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

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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had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law."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,

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December 17, 2019
90-5-2-4-21320

CERTIFICATE OF COMPLIANCE

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Dated: December 17, 2019.

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

Counsel for Appellant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

Case No. 18-cv-03237-HSG

ORDER DENYING DEFENDANTS RULE 60(B) MOTION TO ALTER JUDGMENT

Re: Dkt. No. 109

After the Court's May 6, 2019 Order granting in part Plaintiffs' motion for summary judgment (Dkt. No. 98, "Order"), Defendants U.S. Environmental Protection Agency and Andrew R. Wheeler, in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency (collectively, "EPA") filed the instant motion seeking relief from the Court's Order and Judgment (Dkt. No. 99) pursuant to Federal Rule of Civil Procedure 60(b)(5).[1] Specifically, EPA argues that because the EPA Administrator signed a final rule on August 16, 2019, changing the submission deadline for state plans from May 30, 2017, to August 29, 2019, and changing EPA's timeline to promulgate a federal plan from within six months of the submission deadline to within two years of the submission deadline, these significant changes in facts and law warrant a revision of the Court's May 6, 2019 Order and Judgment. The Court disagrees and **DENIES** EPA's motion.

[1] Plaintiffs are eight states: the State of California, by and through the Attorney General and the California Air Resources Board; the State of Illinois; the State of Maryland; the State of New Mexico; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; and the State of Vermont. Dkt. No. 1 ¶¶ 1, 10–18. Plaintiffs also include the Environmental Defense Fund, which the Court permitted to intervene on November 20, 2018. *See* Dkt. No. 78.

I. BACKGROUND

As relevant for the pending motion, on August 29, 2016, EPA promulgated a final rule related to Municipal Solid Waste landfills.[2] Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016) ("Old Rule"). The Old Rule became effective on October 28, 2016. Thereafter, according to EPA's regulations:

> 1. States were required to submit implementation plans by May 30, 2017, *see* 40 C.F.R. § 60.23(a)(1);
> 2. EPA was required to approve or disapprove submitted plans by September 30, 2017, *see* 40 C.F.R. § 60.27(b); and
> 3. If either (i) states to which the guideline pertained did not submit implementation plans, or (ii) EPA disapproved a submitted plan, then EPA was required to promulgate a federal plan within six months of the submission deadline (November 30, 2017), *see* 40 C.F.R. § 60.27(d).

The parties agreed that EPA failed to fulfill certain non-discretionary duties under 40 C.F.R. § 60.27, and after finding that Plaintiffs had standing to bring suit, the Court granted partial summary judgment for Plaintiffs. Dkt. No. 98. Specifically, the Court ordered the EPA to approve or disapprove existing state plans no later than September 6, 2019, and to promulgate regulations setting forth a federal plan no later than November 6, 2019. *Id.* at 15–16. According to EPA's status report filed on August 7, 2019, it was complying with the Court's Order by making progress on approving or disapproving existing state plans. *See* Dkt. No. 108. On August 22, 2019, EPA published notice of the proposed federal plan. *See* Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014, 84 Fed. Reg. 43,745 (Aug. 22, 2019) ("Proposed Federal Plan").

On August 16, 2019, EPA amended its regulations to change the applicable deadlines. States must now "submit a state plan to the EPA by August 29, 2019," pushing the deadline back over two years. 40 C.F.R. § 60.30f ("New Rule"). Additionally, EPA amended the regulations applicable to the Administrator's actions as follows:

> (c) The Administrator will promulgate, through notice-and-comment rulemaking, a federal plan, or portion thereof, at any time *within two*

[2] A complete review of the history of the case can be found in the Court's previous Order granting summary judgment to the Plaintiffs. Dkt. No. 98.

years after the Administrator:

> (1) Finds that a State fails to submit a required plan or plan revision or finds that the plan or plan revision does not satisfy the minimum criteria under paragraph (g) of this section; or
> (2) Disapproves the required State plan or plan revision or any portion thereof, as unsatisfactory because the applicable requirements of this subpart or an applicable subpart under this part have not been met.

40 C.F.R. § 60.27a(c) (emphasis added). EPA promptly filed this Motion to Amend Order and Judgment on August 28, 2019, for which briefing is complete. Dkt. Nos. 109 ("Mot."), 114 ("Opp."), 116 ("Reply"). EPA asks the Court to vacate its order and judgment that requires EPA to promulgate a federal plan by November 6, 2019. *See generally* Mot.[3] The Court held a hearing on the motion to amend order and judgment on October 24, 2019. Dkt. No. 120.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b), in relevant part, provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reason[]: (5) . . . applying [the judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). "[T]he Rule codifies the courts' traditional authority, 'inherent in the jurisdiction of the chancery,' to modify or vacate the prospective effect of their decrees." *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1252 (9th Cir. 1999) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)).

The Ninth Circuit has established a two-part standard to modify a final judgment or order under Rule 60(b)(5). First, the "party seeking modification of [an order] bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992). Once this initial burden is met, the "district court must then determine whether the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions." *United States v. Asarco Inc.*, 430 F.3d 972, 979–80 (9th Cir. 2005). In making its determination, the Court may "take all the circumstances into account in determining whether to modify or vacate a prior [order or judgment]." *Bellevue Manor*, 165 F.3d at 1256.

[3] The EPA does not seek modification of the Court's order and judgment that requires EPA to take final action on state plans submitted prior to the issuance of the New Rule. Mot. at 7.

III. ANALYSIS

In bringing a Rule 60(b) motion, EPA asks the Court to determine whether its own amendment of a federal rule constitutes "a significant change in facts or law" that warrants the revision of the Court's Order. In its discretion, the Court finds that the situation presented here, where EPA undisputedly violated the Old Rule, received an unfavorable judgment, and then issued the New Rule only to reset its non-discretionary deadline (rather than to remedy its violation), does not render the judgment inequitable.

EPA contends that "[w]hen a change in the law authorizes what had previously been forbidden it is abuse of discretion for a court to refuse to modify an injunction founded on the superseded law." *Am. Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982); *see also Class v. Norton*, 507 F.2d 1058, 1062 (2d Cir. 1974); *McGrath v. Potash*, 199 F.2d 166, 168 (D.C. Cir. 1952). However, the facts in *American Horse* and the other cases where courts have so held are plainly distinguishable from the situation presented here. In each case, the change in law was made by a non-party. In *American Horse*, an amendment of the governing federal statute by Congress warranted granting the Bureau of Land Management's motion to dissolve an injunction. 694 F.2d at 1319–20. In *Class*, a change in federal regulation extending the processing ceiling for applications for Aid to Families with Dependent Children warranted relief for the state agency charged with implementing the state plan. 507 F.3d at 1062. Finally, in *McGrath*, Congress enacted a new statute, removing the statutory basis for the district court's holding and warranting relief under Rule 60(b). Here, unlike those cases, the EPA amended its own regulations after numerous states filed this action to compel it to comply with its duties, after the Court found it in violation of its non-discretionary duties, and after the Court issued an order detailing how the agency was required to comply.[4] 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

[4] That the EPA previously alerted the Court to the then-proposed amendment does not compel a different outcome. *See* Mot. at 3. The amendment was subject to the ordinary uncertainty of the rulemaking process, and importantly, the Court determined that Plaintiffs established harm stemming from the EPA's failure to promulgate a federal plan by November 30, 2017. *See* Dkt. No. 82, 98. That harm does not dissipate, and in fact continues, by virtue of EPA's delay of its non-discretionary deadline.

the Court's order.

Nor does this case present a situation where the agency's new regulation sought to cure the deficiency identified by the Court. While "[i]t is both logical and precedented that an agency can engage in new rulemaking to correct a prior rule which a court has found defective," *N.A.A.C.P., Jefferson Cty. Branch v. Donovan*, 737 F.2d 67, 72 (D.C. Cir. 1984), such that granting a Rule 60(b) motion is equitable, the Court never found the Old Rule defective. Instead, EPA, by its own admission, was in violation of its regulation by failing to act. EPA then enacted the new regulations, which only delay EPA's obligations, rather than changing them. This action sidesteps the Court's order, delaying EPA's fulfillment of unchanged obligations with no guarantee that this precise situation will not occur again in two years' time. Additionally, this scenario presents a serious concern that in cases where a judgment is premised on an agency's failure to meet deadlines, that agency can perpetually evade judicial review through amendment, even after a violation has been found. *Cf. Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1452 (11th Cir. 1987) ("Without at all wishing to suggest any improper motive on the part of the [Administrator] in this case . . . , it is still a concern that [allowing modification of the Order] could permit, in some future case, an abuse of the interaction between administrative agencies and the courts.").

Significantly, outside of Defendant's reliance on the new amendment, all other circumstances indicate that enforcement of the judgment is still equitable. *See Bellevue Manor*, 165 F.3d at 1256 (instructing the Court to "take all the circumstances into account in determining whether to modify or vacate a prior [order or judgment]."). After careful consideration of EPA's representations about the phases required to conduct rulemaking for the final action on a federal plan, the Court imposed a six-month deadline to promulgate a federal plan, a presumptively reasonable timeframe given the previous regulation. Dkt. No. 98 at 13–14. Thus, EPA was ordered to set forth a federal plan no later than November 6, 2019. *Id.* at 16. The Proposed Federal Plan was issued on August 22, 2019, and the notice and comment period was complete as of October 7, 2019. *See* Proposed Federal Plan, 84 Fed. Reg. 43,745. All that remains is for the agency to incorporate public comments and promulgate the federal plan, which EPA noted "is not

a significant regulatory action . . . submitted to [OMB] for review." *Id.* at 43,755. Given EPA's significant progress and the limited work remaining on the federal plan, the record does not establish that the Court-imposed six-month deadline is no longer equitable.

Issuing a final federal plan also poses no obstacle to EPA's New Rule. The New Rule provided additional time for states to submit a state plan, and early issuance of a federal plan does not prevent states from submitting, and EPA from approving, new state plans. *See* 40 C.F.R. §§ 60.27a(c), 60.30f. Instead, it imposes emissions guidelines on all states who failed to provide a state plan, ensuring that the harm disclosed by Plaintiffs ceases.

IV. CONCLUSION

Finding that EPA has failed to meet its burden to demonstrate that imposition of the Court's Order is no longer equitable, the Court, in its discretion, **DENIES** EPA's Motion to Amend Order and Judgment. The Court further **STAYS** the judgment for sixty days to allow either party to file a notice of appeal. If no notice is filed, the stay will lift automatically on January 7, 2020. This order further terminates as **MOOT** Dkt. No. 123.

IT IS SO ORDERED.

Dated: 11/5/2019

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

Case No. 18-cv-03237-HSG

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 87, 92

Pending before the Court are cross-motions for summary judgment filed by Plaintiffs[1] and Defendants U.S. Environmental Protection Agency and Andrew R. Wheeler,[2] in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency (collectively, "EPA"), briefing for which is complete. Dkt. Nos. 87 ("Pls.' Mot."), 92 ("Defs.' Mot."), 93 ("Pls.' Reply"), 94 ("Defs.' Reply"). The parties agree there is no dispute that EPA failed to fulfill certain mandatory duties under 40 C.F.R. § 60.27. *See* Dkt. No. 58. The only questions before the Court is whether Plaintiffs have standing and, if so, how long to give EPA to comply with its long-overdue nondiscretionary duties.

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[1] Plaintiffs are eight states: the State of California, by and through the Attorney General and the California Air Resources Board; the State of Illinois; the State of Maryland; the State of New Mexico; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; and the State of Vermont. Dkt. No. 1 ¶¶ 1, 10–18. Plaintiffs also include the Environmental Defense Fund ("EDF"), which the Court permitted to intervene on November 20, 2018. *See* Dkt. No. 78. EDF has represented to the Court that it only intends to proceed in this action under the existing complaint filed by the States. *See* Dkt. No. 78 at 7 n.3.

[2] Acting Administrator Wheeler is automatically substituted for former Administrator Scott Pruitt. *See* Fed. R. Civ. P. 25(d).

I. BACKGROUND

A. Landfill Emissions

The relevant facts in this case are not in dispute. "The United States produces roughly 265 million tons of solid waste annually, or 4.5 pounds per person, per day . . . ." Dkt. No. 1 ("Compl.") ¶ 27; Dkt. No. 91 ("Answer") ¶ 27. Emitted from solid waste landfills are numerous harmful pollutants, including not only greenhouse gases but also "nearly thirty different organic hazardous air pollutants," which "present a range of public health and safety concerns." Compl. ¶¶ 28, 36; Answer ¶¶ 28, 36. These hazardous air pollutants "are known to cause adverse health effects . . . including heart attacks, asthma, and acute bronchitis leading to premature mortality." Compl. ¶ 36; Answer ¶ 36.

One such greenhouse gas is methane, a potent pollutant and the leading greenhouse gas behind carbon dioxide, which—along with other human-generated greenhouse gases—is "a significant driver of observed climate change." Compl. ¶¶ 2, 29; Answer ¶¶ 2, 29. Municipal solid waste landfills in particular "are the third-largest source of [domestic] human-related methane emissions." Compl. ¶ 29; Answer ¶ 29.

B. Landfill Emission Regulations

The Clean Air Act ("CAA" or the "Act") "protect[s] and enhance[s] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).[3] To that end, the Act directs the EPA Administrator to "publish . . . a list of categories of stationary sources" that "in [the Administrator's] judgment . . . cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A). Once the agency includes a category of stationary sources in the list, the agency must "publish proposed regulations, establishing Federal standards of performance" for emission of pollutants from new or modified sources "within such category." *Id.* § 7411(b)(1)(B); *see also id.* § 7411(a)(2).

As relevant here, the Act also requires the regulation of "existing sources" that fall within

[3] All statutory citations are to the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, unless otherwise stated.

the same category, provided that the emissions are not already covered by certain other CAA programs. *See id.* § 7411(d). Specifically, the CAA states that "[t]he Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan [that] establishes standards of performance," and "provides for the implementation and enforcement of such standards of performance." *Id.* § 7411(d)(1). The Act further provides that the Administrator has authority to promulgate a federal implementation plan "in cases where [a] State fails to submit a satisfactory plan." *Id.* § 7411(d)(2); *see also id.* § 7410(c).

Consistent with the CAA's instruction, EPA promulgated regulations, which established deadlines for the implementation of emission guidelines. According to the regulations, once EPA published an emission guideline, each State to which the guideline pertained was required to "adopt and submit to the Administrator . . . a plan" to implement the guideline "[w]ithin nine months." 40 C.F.R. § 60.23(a). The agency then was required to "approve or disapprove" such implementation plans "within four months after the date required for submission of a plan or plan revision." *Id.* § 60.27(b). Last, if states to which the guideline pertained did not submit an implementation plan or EPA disapproved of a submitted plan, the Administrator was required, "within six months after the date required for submission of a plan or plan revision, [to] promulgate [a federal plan]" to implement the guideline. *Id.* § 60.27(d).

On August 29, 2016, EPA promulgated a final rule related to Municipal Solid Waste ("MSW") landfills. *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 81 Fed. Reg. 59,276 (Aug. 29, 2016) ("Landfill Emissions Guidelines"). The Landfill Emissions Guidelines were the result of decades of consideration, as EPA first proposed rules regulating such emissions in 1991. Compl. ¶ 38; Answer ¶ 38. And in 1996, EPA promulgated landfill emission guidelines, which explained that landfill emissions are "a significant source of air pollution" and that the guidelines aimed to "significantly reduce landfill gas emissions, which have adverse effects on human health and welfare." *Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills*, 61 Fed. Reg. 9,905, 9,909, 9,918 (Mar. 12, 1996). The Administrator in particular determined "that

municipal solid waste landfills cause, or contribute significantly to, air pollution that may reasonably be anticipated to endanger public health or welfare." *Id.* at 9905.

The Landfill Emissions Guidelines became effective on October 28, 2016. In turn, according to EPA's regulations:

1. States were required to submit implementation plans by May 30, 2017, *see* 40 C.F.R. § 60.23(a)(1);
2. EPA was required to approve or disapprove submitted plans by September 30, 2017, *see* 40 C.F.R. § 60.27(b); and
3. If either (i) states to which the guideline pertained did not submit implementation plans, or (ii) EPA disapproved a submitted plan, then EPA was required to promulgate a federal plan by November 30, 2017, *see* 40 C.F.R. § 60.27(d).

As of May 30, 2017, EPA received implementation plans as described by the regulations from California and two from New Mexico—one covering Albuquerque and Bernalillo County and another covering the rest of New Mexico. Defs.' Mot. at 1–2 & n.2 (citing Dkt. No. 92-1 ("Lassiter Decl.") ¶ 15); *see also* Dkt. No. 58 ¶ 2. Subsequently, EPA received implementation plans from Arizona (one covering Maricopa County and another covering the remainder of the state), Delaware, and West Virginia. Defs.' Mot. at 1–2 & n.2 (citing Lassiter Decl. ¶ 15); *see also* Dkt. No. 58 ¶ 2. To date, EPA has neither approved or disapproved of any submitted plans nor promulgated a federal plan. Dkt. No. 58 ¶¶ 1–2. Accordingly, Plaintiffs brought this action, which asks this Court to "[i]ssue a declaratory judgment that, by failing to implement and enforce the Emission Guidelines, EPA has violated the Clean Air Act;" and "[i]ssue a mandatory injunction compelling EPA to implement and enforce the Emission Guidelines." Compl. at 19.

II. LEGAL STANDARD

Summary judgment is appropriate if, viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmoving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The parties agree that this case is properly resolved on their cross-motions for summary judgment. Pls.' Mot. at 1; Defs.' Mot. at 6. When there is no dispute that an agency failed to timely fulfill a nondiscretionary obligation, summary judgment is the appropriate mechanism to

determine when compliance is due. *See, e.g., In re Ozone Designation Litig.*, 286 F. Supp. 3d 1082, 1085 (N.D. Cal. 2018) (setting deadlines for EPA to comply with mandatory duties under the CAA at summary judgment). In those situations, courts generally have broad equitable discretion to fix an appropriate deadline. *See Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 999–1000 (9th Cir. 2000). That said, if Congress found that a certain amount of time was appropriate for the agency to complete its statutory duty in the first instance, that timeframe generally still controls. *Sierra Club v. Thomas*, 658 F. Supp. 165, 171 (N.D. Cal. 1987).

Courts should not, however, demand a deadline for agency compliance that is impossible or infeasible. *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974) ("The sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls for him to do an impossibility.") (internal quotation omitted). To determine whether a deadline is infeasible, the Court should consider: (1) whether the "budgetary" and "manpower demands" required are "beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs"; and (2) an agency's need to have more time to sufficiently evaluate complex technical issues. *Id.* at 712–13. A delinquent agency, though, bears an "especially heavy" burden of showing infeasibility. *Thomas*, 658 F. Supp. at 172.[4]

III. DISCUSSION

EPA admits that it has failed to meet its nondiscretionary obligations to implement the Landfill Emissions Guidelines, as compelled by the CAA. *See* Dkt. No. 58. For that reason, the Court enters the declaratory judgment of liability requested by Plaintiffs. *See* Compl. at 19(1). Plaintiffs also ask the Court to compel EPA immediately to perform its nondiscretionary duties under the Landfill Emissions Guidelines. *Id.* at 19(2).

EPA does not dispute that it has failed to perform its nondiscretionary duties. Dkt. No. 58 ¶¶ 1–2. Nor does it dispute that this Court has authority to "enter an order setting a deadline for

[4] Plaintiffs suggest that this Court should adopt an "impossibility" standard, rather than an "infeasibility" standard. Pls.' Reply at 12. Although courts have explained that agency officials should not be required to do the impossible, the Ninth Circuit does not appear to have held that courts should impose Plaintiffs' requested standard.

EPA to perform an obligation for which it admits liability." *See* Defs.' Mot. at 6. EPA argues, however, that (1) Plaintiffs lack standing, and (2) Plaintiffs' proposed deadlines are not feasible.

A. State Plaintiffs Have Standing

EPA contends that neither the State Plaintiffs nor the intervenor-Plaintiff EDF have standing to sue. Because the Court finds the State Plaintiffs have standing, it need not evaluate whether EDF has standing. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Int'l Brotherhood of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 951 (9th Cir. 2017) (declining to evaluate whether co-petitioners had standing).

1. Legal Standard

A plaintiff seeking relief in federal court bears the burden of establishing the "irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). First, the plaintiff must have "suffered an injury in fact." *Spokeo*, 136 S. Ct. at 1547. This requires "an invasion of a legally protected interest" that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff's injury must be "fairly traceable to the challenged conduct of the defendant." *Spokeo*, 136 S. Ct. at 1547. Third, the injury must be "likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560–61). "States are not normal litigants for the purposes of invoking federal jurisdiction" and are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

2. Analysis

The Court finds the State Plaintiffs are entitled to "special solicitude" under *Massachusetts v. EPA*. The Supreme Court there held that Massachusetts had standing to contest EPA's decision not to regulate greenhouse-gas emissions that allegedly contributed to a rise in sea levels and a loss of coastal land. *Massachusetts v. EPA*, 549 U.S. at 526. It was "of considerable relevance" to the Court "that the party seeking review [was] a sovereign State and not . . . a private individual" because "States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at

518. The Court then identified two other factors that entitled Massachusetts "to special solicitude in [the Court's] standing analysis." *Id.* at 520. The first was that the CAA created a procedural right to challenge EPA's conduct:

> The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry: Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. We will not, therefore, entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.

Id. at 516–17 (internal quotation marks and citations omitted). The second was that EPA's decision affected Massachusetts's "quasi-sovereign" interest in its territory:

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.
>
> These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

Id. at 519–20 (citation omitted) (quoting 42 U.S.C. § 7521(a)(1)).

As was the case in *Massachusetts v. EPA*, the State Plaintiffs here "are not normal litigants" for purposes of federal jurisdiction. *Id.* at 518. And just as Congress afforded Massachusetts a right to challenge EPA's decision not to regulate greenhouse-gas emissions, Congress afforded the State Plaintiffs here the right to challenge EPA's failure to perform its nondiscretionary duties. *Compare id.* at 517 (finding the procedural right afforded under 42 U.S.C. § 7607(b)(1)), *with* 42 U.S.C. § 7604(a)(2) (affording the present procedural right).

Despite *Massachusetts v. EPA*'s clear applicability, EPA argues that the State Plaintiffs

lack standing for failure to plead causation, and relatedly, redressability. Defs.' Mot. at 9 ("[T]he States fail to demonstrate either a sufficient causal connection between EPA's inaction and the alleged injuries to the States' sovereign interests (fairly traceable) or the requested relief (redressability)."). To this end, EPA relies exclusively on *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), in which the Ninth Circuit found the plaintiffs' alleged injuries were too attenuated to the climate change caused by the defendants' conduct to support causation. Defs.' Mot. at 10–11.

The Court finds EPA's reliance on *Bellon* unavailing. First, the *Bellon* Court explained that its holding was based on two factors: (1) plaintiffs there were not sovereigns; and (2) unlike in *Massachusetts v. EPA*, the plaintiffs did not provide evidence that the relevant emissions had a "meaningful contribution" on greenhouse-gas levels. 732 F.3d at 1145–46. Neither factor is present here. As detailed above, the parties do not dispute that the United States "produces roughly 265 million tons of solid waste annually," and that emissions from solid waste landfills contain numerous harmful pollutants. *See* Answer ¶ 27. And the parties do not dispute that solid waste landfills "are the third-largest source of [domestic] human-related methane emissions" and that methane is the leading greenhouse gas behind carbon dioxide. *Id.* ¶¶ 2, 29. Further, the Landfill Emissions Guidelines themselves—promulgated by EPA—detail the meaningful contribution of landfill emissions to harmful pollution. *See* 81 Fed. Reg. at 59,276–77. And the EPA Administrator long ago determined "that municipal solid waste landfills cause, or contribute significantly to, air pollution that may reasonably be anticipated to endanger public health or welfare." 61 Fed. Reg. at 9,905. "Where Congress has expressed the need for specific regulations relating to the environment, that expression supports an inference that there is a causal connection between the lack of those regulations and adverse environmental effects." *Nat. Res. Def. Council v. EPA*, 542 F.3d 1235, at 1248 (9th Cir. 2008) (*NRDC*).[5]

For these reasons, the Court rejects EPA's causation challenge. The Court similarly rejects EPA's redressability challenge, which is entirely derivative of its causation challenge. *See* Defs.'

[5] EPA made no effort to distinguish *NRDC* in either the briefing or at the hearing on these motions.

Mot. at 12–13.

B. Deadlines

Because the Court finds the State Plaintiffs have standing, the sole remaining issue is what timetable to impose on EPA for it to complete its long-overdue nondiscretionary duties. The parties each submitted proposed timetables. Plaintiffs request "strict guidelines," including that EPA be ordered to (1) review existing state plans within thirty days, (2) promulgate a federal plan within five months, (3) respond to any future state plans within sixty days of submission, and (4) file status reports every sixty days. Pls.' Mot. at 17–22. EPA requests (1) four to twelve months to review existing state plans, (2) twelve months to promulgate a federal plan, and (3) that the Court deny Plaintiffs' request for imposition of deadlines for future state plans. Defs.' Mot. at 17–25. In support of its timetables, EPA submits the Declaration of Penny Lassiter, the Acting Director of the Sector Policies and Programs Division within the Office of Air Quality Planning and Standards, Office of Air and Radiation at EPA. Lassiter Decl. ¶ 2.

As a preliminary matter, Plaintiffs argue that strict deadlines are warranted due to EPA's longstanding recalcitrance. Pls.' Mot. at 17–18. In Plaintiffs' view, "[a] court order setting specific and expeditious deadlines is needed to ensure EPA follows the law." *Id.* at 18. There is no denying EPA's clear failure to meet its nondiscretionary duties. But that alone does not dictate deadlines. The Court is now faced with the question of feasibility. And nothing about past recalcitrance in any practical sense changes the feasibility of timelines moving forward. To be sure, EPA's delinquency means that it has an "especially heavy" burden of showing infeasibility. *Thomas*, 658 F. Supp. at 172. But recalcitrance does not render feasible what is otherwise infeasible.

Plaintiffs also ask the Court to reject EPA's representation that it is short-staffed, because the President's recent budget request seeks to reduce EPA's funding. Pls.' Reply at 14. Again, this claim does not solve the issue at hand. As EPA notes, "the budget request is just that: the Executive's request to Congress." Defs.' Reply at 6. More important, that the President may seek to reduce EPA's future funding does not change EPA's present capabilities.

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1. Existing State Plans

EPA received state plans from five states: California, New Mexico, Arizona, Delaware, and West Virginia. Lassiter Decl. ¶ 13. Two plans are in EPA Region 3: Delaware and West Virginia. *Id.* Two plans are in EPA Region 6: Albuquerque/Bernalillo County, New Mexico; and the rest of New Mexico. *Id.* Three plans are in EPA Region 9: Maricopa County, Arizona; the rest of Arizona; and California. *Id.*

Ms. Lassiter details five phases to the rulemaking process for state plan approval or disapproval: (1) review and analysis of submitted state plan; (2) development of rule proposal package; (3) proposed rule publication and public comment period; (4) summarization of comments, development of comment responses; and (5) development of final rule package. *Id.* ¶¶ 17–22. Ms. Lassiter provides a summary of the tasks necessary to complete each phase as well as an estimate of how long she estimates EPA will need to complete those tasks for each regional office, given that individual regional offices "review and approve or disapprove individual state plans." *Id.* ¶ 14. Each estimate purportedly represents the "minimum time" to complete a phase. *See id.* ¶ 10.

Plaintiffs argue that EPA needs no more than thirty days to review existing state plans, as most of the state plans are less than twenty-five pages and incorporate by reference federal standards. Pls.' Mot. at 19. EPA counters that Plaintiffs' thirty-day proposal "is patently unreasonable" because, among other things, "the required public notice and comment period and response to public comments cannot be completed in less than 45 days." Defs.' Mot. at 17. EPA adds that the presumptively reasonable timeframe is the four months afforded under the regulations. *Id.* And indeed, EPA proposes a four-month timeframe for completing its review of state plans outside of EPA Region 9.

EPA, however, proposes dramatically protracted deadlines for state plans from within EPA Region 9, without a satisfactory explanation. Ms. Lassiter claims that EPA Region 9 is "operating with seriously reduced resources; [has] a significant existing backlog of actions to complete; and [has] limited staff expertise in the MSW landfill source category." Lassiter Decl. ¶ 16. EPA adds that although California submitted a plan it considers "equivalent" to the relevant requirements

underlying the Landfill Emission Guidelines, EPA "anticipates that a line-by-line analysis will be necessary to determine" if that is true because California's existing program predates the relevant requirements. *Id.* EPA contends that these factors support an eight-month timeframe for the Arizona proposals and a twelve-month timeframe for the California proposal.

The Court takes EPA's representations about the phases required to conduct rulemaking for final action on state plans at face value and proceeds to analyze its proposed timetables on a phase-by-phase basis. In the review-and-analysis phase (Phase I), EPA Regions review the state plans "to determine whether [they] conform[] to the applicable statutory and regulatory requirements." Lassiter Decl. ¶ 18. EPA estimates that this phase will take fifteen days for state plans submitted in regions outside of EPA Region 9, thirty-five days for the Arizona plans, and sixty-five days for the California plan. *Id.* Tbls. 1–2. For the development of rule proposal package phase (Phase II), EPA performs some technical analysis, briefs the Regional EPA Administrator, and drafts regulatory text ultimately leading to a proposed rule. *Id.* ¶ 19. EPA uses a "tiering" approach at this phase, based on the complexity of the rulemaking actions, and concedes that the present "types of rulemakings" typically fall in the least complex category. *Id.* Nonetheless, EPA estimates that this phase will take thirty days for state plans submitted in regions outside of EPA Region 9, forty days for the Arizona plans, and seventy-five days for the California plan. *Id.* Tbls. 1–2. The next phase is the notice and comment period (Phase III), which is the ordinary period for public comment on the approval or disapproval of state plans. *Id.* ¶ 20. Publication in the Federal Register typically takes two weeks, after which the public comment period is thirty days. *Id.* EPA thus estimates that this phase will take forty-five days for all state plans. *Id.* Tbls. 1–2. Following notice and comment is the summarization of comment phase (Phase IV), wherein EPA "drafts a comment summary document." *Id.* ¶ 21. EPA estimates that this phase will take fifteen days for state plans submitted in regions outside of EPA Region 9, sixty days for the Arizona plans, and 120 days for the California plan. *Id.* Tbls. 1–2. Last is the final rule phase (Phase V), which includes briefing the Regional EPA management and producing the final regulatory package. *Id.* ¶ 22. EPA estimates that this phase will take fifteen days for state plans submitted in regions outside of EPA Region 9 and sixty days for the Arizona and

California plans. *Id.* Tbls. 1–2.

The Court begins by adopting the four-month deadline for state plans outside of EPA Region 9, which is the presumptively reasonable timeframe. Turning then to state plans within EPA Region 9, EPA has an "especially heavy" burden to prove that it is infeasible to approve or disapprove state plans in four months. *Thomas*, 658 F. Supp. at 172. The Court finds EPA has not met this burden.

Starting with Phase I, EPA's fifteen-day estimate for non-Region 9 plans seems imminently reasonable for the Region 9 plans as well. Although Ms. Lassiter claims that EPA may need to conduct a thorough review, including potentially a "line-by-line" analysis of California's plan, *see* Lassiter Decl. ¶ 16, the California plan is twenty pages long, *see* Dkt. No. 87-13. The Court sees no reason why even a line-by-line analysis of a twenty-page document requires sixty-five days, as EPA suggests.

As to Phase II, EPA only indicates that more time is needed in Region 9 because of "resource constraints" and "a backlog" of other work. Defs.' Mot. at 21. The Court finds two flaws in this explanation. First, these points are true for both the Arizona plans and the California plan, and yet EPA does not explain why it purportedly needs thirty-five *more* days for the California plan. Second, Ms. Lassiter concedes in her declaration that under EPA's "tiering" approach, the rulemaking actions at issue here fall within the least complex category of actions. Accepting that as true, the Court finds the thirty days EPA proposes for non-Region 9 state plans is reasonable across the board.

Turning next to Phase III, Plaintiffs contend that EPA could avoid a full-blown notice-and-comment process by approving the state plans with a "direct final rule," which would be effective "without requiring further notice." Pls.' Reply at 13 (citing *Approval and Promulgation of State Plans for Designated Facilities and Pollutants: California*, 64 Fed. Reg. 51,447, 51,447, 51,449–50 (Sept. 23, 1999)). As EPA responds, however, "it is not clear that [the discretionary direct final rule mechanism] is appropriate" and, more important, the exemplary direct final rule Plaintiffs cite states that the reception of adverse comments would render a direct final rule ineffective. Defs.' Reply at 2; *see also* 64 Fed. Reg. at 51,447 ("If EPA receives such comments, then it will publish

a timely withdrawal in the Federal Register informing the public that this rule will not take effect."). The Court thus finds it unreasonable to mandate that EPA employ the direct final rule mechanism.

As to Phase IV, EPA provides no explanation whatsoever for why it can complete the summarization phase for state plans outside of Region 9 in fifteen days, but needs *sixty* days for the Arizona plans and *120* days for the California plan. *See* Defs.' Mot. at 21 (stating summarily that "Phase IV . . . will take 60 and 120 days, for the Arizona plans and the California plan, respectively"). The Court finds that EPA has not met its "especially heavy" burden of demonstrating it needs more than fifteen days with such conclusory statements. *See Thomas*, 658 F. Supp. at 172.

Last, as to Phase V, EPA again provides no explanation whatsoever for why it can complete the final rule phase for state plans outside of Region 9 in fifteen days, but needs sixty days for the Arizona and California plans. *See* Defs.' Mot. at 21 ("For the same reasons, Phase V, development of final rule package, is estimated to take 60 days."). The Court again finds that EPA has not met its "especially heavy" burden of demonstrating it needs more than fifteen days with such conclusory statements. *See Thomas*, 658 F. Supp. at 172.

For these reasons, the Court adopts the four-month timetable EPA set forth for state plans outside of Region 9, but finds that EPA must meet the same timetable for plans within Region 9.

2. Federal Plan

Although the presumptively reasonable timeframe to promulgate a federal plan is six months—given the regulations—Plaintiffs argue that EPA needs no more than five months to propose a single federal plan, receive comments, and finalize it. Pls.' Mot. at 20–21. EPA counters that it needs twelve months—twice the regulatory timeframe. *See* Defs.' Mot. at 21–25. To this end, Ms. Lassiter details six phases to the rulemaking process for finalizing a federal plan, which are the same five phases described for action on state plans "plus a prefatory project kick-off phase." *Id.* at 21 (citing Lassiter Decl. ¶¶ 23–24). Ms. Lassiter again provides a summary of the tasks necessary to complete each phase as well as an estimate of how long she estimates EPA will need to complete those tasks. *Id.* ¶¶ 23–29.

Although the Court takes EPA's representations about the phases required to conduct rulemaking for final action on a federal plan at face value, it rejects EPA's overall timetable for promulgation of a federal plan. Due to EPA's delinquency, it bears an "especially heavy" burden to prove that six months is infeasible. *See Thomas*, 658 F. Supp. at 172. Merely describing what tasks must be performed in the various phases as EPA does is thus unhelpful, as those steps presumably have always been required. It is EPA's burden to go beyond a description of the process and instead explain why it cannot complete the process within six months. And on this point EPA cites to only one factor: EPA staff members "with responsibility for rule writing" and the requisite knowledge and expertise "required for the development of a federal plan . . . are working on" other matters with court-ordered deadlines. Defs.' Mot. at 24–25 (citing Lassiter Decl. ¶¶ 10, 12); *see also Cmty. In-Power & Dev. Ass'n, Inc. v. Pruitt*, 304 F. Supp. 3d 212, 225 (D.D.C. 2018) (ordering EPA "to complete all nine overdue rulemakings no later than October 1, 2021"); *Blue Ridge Envtl. Def. League v. Pruitt*, 261 F. Supp. 3d 53, 61 (D.D.C. 2017) (ordering EPA "to complete RTRs [Risk and Technology Reviews] for at least 7 overdue source categories by December 31, 2018, and to complete the remaining 6 RTRs by June 30, 2020"); *Cal. Cmtys. Against Toxics v. Pruitt*, 241 F. Supp. 3d 199, 207 (D.D.C. 2017) (ordering EPA to perform overdue rulemaking as to "20 source category RTRs within three years"). Put differently, EPA seeks additional time to complete a nondiscretionary duty it failed to meet until ordered to act by the Court, because it faces other court orders to perform other unmet nondiscretionary duties. The Court finds EPA's self-inflicted inconvenience, by itself, does not satisfy the "especially heavy" burden necessary to warrant more than six months to promulgate a federal plan. *See Thomas*, 658 F. Supp. at 172.

3. Future State Plans

Plaintiffs finally ask this Court to "order EPA to respond to any future state plan submissions within two months." Pls.' Mot. at 21. Plaintiffs maintain that "[m]any states did not submit plans by the deadline because EPA affirmatively encouraged them not to," and thus "this Court should require EPA to quickly review and determine if [future plans are] approvable." *Id.* The EPA counters that this Court lacks jurisdiction to order EPA to take action based on future

plans because the "EPA has not yet missed any deadline to take final action on such plans." Defs.' Mot. at 25.

The Court finds that it does not yet have jurisdiction to order EPA to act based on as-yet-unmissed deadlines. As EPA notes, the CAA citizen suit provision under which Plaintiffs brought suit only vests jurisdiction in district courts "*after* EPA has failed to undertake some mandatory action prior to a certain deadline." *Id.* (quoting *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 93 (D.D.C. 2001) and citing 42 U.S.C. § 7604(a)). In response, Plaintiffs cite to no authority to the contrary, but nonetheless urge this Court to exercise "close oversight in this matter," given that "EPA has shown that it has no intention of implementing the Emission Guidelines absent a specific court order, that it will implement them only in the narrowest way required, and that it will only fulfill additional mandatory obligations if it is hailed into court again." Pls.' Reply at 15 (internal citations omitted). Whether or not that characterization is accurate, the Court finds that the proper remedy given the jurisdiction-vesting statute is limited to compelling EPA to perform mandatory duties it has already failed to perform.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion for summary judgment and enters judgment in favor of Plaintiffs and against Defendants. The terms of the judgment are as follows:

(1) The Court **DECLARES** that Defendants U.S. Environmental Protection Agency and Andrew R. Wheeler, in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency, have failed to perform non-discretionary duties imposed by 40 C.F.R. § 60.27 to both (1) approve or disapprove existing state plans submitted to EPA addressing emission guidelines promulgated for municipal solid waste landfills within four months of receipt, and (2) promulgate regulations setting forth a federal plan addressing the emission guidelines promulgated for municipal solid waste landfills by November 30, 2017, both in violation of the Clean Air Act;

(2) The Court **ORDERS** Defendants to approve or disapprove of existing state plans, as required by 40 C.F.R. § 60.27(b), no later than September 6, 2019;

(3) The Court **ORDERS** Defendants to promulgate regulations setting forth a federal plan, as required by 40 C.F.R. § 60.27(d), no later than November 6, 2019;

(4) The Court **ORDERS** Defendants to file status reports with the Court every ninety days—such that the first status report is due August 5, 2019—detailing EPA's progress in complying with this order.

The Clerk is directed to enter judgment in favor of Plaintiffs and close the case. The Court retains jurisdiction to make such orders as may be necessary or appropriate.

IT IS SO ORDERED.

Dated: 5/6/2019

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

Case No. 18-cv-03237-HSG

ORDER DENYING MOTION TO STAY

Re: Dkt. No. 129

Pending before the Court is Defendants' motion for a stay pending appeal of the Court's November 5, 2019 Order denying EPA's motion to alter judgment under Federal Rule of Civil Procedure 60(b)(5). Dkt. No. 129. As relevant for the pending motion, as of October 28, 2016, the EPA's regulations imposed the following requirements:

> 1. States were required to submit implementation plans by May 30, 2017, *see* 40 C.F.R. § 60.23(a)(1);
> 2. EPA was required to approve or disapprove submitted plans by September 30, 2017, *see* 40 C.F.R. § 60.27(b); and
> 3. If either (i) states to which the guideline pertained did not submit implementation plans, or (ii) EPA disapproved a submitted plan, then EPA was required to promulgate a federal plan within six months of the submission deadline (November 30, 2017), *see* 40 C.F.R. § 60.27(d).

Pursuant to these regulations, the parties agreed that EPA failed to fulfill certain non-discretionary duties under 40 C.F.R. § 60.27, and after finding that Plaintiffs had standing to bring suit, the Court granted partial summary judgment for Plaintiffs. Dkt. No. 98.[1] Specifically, the Court

[1] Plaintiffs are eight states: the State of California, by and through the Attorney General and the California Air Resources Board; the State of Illinois; the State of Maryland; the State of New Mexico; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; and the State of Vermont. Dkt. No. 1 ¶¶ 1, 10–18. Plaintiffs also include the Environmental Defense Fund, which the Court permitted to intervene on November 20, 2018. *See* Dkt. No. 78.

ordered the EPA to approve or disapprove existing state plans no later than September 6, 2019, and to promulgate regulations setting forth a federal plan no later than November 6, 2019. *Id.* at 15–16. On August 22, 2019, EPA published notice of the proposed federal plan. *See* Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014, 84 Fed. Reg. 43,745 (Aug. 22, 2019) ("Proposed Federal Plan").[2]

On August 16, 2019, EPA amended its regulations to change the applicable deadlines. States now must "submit a state plan to the EPA by August 29, 2019," pushing the deadline back over two years. 40 C.F.R. § 60.30f ("New Rule"). Additionally, EPA amended the regulations applicable to the Administrator's actions as follows:

> (c) The Administrator will promulgate, through notice-and-comment rulemaking, a federal plan, or portion thereof, at any time *within two years* after the Administrator:
>
> (1) Finds that a State fails to submit a required plan or plan revision or finds that the plan or plan revision does not satisfy the minimum criteria under paragraph (g) of this section; or
>
> (2) Disapproves the required State plan or plan revision or any portion thereof, as unsatisfactory because the applicable requirements of this subpart or an applicable subpart under this part have not been met.

40 C.F.R. § 60.27a(c) (emphasis added). EPA subsequently filed a Motion to Amend Order and Judgment, which the Court denied on November 5, 2019. Dkt. No. 124. The Court stayed the judgment for sixty days to allow the EPA to appeal the order. *Id.* at 6. The EPA now seeks to stay the judgment pending appeal. Dkt. No. 129 ("Mot."), 134 ("Opp.").

In deciding whether to grant a stay pending appeal, the Court must consider the following four factors: (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 the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Courts in the Ninth Circuit weigh these factors with a "general balancing" or "sliding scale" approach, under which "a

[2] A complete review of the history of the case can be found in the Court's previous Order granting summary judgment to the Plaintiffs. Dkt. No. 98.

stronger showing of one element may offset a weaker showing of another." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). As to the first factor, if a movant is unable to show a "strong likelihood of success," then the movant must at least demonstrate that the appeal presents a "substantial case on the merits," or that there are "serious legal questions" raised. *Id*. at 965–68. However, under this lower threshold, the movant must then demonstrate that the balance of hardships under the second and third factors tips sharply in the movant's favor. *Id*. at 970.

The Court finds in its discretion that these factors weigh in favor of denying a stay. The Court found that the EPA failed to meet its burden under Rule 60(b)(5), and continues to believe that EPA is unlikely to succeed on appeal. However, the Court recognizes that the law is far from clear given the unusual facts presented in this case. As noted in its Order, numerous precedents support the proposition that "[w]hen a change in the law authorizes what had previously been forbidden, it is abuse of discretion for a court to refuse to modify an injunction founded on the superseded law." *Am. Horse Prot. Ass'n, Inc. v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982); *see also Class v. Norton*, 507 F.2d 1058, 1062 (2d Cir. 1974); *McGrath v. Potash*, 199 F.2d 166, 168 (D.C. Cir. 1952). Although the "EPA's voluntary action 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," this case implicates serious legal questions regarding the division of authority between our branches of government. Dkt. No. 124 at 4–5. Additionally, as noted in the Order, the EPA's compliance with its judgment is not a substantial burden, since it has already promulgated and received comments on the Proposed Federal Plan.[3] On the other hand, Plaintiffs continue to be harmed by the delay in implementing the Emission Guidelines. The Court's original judgment imposed a deadline to promulgate regulations setting forth a federal plan by November 6, 2019, recognizing the harm suffered by Plaintiffs. Over a month has passed since the original deadline and EPA seeks to further delay implementation of the judgment. Because

[3] The Court finds the EPA's reliance on *Seaside Civic League, Inc. v. HUD* unavailing. No. C-14-1823-RMW, 2014 WL 2192052, at *3 (N.D. Cal. May 23, 2014). Although "there is inherent harm to an agency in preventing it from enforcing regulations," the Court is not preventing the EPA from enforcing any substantive regulation. *Id.* The New Rule did not change the EPA's obligation to promulgate a federal plan, but instead only changed the deadlines. This does not constitute the type of harm discussed in *Seaside*.

EPA's appeal raises a serious legal question, but does not in the Court's view establish a likelihood of success, it must show that the balance of equities tips sharply in its favor. It fails to do so.

Accordingly, the Court **DENIES** the EPA's motion to stay proceedings pending appeal.

IT IS SO ORDERED.

Dated: 12/17/2019

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California