. 19-17480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, et al.,
Plaintiffs/Appellees,

and

ENVIRONMENTAL DEFENSE FUND,
Plaintiff-Intervenor/Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants/Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:18-cv-03237 (Hon. Haywood S. Gilliam, Jr.)

APPELLANTS' MOTION FOR STAY PENDING APPEAL

JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
JOAN M. PEPIN
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-4626
joan.pepin@usdoj.gov

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INTRODUCTION

The district court enjoined the United States Environmental Protection Agency (EPA) to comply with law that no longer exists. The court's refusal to relieve EPA from that injunction in light of intervening law contravenes this Court's and the Supreme Court's precedents, and it creates irreparable harm to EPA, non-plaintiff states, and the public. The injunction and judgment should be stayed pending this Court's review.

Plaintiffs claimed below that EPA had failed to meet a deadline of EPA's own creation to promulgate certain regulations relating to landfill emissions. The district court enjoined EPA to promulgate these regulations by a judicially imposed deadline of November 6, 2019 (later extended to January 14, 2020). While this case was pending, however, EPA was engaging in a notice-and-comment rulemaking. That rulemaking reconsidered numerous deadlines and standards relating to these and similar emissions. As part of that parallel effort, after the judgment below was issued, EPA lawfully revised the regulatory deadlines for the subject categories of emissions. Consequently, EPA is no longer in violation of any regulatory deadline.

EPA thereafter moved for relief under Federal Rule of Civil Procedure 60(b)(5), which affords relief from a judgment if, among other reasons, "applying it prospectively is no longer equitable." It is not equitable for a court to subject EPA to an injunction mandating compliance with a legal duty that was of the EPA's own creation and that no longer exists. And it is well-established that when "a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law." *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986). The district court nevertheless denied EPA's motion for relief.

Therefore, pursuant to Federal Rule of Appellate Procedure 8(a)(2) and 27(a), EPA respectfully moves this Court to stay pending appeal the district court's injunction requiring EPA to promulgate regulations by January 14, 2020. Plaintiffs' counsel have indicated that they will oppose this motion. Without this Court's intervention, EPA will incorrectly be compelled to establish by regulation a federal plan that is not required under current law. EPA respectfully requests that this Court rule on the present motion by January 13, 2020.

BACKGROUND

A. The Clean Air Act's regulation of new and existing stationary sources of air pollutants

Section 111 of the Clean Air Act (CAA or Act) sets forth separate approaches to the regulation of new and existing stationary sources of air pollutants. 42 U.S.C. § 7411. For *new* sources, the Act gives the default role as regulator to EPA. It requires the agency to establish, by regulation, "Federal standards of performance," *id.* § 7411(b)(1), and it provides that states "may" submit procedures pursuant to which EPA (if it approves the procedures) would delegate to the state authority to implement and enforce those performance standards, *id.* § 7411(c).

But for *existing* sources, like those at issue here, the Act contemplates that states will take the leading role. The Act directs EPA to establish by regulation a procedure under which "each state *shall* submit" a plan to implement and enforce standards for certain existing sources. *Id.* § 7411(d)(1) (emphasis added). EPA issued those regulations in 1975, requiring states to submit plans within 9 months after EPA publishes emission guidelines for existing sources. 40 C.F.R. § 60.23(a)(1). Under those regulations, EPA

was required to approve or disapprove submitted plans within four months of the submission deadline, *id.* § 60.27(b), and to promulgate a federal plan within six months of the submission deadline for those states without an approved plan, *id.* § 60.27(d).

The procedures for section 111(d) must, by statute, be "similar to that provided" under section 110 of the Act. 42 U.S.C. § 7411(d)(1).[1] For that reason, the deadlines stated in EPA's 1975 implementing regulations mirrored the deadlines in section 110 at that time. In 1990, however, Congress amended section 110 to lengthen those impractically short timelines. EPA did not, however, then amend its corresponding regulations. In August 2018, EPA began the process of updating its section 111(d) implementing regulations. 83 Fed. Reg. 44,746 (Aug. 31, 2018). EPA did this as part of a comprehensive reassessment of its section 111(d) implementation regulations—*not* specifically in response to, or as a result of, the case below. *See, e.g., id.* at 44,746 (summarizing the threefold purpose of the rulemaking, which would generally apply to "any future emission guideline issued under section 111(d) of the Clean Air Act").

Under the revised regulations, finalized in July 2019, 84 Fed. Reg. 32,520 (July 8, 2019), states now have a corresponding three years after EPA promulgates new emission guidelines in which to submit a state plan. 40 C.F.R. § 60.23a. No later than six months after that submission deadline, EPA must determine whether the state plan is complete. *Id.* § 60.27a(g)(1). If EPA fails to make such a finding, the state plan will be deemed complete by operation of law. *Id.* Once a state plan is determined to be

[1] Section 110 governs the "State Implementation Plan" process, under which states develop and submit—and EPA reviews and approves or disapproves—plans implementing the National Ambient Air Quality Standards program.

complete, EPA must take action to approve or disapprove the plan within one year. *Id.* § 60.27a(b). If EPA finds that a state failed to submit a required plan, determines a plan to be incomplete, or disapproves a plan in whole or in part, EPA must promulgate a federal plan within two years. *Id.* § 60.27a(c). *Compare* 40 C.F.R. Subpart Ba, §§ 60.20a-60.29a *with* 42 U.S.C. § 7410(a)(1), (c)(1), (k)(1)(B).

B. EPA's emission guidelines for municipal solid waste landfills

In 1996, EPA promulgated regulations establishing emission guidelines for municipal solid waste landfills. 61 Fed. Reg. 9905 (Mar. 12, 1996). The landfill emissions guidelines generally required any landfill emitting more than 50 metric tons annually of certain air pollutants to install control technology. In 2016, EPA amended the landfill emission guidelines, lowering the emissions threshold to 34 metric tons per year. 81 Fed. Reg. 59,276 (Aug. 29, 2016). At that time, EPA estimated that the change would bring an additional 93 landfills within the regulation's scope and thereby reduce greenhouse gas emissions nationwide by 0.1% by 2025. 81 Fed. Reg. at 59,305 (Table 2); ECF No. 92-1, at 2 (declaration of EPA official, filed Feb. 19, 2019). The amended landfill emission guidelines are codified at 40 C.F.R. Subpart Cf, §§ 60.30f–60.41f.

At the time that the landfill emission guidelines were amended in 2016, the 1975 implementing regulations were still in effect. Those regulations gave the states only 9 months to submit plans. 81 Fed. Reg. at 59,304. Only two states were able to comply with that short deadline, which fell on May 30, 2017, and another three states submitted plans later in 2017 and 2018. ECF No. 92-1, at 6. After the July 2019 update to the implementing regulations applicable to emissions guidelines in general was finalized, EPA amended the landfill emission guidelines to cross-reference the new implementing

regulations and make them applicable. 84 Fed. Reg. 44,547 (Aug. 26, 2019); 40 C.F.R. Subpart Cf, § 60.30f(a), (b). Under this most recent amendment to the landfill emission guidelines, state plans were due on August 29, 2019. *Id.*

C. Proceedings in the district court

On May 31, 2018, the plaintiff states sued EPA under the Act's citizen-suit provision, 42 U.S.C. § 7604(a)(2), alleging that EPA had failed to perform a nondiscretionary duty to act on the submitted state plans and to promulgate a federal plan for states without approved plans by the dates specified in the 1975 implementing regulations. The Environmental Defense Fund intervened as a plaintiff.

EPA moved to dismiss the complaint for lack of jurisdiction. The district court denied the motion to dismiss, holding that duties under the implementing regulations are duties "under" the Act, enforceable through the Act's citizen-suit provision. ECF No. 82 (Dec. 21, 2018). EPA does not challenge that ruling in this appeal.

EPA also moved to stay the proceedings, noting that the agency was actively engaged in rulemakings to conform the 1975 implementing regulations to the amended section 110 of the Act and to apply those new implementing regulations to the landfill emission guidelines. The district court, however, refused to stay the proceedings despite the pending rulemaking process that would have altered (and ultimately did alter) the nondiscretionary duty at issue in this case. *Id.*

The parties then filed cross-motions for summary judgment. Because it was undisputed that EPA had failed to take the actions required under the then-existing regulatory deadlines, the district court granted summary judgment for the plaintiffs. Exhibit 2. The court granted declaratory and injunctive relief, ordering EPA to approve

or disapprove submitted state plans by September 6, 2019, which EPA timely did. The district court also ordered EPA by November 6, 2019 to promulgate regulations setting forth, for those states without approved state plans, a federal plan for landfill emissions. EPA has taken steps to comply with that order, publishing a proposed rule. 84 Fed. Reg. 43,745 (Aug. 22, 2019).

After the district court ordered that relief, EPA completed its rulemaking and finalized the amendments to the implementing regulations and the landfill emission guidelines. Based on those new legal standards, EPA filed a motion to amend the judgment, seeking relief from the November 6 deadline imposed by the district court. EPA explained that, under the updated regulations, state plans implementing the landfill emission guidelines were not due until August 29, 2019. And EPA has no duty to promulgate a federal plan until two years after finding that a state failed to submit a plan by this date—in other words, August 30, 2021 at the earliest. Therefore, because current law requires no action from EPA at this time, EPA is no longer in violation of any nondiscretionary duty to promulgate a federal plan.

The district court denied the motion to amend the judgment on November 5, 2019. Exhibit 1. But the court stayed the judgment until January 7, 2020 "to allow either party to file a notice of appeal," providing that if "no notice is filed, the stay will lift automatically on January 7, 2020." *Id.* On November 22, 2019, EPA moved the district court for a stay pending appeal. On December 10, 2019, the district court entered an order extending the stay to **January 14, 2020**, and on December 17, 2019, the court denied EPA's motion for stay pending appeal. Exhibit 3.

Without this Court's intervention, EPA will be compelled to promulgate a rule by January 14, 2020 establishing a federal plan that is not required under current law. **EPA therefore respectfully requests that this Court rule on the pending motion by January 13, 2020.**

STANDARD OF REVIEW

A district court's decision denying a Rule 60(b)(5) motion for relief from judgment is appealable under 28 U.S.C. § 1291. *Deocampo v. Potts*, 836 F.3d 1134, 1140 (9th Cir. 2016). This Court reviews "for an abuse of discretion the district court's decision to deny a Rule 60(b) motion, and review[s] de novo any questions of law underlying the decision to deny the motion." *Id.*

ARGUMENT

This Court evaluates motions for stay pending appeal using the traditional four-factor test, considering "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). As in the similar test for preliminary injunctions, likelihood of success on the merits "is the most important factor." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

It is well-established that when "a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law." *Toussaint*, 801 F.2d at 1090. The district court committed precisely that abuse of discretion, and EPA therefore has a high

likelihood of success on the merits. Moreover, the district court's denial of relief irreparably harms both EPA and the public by violating separation-of-powers principles that are at the heart of the American system of government, and by thwarting the cooperative federalism that Congress sought to foster in the Clean Air Act. *Sierra Club*, 929 F.3d at 705 (holding that, when government seeks a stay, the question whether it will be irreparably harmed may "merge with consideration of the public interest").

I. EPA has a strong likelihood of success on the merits of its appeal.

A. It is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law.

EPA's case for relief from judgment is straightforward: the district court's judgment—EPA to publish a federal plan by January 14, 2020—is premised on the legal conclusion that EPA violated a nondiscretionary duty under the CAA to promulgate by November 30, 2017 a federal plan for states without approved plans. But after the 2019 amendments to section 111(d)'s implementing regulations and the landfill emission guidelines, that former deadline ceased to exist. Therefore, EPA is no longer in violation of any current duty under the Act. No federal plan is required until August 30, 2021 at the earliest. It is inequitable to give continued prospective effect to a judgment enforcing a legal duty that no longer exists. Accordingly, relief from judgment should be granted under Federal Rule of Civil Procedure 60(b)(5), which authorizes relief from judgment when, among other reasons, "applying it prospectively is no longer equitable."

This Court's and the Supreme Court's precedents establish that "it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions *or in law*.' "

Agostini v. Felton, 521 U.S. 203, 215 (1997) (emphasis added) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). A "court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.' " *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Agostini*, 521 U.S. at 215); *accord Toussaint*, 801 F.2d 1080, 1090 ("When a change in the law authorizes what had previously been forbidden it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law"). The district court acknowledged that rule but declined to follow it, holding that those cases are "plainly distinguishable" because in "each case, the change in law was made by a non-party." Exhibit 1 at 4. Without explaining why that factual distinction makes a legal difference, the court held that "EPA's voluntary action here makes this case unlike those where subsequent changes in law were enacted by third parties, as opposed to by the very party subject to the Court's order." *Id.* at 4-5.

In so holding, the district court created a new, unprecedented exception to the well-established rule that a change in law that "remove[s] the legal basis for the continuing application of the court's Order . . . entitles [the movant] to relief under Rule 60(b)(5)." *California Dep't of Social Services v. Leavitt*, 523 F.3d 1025, 1032 (9th Cir. 2008) (quoting *Agostini*, 521 U.S. at 237). The validity of the court's newly grafted "third-party actor" requirement to the established rule is a legal question subject to de novo review by this Court. In other words, if the district court failed to apply the correct rule of law, that constitutes an abuse of discretion per se. *United States v. Hinkson*, 585 F.3d 1247, 1262–63 (9th Cir. 2009) (en banc).

Moreover, the district court's unreasoned holding that the established rule does not apply when an agency amends its own regulations is inconsistent with its holding that those very regulations created an enforceable, nondiscretionary duty in the first place. If, as the court held, the implementing regulations create an enforceable "duty under [the Clean Air Act] which is not discretionary with the Administrator," 42 U.S.C. § 7604(a)(2), then a subsequent legislative rule amending those same regulations—after extensive public notice and comment—cannot be discounted as the mere unilateral act of a party. The deadlines contained in the implementing regulations and emission guidelines must either supply the substantive, enforceable law determining EPA's duties—or not. Having determined, for the purposes of finding a violation, that they do, the district court was bound by law and reason to recognize that EPA's amendment of those regulatory deadlines worked "a change in the law [that] authorizes what had previously been forbidden," warranting relief from judgment. *Toussaint*, 801 F.2d at 1090. The court's reasoning is self-contradictory, treating EPA's regulations as binding law for the purposes of waiver of sovereign immunity and of creating a judicially enforceable mandatory duty, but not for the purpose of an intervening change in law and of relief from judgment. That was abuse of discretion.

B. The district court misconstrued the most relevant case.

The D.C. Circuit's decision in the analogous case of *NAACP v. Donovan*, 737 F.2d 67 (D.C. Cir. 1984), strongly supports EPA's position here. In that case, the district court had entered summary judgment against the Department of Labor (DOL), holding that it had violated its own regulations governing the calculation of minimum piece-work wages, and ordering DOL to comply with those regulations. After judgment was

entered, DOL amended the regulation that it had been adjudged to have violated, and it proceeded to apply the new regulation in calculating wages. The plaintiffs filed a motion to enjoin enforcement of the amended regulation on the ground that it violated the district court's order. The district court granted the motion, enjoining DOL from implementing its new regulation and revoking certifications issued thereunder.

On appeal by DOL, the D.C. Circuit reversed, holding that the district court's prior order holding that DOL had violated its own regulation did not prevent the agency from later amending that regulation; consequently, "the district court could not enjoin implementation of the amended regulation on the ground that it violated the court's earlier order." 737 F.2d at 72. "Where an injunction is based on an interpretation of a prior regulation, the agency need not seek modification of that injunction before it initiates new rulemaking to change the regulation." *Id.*

The court below purported to distinguish *Donovan* on the basis that the decision held that an agency may "correct a prior rule which a court has found defective," and that the court below had never held EPA's original regulations defective. Exhibit 1 at 5. But the district court in *Donovan* had not found the prior rule to be defective either. To the contrary, in both cases, the district court's judgment *enforced* the prior rule. And in both cases, the court's post-judgment order compelled the agency to continue to comply with the prior rule even after it had been amended and superseded. The D.C. Circuit's reversal of the district court's injunction recognized that agencies have the lawful authority to change their own regulations, and that it is improper for a district court to compel an agency to comply with a judgment is premised on a superseded regulatory duty.

Plaintiffs argued below that *Donovan* is distinguishable because it is "not even a Rule 60(b) case." But a motion for injunction to *enforce* a judgment (as in *Donovan*) and a motion for *relief* from judgment (as here) are mirror images of each other, the only relevant difference being whether the defendant continues to comply with the judgment and, thus, which party need move for relief. Surely, a defendant who continues to obey a judgment premised on superseded law until granted relief from judgment is not *less* entitled to that relief than a defendant who ignores the judgment after the change in the law and thereby requires the plaintiff to move to enforce the judgment. In both cases, the question is whether a court, having found an agency in violation of its own regulations, may continue to enforce a judgment compelling the agency to comply prospectively with those regulations even after those regulations have been amended such that the agency is no longer in violation. *Donovan* teaches that the answer is *no*.

C. EPA's ability to comply with the judgment is legally irrelevant to the question whether it is equitable to deny relief from a judgment enforcing a superseded legal duty.

Under current regulations, promulgated after full notice-and-comment rulemaking, no federal plan is required until August 30, 2021 at the earliest. The district court reasoned, however, that it is "equitable" to require EPA to adhere to a faster timeline than the law requires, simply because it is *possible* for EPA to do so. That holding is simply an error of law and thus an abuse of discretion. That a party is capable of complying with a judgment enforcing duties superseded by a change in law does not disentitle it to relief from such a judgment. Rather, the rule is that a "court errs when it refuses to modify an injunction" premised on superseded law; the moving party need not also show impossibility of performance. *Agostini*, 521 U.S. at 215. That clear rule

recognizes that there is nothing "equitable" about compelling a party to perform a duty that is no longer required by law.

D. The district court abused its discretion by withholding relief based on a speculative and unrealistic concern that EPA might "perpetually" extend the deadline.

The court also abused its discretion by denying relief out of concern that EPA could "perpetually evade judicial review through amendment." Exhibit 1 at 6. Not only did the court err by engaging in pure speculation, but an examination of the regulations proves that speculation to be unrealistic. The new regulations do not set a due date that EPA could simply change; rather, they establish a timeline that runs from promulgation of each emission guideline. The date on which the landfill emission guidelines were promulgated, August 29, 2016, has not changed and will not change. What has changed is the timeline. As noted above (pp. 2-4), EPA amended its section 111(d) implementing regulations to conform them to the deadlines established by Congress in section 110 of the CAA, and it amended the landfill emission guidelines to make those regulations applicable. The combined effect of the regulatory changes is that the state plan deadline shifted to August 29, 2019, and the deadline for EPA to establish a federal plan is two years after finding that a state has failed to submit a plan (or finding a plan incomplete, or disapproving a plan in whole or in part), or August 30, 2021 at the earliest.

It is far-fetched to imagine that EPA, having just overhauled its section 111(d) implementing regulations for the first time in 44 years, will amend them again in the next year or so to further lengthen the timeline. That is particularly true given that the timeline is explicitly linked to the statutory timeline in section 110, which only Congress may change. Because it is virtually impossible for "this precise situation" to "occur again

in two years' time," Exhibit 1 at 5, the district court abused its discretion in denying relief from judgment on that unrealistic and speculative basis.

E. An order to promulgate a federal plan does not simply remedy a past violation.

The district court asserted that requiring EPA to issue a federal plan "poses no obstacle" to the new regulations, Exhibit 1 at 6, suggesting that the requirement simply remedies a past violation and allows EPA to follow its new regulations going forward. Plaintiffs have similarly argued that the judgment "requires one discrete act to remedy one past violation," yet does not prevent EPA from implementing current regulations. ECF 134, at 9 (Dec. 5, 2019). But the problem with the district court's judgment is not that it prevents EPA from applying its existing regulations in future cases. It is that the judgment requires EPA to prospectively apply prior regulations that are no longer in effect. Under current regulations, no federal plan is required until August 30, 2021 at the earliest, but the district court's orders require EPA to establish a federal plan no later than January 14, 2020.

Moreover, requiring EPA to promulgate a federal plan cannot reasonably be characterized as requiring "one discrete act." *Id.* The federal plan imposes many deadlines on landfill owners and operators to submit reports and plans which, in turn, require EPA's review or approval or both. *See* 84 Fed. Reg. at 43,752. Thus, the district court's injunction requires a substantive, ongoing, *prospective* regulatory commitment, not a mere one-time publishing requirement.

EPA does not dispute that it violated a legal duty under the former regulations. *But that legal duty no longer exists.* The amendments to the regulations do not, as plaintiffs

argue, "perpetuate" the former violation. ECF 134, at 5. They eliminate it. No law or regulation requires EPA to publish a federal plan prior to August 30, 2021; only the district court's judgment does that. A court may generally leave *retrospective* sanctions for prior violations in place, even if the law that was violated changes. But by leaving in effect an injunction that requires *prospective* compliance with a regulatory duty that no longer exists, the district court abused its discretion.

II. EPA would be irreparably injured if it were compelled to publish a federal plan years in advance of the current regulatory deadline.

There is "inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *cf. Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (finding it clear that a government "suffers irreparable injury whenever an enactment of its people or their representatives is enjoined").

Here, the Clean Air Act required EPA to promulgate regulations implementing section 111(d) by "establish[ing] a procedure similar to that provided by" section 110. 42 U.S.C. § 7411(d)(1). Pursuant to that directive of Congress, EPA promulgated its initial implementing regulations in 1975, and it amended those regulations this year to reflect the amendments that Congress made to section 110 in 1990. 84 Fed. Reg. at 32,521, 32,564. Similarly, EPA issued the landfill emission guidelines in 2016 and amended those guidelines this year to provide a new deadline for submissions of state plans and to cross-reference the revised implementing regulations. *Id.* at 32,564, 44,549. These substantive regulations "have the force and effect of law." *Perez v. Mortgage*

Bankers Ass'n, 575 U.S. 92, 122-23 (2015). But the district court's order requiring EPA to issue a federal plan by January 14, 2020, even before a federal plan is required under the amended regulations, essentially nullifies EPA's valid regulatory actions. Refusing to give effect to those actions is inconsistent with the constitutional separation of powers and inherently imposes harm on the agency and the public.

Likewise, failure to amend the judgment denigrates the principle of cooperative federalism that is central to the Act. The CAA "has established a uniquely important system of cooperative federalism in the quest for clean air," *Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1173 (9th Cir. 2015), in which "the States and the Federal Government partner in the struggle against air pollution," *Montana Environmental Information Center v. Thomas*, 902 F.3d 971, 974 (9th Cir. 2018) (quoting *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990)). Relevant to this case is the shared federal and state responsibility in section 111(d), which requires *states* to prepare and implement *state* plans and then—only if states fail to provide plans or submit an insufficient plans—for EPA to prepare and implement a *federal* plan. 42 U.S.C. § 7411(d).

Under EPA's new implementing regulations, submitted state plans are first subject to a review for completeness, followed by a substantive review to determine whether the plans are approvable. 40 C.F.R. § 60.27a(g), (b). For states that fail to submit a state plan by the submission deadline in 40 C.F.R. § 60.30f(b), EPA is required to promulgate a federal plan within two years after EPA "[f]inds that a State fails to submit a required plan or plan revision." *Id.* § 60.27a(c)(1).

Under the district court's orders mandating EPA's issuance of a federal plan by January 14, 2019, however, states that submit a plan that has not yet been approved or

that fail to submit a plan would inappropriately be subject to a federal plan immediately. Immediate imposition of a federal plan—without the submission, review, and approval process in the regulations, particularly the opportunity to have state plans considered initially before EPA issues a federal plan—turns that bedrock principle on its head and irreparably injures EPA. *See Committee for a Better Arvin*, 786 F.3d at 1173 (recognizing the Clean Air Act's "uniquely important system of cooperative federalism" in which EPA "sets required air quality standards but the state is a primary actor in creating plans to achieve them").

Further, although it is EPA's position that its appeal would not become moot if EPA is required to promulgate a federal plan on January 14, 2020, the plaintiffs may well argue otherwise.[2] Should they succeed in arguing that EPA's appeal is moot, then EPA would be irreparably harmed by the denial of a stay because it would be deprived of the opportunity to vindicate its position on appeal. *See Protectmarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014) (noting that "the utmost caution" should be used to avoid a situation in which the denial of the requested relief creates a "mootness Catch-22").

III. The balance of the equities favors a stay.

As explained above, EPA will be irreparably harmed if the district court's order is not stayed. EPA expects that plaintiffs will allege that both they and the public are harmed by landfill emissions that are not being addressed during the pendency of an

[2] When an agency amends its regulations "only for the purpose of interim compliance with the District Court's judgment and order," the "revision of the regulation does not render the case moot." *Maher v. Roe*, 432 U.S. 464, 469 n.4 (1977); *accord, e.g., Lewis v. Hegstrom*, 767 F.2d 1371, 1372 n.1 (9th Cir. 1985).

appeal. However, the number of landfills expected to be impacted by the landfill emission guidelines is small. In the 2016 emission guidelines, EPA estimated that by 2025, only 93 landfills nationwide would have to install controls as a result of the new lower emissions threshold. 81 Fed. Reg. at 59,305 (Table 2). Controls at those landfills would not become operational until October 2022 at the earliest, even if the federal plan went into effect on January 14, 2020, 40 C.F.R. §§ 60.32f, 60.38f(a), and the controls are predicted to reduce methane emissions by only 0.1% nationwide, ECF 92-1, at 2. EPA does not dispute that its emissions guidelines promote the public interest, but the air quality benefits are modest and do not outweigh the harm caused by premature court-ordered imposition of a federal plan, displacing the lawful functioning of representative government and frustrating Congress's clear intent in section 111(d) that *states* take the lead in regulating existing sources.

Further, a myopic focus on the modest expansion of coverage under the 2016 landfill emissions guidelines fails to recognize that landfills are currently subject to numerous other regulations including New Source Performance Standards, 40 C.F.R. Part 60, Subparts WWW and XXX; state plans under the prior emission guidelines, *id.*, Part 60, Subpart Cc; the federal plan implementing the prior emission guidelines, *id.,* Part 62, Subpart GGG; and the National Emission Standards for Hazardous Air Pollutants for landfills, *id.,* Part 63, Subpart AAAA. The balance of harms favors EPA.

IV. A stay is in the public interest.

The Supreme Court held in *Nken v. Holder* that the third and fourth factors—whether issuance of a stay will substantially injure other parties and where the public interest lies—"merge when the Government is the opposing party." 556 U.S. at 435. This Court has further explained that where, as here, the government is the party seeking the stay, the public interest inquiry merges with consideration of the irreparable harm to the movant. *Sierra Club v. Trump*, 929 F.3d at 704-05. Both cases rightly recognize that enjoining the government from implementing duly enacted statutes or lawfully promulgated regulations inherently imposes harm on the public by thwarting the legal effect of the public's representative.

EPA's new implementing regulations accord with its mandate to "prescribe regulations which shall establish a procedure similar to that provided by section [110]," 42 U.S.C. § 7411(d)(1), as they provide a framework under which states submit plans and EPA takes action on those plans that more closely aligns with section 110. 84 Fed. Reg. at 32,564. In assessing the public interest, a court must heed "the judgment of Congress, deliberately expressed in legislation" and "the balance that Congress has struck." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 497 (2001). Absent a stay pending appeal, the full force and effect of EPA's regulatory changes will not be realized, an outcome that is contrary to the public interest.

CONCLUSION

For the foregoing reasons, this Court should grant a stay pending appeal. Because the district court's temporary stay expires on January 14, 2020, EPA respectfully requests that this Court act on this motion by **January 13, 2010**.

Respectfully submitted,

s/ *Joan M. Pepin*
JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
JOAN M. PEPIN
Attorney
Environment and Natural Resources Division
U.S. Department of Justice

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CERTIFICATE OF COMPLIANCE

1. This document complies with the page limit of Circuit Rule 27-1(1)(d).

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

Dated: December 17, 2019.

s/ *Joan M. Pepin*
JOAN M. PEPIN

Counsel for Appellant