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9  
10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
12 **OAKLAND DIVISION**

13 STATE OF CALIFORNIA, *et al.*

14 Plaintiffs,

15 and

16 ENVIRONMENTAL DEFENSE FUND,

17 Plaintiff-Intervenor,

18 v.

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

21 Defendants.  
22  
23

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

**EPA’S MEMORANDUM IN OPPOSITION  
TO JOINT MOTION FOR SUMMARY  
JUDGMENT, AND IN SUPPORT OF  
EPA’S CROSS-MOTION FOR SUMMARY  
JUDGMENT, AND [PROPOSED] ORDER**

Date: April 25, 2019

Time: 2:00 p.m.

Place: 2, 4th Floor, Oakland Courthouse

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**NOTICE OF CROSS-MOTION**

Please take notice that on April 25, 2019, at 2:00 p.m. or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Haywood S. Gilliam, Jr., Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, California, Defendants the United States Environmental Protection Agency and Andrew R. Wheeler, in his official capacity as Acting Administrator of the United States Environmental Protection Agency (collectively, “EPA”), will and do respectfully move to grant summary judgment and enter EPA’s proposed order.

**RELIEF REQUESTED**

The relief EPA seeks is denial of Plaintiffs’ joint motion for summary judgment and granting of EPA’s cross-motion as to remedy and entry of EPA’s proposed order.

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1 Pursuant to Civil L.R. 7-2 and Fed. R. Civ. P. 56(a), Defendant EPA files this opposition  
2 to Plaintiffs' Joint Motion for Summary Judgment (Dkt. No. 85, "Pls.' Mot.") and concurrently  
3 cross-moves for summary judgment as to remedy.

#### 4 **I. INTRODUCTION**

5 In 1996, EPA issued Clean Air Act ("CAA") performance standards for emissions from  
6 new municipal solid waste ("MSW") landfills and emission guidelines for existing MSW  
7 landfills. 61 Fed. Reg. 9905 (Mar. 12, 1996). In 2016, EPA revised the new source performance  
8 standards, 81 Fed. Reg. 59,332 (Aug. 29, 2016) (codified at 40 C.F.R. §§ 60.760-60.769), and  
9 issued revised emission guidelines, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (codified at 40 C.F.R.  
10 §§ 60.30f-60.41f) (the "Emission Guidelines" or "Guidelines"). Under the Emission Guidelines,  
11 any state with one or more existing MSW landfills that commenced construction, modification,  
12 or reconstruction on or before July 17, 2014, was required to submit a state plan to EPA by May  
13 30, 2017. 40 C.F.R. § 60.30f(a)-(b). Pursuant to 40 C.F.R. § 60.27(b), EPA will approve or  
14 disapprove a state's plan within four months of the submission deadline. *Id.* § 60.27(b). If a  
15 state does not submit a plan, EPA will promulgate a federal plan within six months of the  
16 deadline for the state to submit a plan. *Id.* § 60.27(d).

17 In the operative Complaint in this matter,<sup>1</sup> Plaintiffs allege that California and New  
18 Mexico submitted plans to implement the Emission Guidelines and that EPA failed to perform a  
19 nondiscretionary duty under its regulation, 40 C.F.R. § 60.27(b), to approve or disapprove those  
20 "state plan submissions within four months of the submission deadline, that is, by September  
21 30, 2017." Compl. ¶ 63 (Dkt. No. 1); *see also id.* ¶¶ 1, 4, 8, 24, 49. After the deadline for action  
22 on timely submitted state plans, EPA received submissions from Arizona, Delaware, and West  
23

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24  
25 <sup>1</sup> Pursuant to the Court's Order of December 21, 2018, Plaintiff-Intervenor EDF is proceeding  
26 under the complaint filed by the State Plaintiffs. *See* Order at 1 n.1 (Dkt. No. 82) ("EDF has  
27 represented to the Court that it only intends to proceed in this action under the existing  
28 complaint filed by the States."); *but see* Fed. R. Civ. P. 24(c) (requiring that a motion to  
intervene must "be accompanied by a pleading that sets out the claim or defense for which  
intervention is sought").

1 Virginia.<sup>2</sup> Plaintiffs further allege that, pursuant to 40 C.F.R. § 60.27(b) and (d), EPA has a non-  
2 discretionary duty “to promulgate a federal plan for states that did not timely submit state plans  
3 within six months of the submission deadline, that is, by November 30, 2017.” Compl. ¶ 64; *see*  
4 *also id.* ¶¶ 1, 4, 8, 24, 63.

5 EPA concedes that it has not approved or disapproved any submitted state plans, and  
6 that it has not promulgated a federal plan. However, the Plaintiffs have failed to demonstrate  
7 their standing and, even if they could establish standing, the relief they seek is inadequate in  
8 some respects, and unauthorized in other respects. Plaintiffs have failed to demonstrate standing  
9 because they have not met their burden of demonstrating that their alleged climate-related  
10 injuries are fairly traceable to EPA’s inaction with respect to state plans and a federal plan.  
11 Plaintiffs have also failed to meet their burden to demonstrate that their alleged injuries are  
12 likely to be redressed by the relief sought. Plaintiffs request that the Court order EPA to: (1)  
13 respond to “already submitted” state plans within thirty days of the Court’s order; (2)  
14 promulgate a federal plan within five months; (3) respond to “any future” state plans within  
15 sixty days; and (4) provide status reports every sixty days. Pls.’ Mot. at 22. The most  
16 expeditious schedule under which EPA could take final action on the plans noted above is four  
17 months from entry of the Court’s order for the New Mexico, Delaware, and West Virginia  
18 plans, eight months for the Arizona plans, and 12 months for the California plan. The most  
19 expeditious schedule under which EPA could sign a final rule promulgating a federal plan is 12  
20 months from entry of the Court’s order.<sup>3</sup> Further, the Court lacks jurisdiction to order EPA to  
21

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22 <sup>2</sup> Declaration of Penny Lassiter ¶ 15 (“Lassiter Decl.”) (attached as Exhibit A); *see also* Joint  
23 Stipulation Regarding Undisputed Facts ¶ 2 (Dkt. No. 58). EPA received two plans from New  
24 Mexico, one covering Albuquerque and Bernalillo County on May 24, 2017, and another  
25 covering the rest of New Mexico on May 25, 2017. *Id.* Similarly, EPA received a plan from  
26 Arizona covering Maricopa County on May 4, 2018, and another covering the remainder of the  
27 state on July 24, 2018. For purposes of this brief, we will refer to the “New Mexico plans” and  
28 the “Arizona plans” for brevity. The Joint Stipulation Regarding Undisputed Facts inadvertently  
omitted listing the state plans received from Delaware and West Virginia. *Id.*

<sup>3</sup> EPA proposes timeframes for the Court’s order in terms of months after entry of the order,  
consistent with Plaintiffs’ proposed remedy to allow for comparison.

1 take action on state plans submitted in the future, as Plaintiffs have no claim with respect to  
2 those plans. Though EPA disputes that jurisdiction for the claims in the Complaint lies under  
3 CAA sections 304(a) or 304(a)(2), 42 U.S.C. §§ 7604(a), 7604(a)(2), the United States has only  
4 waived sovereign immunity for a presently required and unfulfilled nondiscretionary duty and  
5 not for future non-discretionary duties that have not yet accrued. *Sierra Club v. Browner*, 130 F.  
6 Supp. 2d 78, 93 (D.D.C. 2001).<sup>4</sup> Moreover, as discussed in EPA’s prior motion (Dkt. No. 70), if  
7 EPA finalizes two proposed rules, 83 Fed. Reg. 44,746 (Aug. 31, 2018) and 83 Fed. Reg.  
8 54,527-29 (Oct. 30, 2018), the regulatory deadline for state plan submissions would  
9 automatically be reset to August 29, 2019. *Lassiter Decl.* ¶ 30-33. Thus, the Court must reject  
10 Plaintiffs’ request that the Court order EPA to take action on plans submitted in the future.  
11 Finally, if the Court were to reach the issue of an appropriate remedy, EPA does not object to  
12 Plaintiffs’ request that EPA provide the Court with periodic status reports.

## 13 **II. STATUTORY AND REGULATORY BACKGROUND**

### 14 **A. Clean Air Act**

15 The CAA is intended to “protect and enhance the quality of the Nation’s air resources so  
16 as to promote the public health and welfare.” 42 U.S.C. § 7401(b)(1). The CAA sets up a  
17 comprehensive and detailed program for control of air pollution through a system of shared  
18 federal and state responsibility. CAA section 111 “directs the EPA Administrator to list  
19 ‘categories of stationary sources’ that ‘in [her] judgment . . . caus[e], or contribut[e]  
20 significantly to, air pollution which may reasonably be anticipated to endanger public health or  
21 welfare.’” *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 424 (2011) (quoting 42 U.S.C.

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22  
23 <sup>4</sup> Any future failure of EPA to act in a timely matter would be the subject of future litigation and  
24 subject to the notice provisions of the Act. 42 U.S.C. §§ 7604(a), 7604(b)(1)(A). No suit  
25 brought under CAA section 304(a)(2) may be filed unless a plaintiff has first complied with the  
26 “60-day notice” requirement of CAA section 304(b), 42 U.S.C. § 7604(b), and the notice  
27 requirements prescribed by EPA’s regulations. *See, e.g., Hallstrom v. Tillamook Cty.*, 493 U.S.  
28 20, 33 (1989); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 519 (9th Cir.  
2013). Similarly, no suit brought under CAA section 304(a) alleging an unreasonable delay by  
EPA may be brought without 180 day-notice. 42 U.S.C. § 7604(a). EPA regulations at 40  
C.F.R. §§ 54.2(a), 54.3(a) set forth additional requirements for such notices.

1 § 7411(b)(1)(A)). For each category, EPA must prescribe federal “standards of performance”  
 2 under Section 111(b) for emissions of pollutants from new or modified sources. 42 U.S.C.  
 3 § 7411(b)(1)(B).

#### 4 **B. Regulatory Background**

5 In addition, EPA has promulgated implementing regulations under Section 111(d) with  
 6 respect to existing sources’ emissions of pollutants not covered under certain other programs,  
 7 where those existing sources’ emissions of those pollutants would be subject to a Section 111(b)  
 8 standard were they new or modified sources. *Id.* § 7411(d); 40 C.F.R. pt. 60, subpt. B. Under  
 9 these regulations, EPA promulgates source-category-specific “emission guidelines.” *See* 40  
 10 C.F.R. § 60.22. These emission guidelines, unlike Section 111(b) standards, are not designed to  
 11 regulate existing sources directly, but instead “establish a procedure” for “each State” to submit  
 12 to EPA a plan that establishes “standards of performance” for existing sources of the relevant  
 13 pollutant. *Id.* States must submit their plans to EPA within nine months of the promulgation of a  
 14 particular emission guideline, unless that emission guideline specifies a different deadline. *Id.*  
 15 § 60.23(a)(1). EPA will then approve or disapprove a state’s plan within four months of the  
 16 submission deadline. *Id.* § 60.27(b). If a state does not submit a plan, EPA will promulgate a  
 17 federal plan within six months of the deadline for the state to submit a plan. *Id.* § 60.27(d). In  
 18 addition, “[t]he Administrator may, whenever he determines necessary, extend the period for  
 19 submission of any plan or plan revision or portion thereof.” *Id.* § 60.27(a).<sup>5</sup>

### 20 **III. LEGAL STANDARDS**

#### 21 **A. Standing**

22 The “irreducible constitutional minimum of standing contains three elements.” *Lujan v.*  
 23

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24  
 25 <sup>5</sup> EPA has proposed two rules that, if finalized, would extend the current timelines for EPA  
 26 action on state plans and promulgation of federal plans, and set a new submission deadline for  
 27 state plans implementing the Emission Guidelines and potentially require resubmission  
 28 currently submitted plans to allow for EPA to review them for completeness before taking final  
 action. *See* EPA Stay Mot. at 2-5 (Dkt. No. 70) (describing proposed rules and impact on the  
 claims in this case); Lassiter Decl. ¶¶ 30-33.

1 *Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs must establish that they have sustained an  
2 injury in fact, that the injury is fairly traceable to the challenged action or inaction of the  
3 defendant, and that their injury is likely to be redressed by a favorable outcome. *Id.* at 560-61.  
4 Plaintiffs bear the burden of establishing these elements. *Id.* at 561 (internal citations omitted).  
5 At summary judgment, Plaintiffs “must ‘set forth’ by affidavit or other evidence ‘specific facts’  
6 demonstrating standing. *Id.* States have been found to enjoy a limited right to “special  
7 solicitude” for purposes of standing when they are protecting a quasi-sovereign interest and they  
8 are afforded a procedural right. *Massachusetts v. EPA*, 549 U.S. 497, 520-21 (2007).

9 To satisfy the causality element for Article III standing, Plaintiffs must show that the  
10 injury is causally linked or “fairly traceable” to defendant’s alleged misconduct. *Lujan*, 504  
11 U.S. at 560-61; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,  
12 180 (2000). Although a defendant’s action (or inaction) need not be the sole source of injury to  
13 support standing, *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011), “[t]he line of  
14 causation between the defendant’s action and the plaintiff’s harm must be more than  
15 attenuated,” *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012)  
16 (citations and quotation marks omitted). The requirements that the injury be fairly traceable to  
17 the defendant’s conduct and redressable by the court have overlapped; however, the  
18 redressability “examines the causal connection between the alleged injury and the judicial relief  
19 requested.” *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). A causal chain may have multiple  
20 links, but the links must be plausible and not hypothetical or tenuous. *Id.* at 1141-42 (internal  
21 citations and quotations omitted). A plaintiff must demonstrate standing “for each claim he  
22 seeks to press” and for “each form of relief sought.” *Oregon v. Legal Servs. Corp.*, 552 F.3d  
23 965, 969 (9th Cir. 2009) (internal quotations omitted).

24 In order for an organization to have standing to sue on behalf of its individual members,  
25 it must meet the Supreme Court’s three-part test: (a) its members would otherwise have  
26 standing to sue in their own right; (b) the interests it seeks to protect are germane to the  
27 organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the  
28 participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advert. Comm’n*,

1 432 U.S. 333, 342-43 (1977); *United Union of Roofers, Waterproofers, & Allied Trades No. 40*  
2 *v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990).

### 3 **B. Subject Matter Jurisdiction**

4 Federal courts have limited jurisdiction and can hear only those cases specifically  
5 authorized by the U.S. Constitution or by statute. *See Kokkonen v. Guardian Life Ins. Co. of*  
6 *Am.*, 511 U.S. 375, 377 (1994). Where, as here, the United States or its agencies have been  
7 sued, an express and unambiguous waiver of sovereign immunity is a prerequisite for subject  
8 matter jurisdiction. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). Even when a statute provides  
9 an express waiver of sovereign immunity, that waiver is strictly construed in favor of the  
10 government. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992); *United States Dep't*  
11 *of Energy v. Ohio*, 503 U.S. 607, 615 (1992). Section 304 of the CAA limits the Court's  
12 jurisdiction in this matter to an "alleged . . . failure of the Administrator to perform any act or  
13 duty . . . which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). In a  
14 challenge to subject matter jurisdiction, the burden of establishing jurisdiction falls on the  
15 plaintiff. *Lujan*, 504 U.S. at 561; *United States v. Sherwood*, 312 U.S. 584, 587-88 (1941).  
16 Where subject matter jurisdiction does not exist, "the court cannot proceed at all in any cause."  
17 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Thus, if there is no non-  
18 discretionary duty, the Court must dismiss the claim for lack of jurisdiction. *Sierra Club v.*  
19 *Whitman*, 268 F.3d 898, 901 (9th Cir. 2001).

### 20 **C. Remedy for Failure to Meet Deadline**

21 Courts adjudicating similar disputes concerning the remedy for an agency's failure to  
22 meet a deadline commonly resolve such disputes through summary judgment. *See, e.g., Sierra*  
23 *Club v. McCarthy*, No. 14-cv-05091, 2015 WL 3666419, at \*3 (N.D. Cal. May 7, 2015); *Sierra*  
24 *Club v. Johnson*, 444 F. Supp. 2d 46, 52 (D.D.C. 2006) (where liability is not contested "the  
25 entry of summary judgment is appropriate, and it remains only for the Court to fashion an  
26 appropriate equitable remedy.") (citing cases). The Court may properly enter an order setting a  
27 deadline for EPA to perform an obligation for which it admits liability. *See Nat. Res. Def.*  
28 *Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974).

1 A district court has broad discretion to fashion equitable remedies. *Weinberger v.*  
2 *Romero-Barcelo*, 456 U.S. 305, 311-13 (1982); *Am. Lung Ass'n v. Browner*, 884 F. Supp. 345,  
3 347 (D. Ariz. 1994); *see Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 569-70 (D.D.C. 1986)  
4 (adopting compliance schedule proposed by EPA in a case where EPA had failed to comply  
5 with a nondiscretionary statutory duty, after finding that EPA's proposed schedule was  
6 "reasonable"); *Sierra Club v. Johnson*, 444 F. Supp. 2d at 58 (focusing on amount of time  
7 "necessary for the promulgation of workable regulations"). In cases alleging violation of  
8 statutorily-mandated duties, courts have recognized circumstances that can make it infeasible  
9 for an agency to comply with a particular deadline, such as where: (1) the "budgetary" and  
10 "manpower demands" required are "beyond the agency's capacity or would unduly jeopardize  
11 the implementation of other essential programs," or (2) the agency requires more time to  
12 sufficiently evaluate complex technical issues. *See Train*, 510 F.2d at 712-13.

#### 13 **IV. ARGUMENT**

14 Plaintiffs fail to demonstrate standing because they have not established causation, i.e.,  
15 showing that EPA's conduct could meaningfully contribute to their alleged climate-related  
16 injuries or that Plaintiffs' proposed remedy is likely to redress their alleged injuries. Therefore,  
17 the Court should dismiss the Complaint for want of standing.

18 If the Court finds that Plaintiffs have standing and proceeds to consider a remedy, EPA  
19 requests that the Court allow EPA four months to approve or disapprove state plans submitted  
20 by Delaware, New Mexico, and West Virginia, eight months for the plans submitted by  
21 Arizona, and 12 months for the plan submitted by California. Further, EPA requests that the  
22 Court allow it 12 months to promulgate a federal plan. EPA's remedy is supported by the  
23 Declaration of Penny Lassiter, the Acting Director of EPA's Sector Policies and Programs  
24 Division ("SPPD") within EPA's Office of Air and Radiation. Ms. Lassiter's Declaration  
25 describes in detail each of the steps required for both actions and identifies the resource  
26 constraints that impact the time required for various steps. Lassiter Decl. ¶¶ 10-29.

27 Plaintiffs' request that the Court order EPA to take action on state plans within 30 days  
28 from entry of the Court's order and promulgate a federal plan within five months is unsupported



1 and unreasonable. Plaintiffs provide no factual support for their requested deadlines requested.  
2 Instead, they summarily assert that their requested deadline for state plan action is “eminently  
3 reasonable” because the state plans are not long documents and this is not the first time states  
4 have submitted plans. Pls.’ Mot. at 18-19. Likewise, Plaintiffs merely assert, without more, that  
5 EPA can issue a federal plan in five months because EPA has issued one for landfills before and  
6 would only need to modify that plan. *Id.* at 20. Plaintiffs’ timeframes fail to account for the  
7 steps inherent in the rulemaking process, particularly the required public notice-and-comment  
8 process, or EPA’s resource constraints.

9 Finally, Plaintiffs’ request that this Court enter an order requiring EPA to take action on  
10 future (*i.e.*, not yet submitted) state plans within 60 days of receipt is barred by sovereign  
11 immunity, 42 U.S.C. § 7604(a), and inconsistent with the four months EPA regulations allow  
12 for it to take action on timely-submitted state plans. *See* 40 C.F.R. § 60.27(b). This Court’s  
13 jurisdiction is limited by the waiver of sovereign immunity in section 304(a) which provides  
14 only for suits regarding EPA’s failure to comply with a present duty that is nondiscretionary or  
15 to compel action that has been unreasonably delayed. *See* 42 U.S.C. §§ 7604(a)(2), 7604(a).  
16 Moreover, if the Court orders EPA to promulgate a federal plan, then it is unclear how Plaintiffs  
17 could be harmed by a future failure of EPA to respond a future-submitted state plan and  
18 therefore how Plaintiffs can demonstrate standing as to this aspect of the requested relief.

19 **A. Plaintiffs and Plaintiff-Intervenors Lack Standing**

20 To demonstrate standing at the summary judgment stage, plaintiffs “must set forth by  
21 affidavit or other evidence specific facts, which for purposes of the summary judgment motion  
22 will be taken to be true.” *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013),  
23 *denying rehearing en banc*, 741 F.3d 1075 (9th Cir. 2014) (quoting *Lujan*, 504 U.S. at 561).  
24 The States allege standing based on alleged injury to their quasi-sovereign interests. Pls.’ Mot.  
25 at 11-12. The States present an attenuated line of causation, alleging that implementation of the  
26 Emission Guidelines will reduce methane emissions, that methane is a greenhouse gas, and that  
27 greenhouse gases (“GHG”) cause a variety of climate-related injuries to their quasi-sovereign  
28 interests in their shore lines, forests, roads, such as increased fires and sea-level rise.



1 Establishing causation and redressability demands more. The Plaintiff States have failed to meet  
2 their burden. As explained below, the States fail to demonstrate either a sufficient causal  
3 connection between EPA’s inaction and the alleged injuries to the States’ sovereign interests  
4 (fairly traceable) or the requested relief (redressability). The States also wrongly allege that they  
5 have standing because “the health of the States’ citizens living in proximity to landfills is also  
6 threatened by the [volatile organic compounds (“VOC”)] and hazardous air pollutants emitted  
7 by landfills.” *Id.* at 13. A “[s]tate does not have standing as *parens patriae* to bring an action on  
8 behalf of its citizens against the Federal Government.” *Alfred L. Snapp & Son, Inc. v. Puerto*  
9 *Rico*, 458 U.S. 592, 610 n.16 (1982). Thus, the States do not meet their burden to demonstrate  
10 standing to maintain this suit.<sup>6</sup>

11 EDF similarly fails to establish its standing. EDF alleges that it has associational  
12 standing to bring suit on behalf of its members, Pls.’ Mot. at 13-15, and makes the same  
13 generalized allegation that EPA’s “inaction on the Emission Guidelines also harms EDF’s  
14 members due to the impacts from climate change.” *Id.* at 14. EDF supports this allegation with a  
15 declaration that makes the same conclusory allegation as the States: landfills emit greenhouse  
16 gases and one of EDF’s members experience climate-related impacts such as increased  
17 temperatures and extreme weather events. Fort Decl. ¶¶ 8, 10-11,13-15 (Dkt. No. 87-20);  
18 Sheehan Decl. ¶ 11 (Dkt. No. 87-19). As with the States, EDF fails to meet its burden to  
19 demonstrate sufficient causal connections between EPA’s inaction and its members’ alleged  
20 injuries or to the requested relief. EDF also alleges without sufficient particularity that many  
21 “EDF members live in such close proximity to covered landfills that they suffer from the  
22 localized health impacts and increased cancer risk associated with their exposure to hazardous  
23 air pollutants.” Pls.’ Mot. at 14. EDF does not meet its burden to connect EPA’s inaction to  
24

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25 <sup>6</sup> The Plaintiff States do not contend that the “special solicitude” allowed to states in the  
26 standing analysis under *Massachusetts v. EPA*, 549 U.S. at 516-26, applies here. Instead,  
27 Plaintiff States argue that the principle “serves only to strengthen the conclusion that the States  
28 have standing to maintain this action.” Pls.’ Mot. at 12. Thus, the touchstone of the standing  
analysis remains the “irreducible constitutional . . . elements” of standing. *Lujan*, 504 U.S. at  
560.

1 these alleged injuries. EDF also posits an even more tenuous causal connection, suggesting that  
2 landfills emit VOCs which in turn can contribute to the creation of ozone and because many of  
3 its members live in areas that do not attain the national ambient air quality standard for ozone,  
4 some of its members will suffer exacerbated health effects. Again, EDF fails to present evidence  
5 sufficient to establish a causal connection, both to the alleged injury and to their proposed  
6 remedy.

7 1. Plaintiffs Fail to Demonstrate a Causal Connection Between the Alleged  
8 Climate-Related Injury and EPA's Conduct and Between the Requested  
9 Relief and the Alleged Injury.

10 Plaintiffs have not demonstrated a sufficient causal connection between the injury and  
11 EPA's inaction. *Lujan*, 504 U.S. at 560. Considering the causation element in *Massachusetts v.*  
12 *EPA*, the court determined that, because motor vehicle emissions of carbon dioxide in the  
13 United States comprised 6% of the world's total carbon dioxide emissions, the emissions made  
14 a "meaningful contribution to greenhouse gas concentrations and [ . . . ] global warming"  
15 sufficient for plaintiff states to meet the causation requirement for standing. 549 U.S. at 524-  
16 525. In contrast, in *Washington Environmental Council v. Bellon*, the Ninth Circuit found the  
17 relationship between the plaintiffs' alleged injuries from climate change and the defendants'  
18 misconduct too attenuated to support causation where the regulations at issue could only impact  
19 greenhouse gas emissions from oil refineries totaling 5.9% of greenhouse gases emitted from  
20 Washington State sources. 732 F.3d at 1141.

21 In *Bellon*, non-state plaintiffs alleged that Washington's failure to set and apply  
22 reasonably available control technology ("RACT") standards to five oil refineries in the state  
23 caused them injuries from climate change. *Id.* at 1137. The plaintiffs offered "vague, conclusory  
24 statements that the [state agencies'] failure to set RACT standards at the [oil refineries]  
25 contributes to greenhouse gas emissions, which in turn, contributes to climate-related changes  
26 that result in their purported injuries." *Id.* at 1142. The Ninth Circuit found that the oil refineries  
27 emit 5.94 metric tons of carbon dioxide equivalents, or "mtCO<sub>2e</sub>," and are responsible for 5.9%  
28 of the GHG emissions in Washington, but held that insufficient evidence was presented to  
demonstrate that that amount of emissions constituted a meaningful contribution to greenhouse

1 gas levels within the United States or worldwide sufficient to establish causality. *Id.* at 1145-46  
2 (internal quotations omitted). The court also found that the plaintiffs failed to meet the  
3 redressability requirement given the global nature of GHG emissions and the plaintiffs' failure  
4 to demonstrate that implementation of the RACT standards would cause a significant reduction  
5 to the pollution causing the plaintiffs' injuries. *Id.* at 1146-47.<sup>7</sup>

6 The Ninth Circuit has made several observations relevant to the analysis of standing  
7 based on climate-related injuries. First, the court has observed that "there are numerous  
8 independent sources of GHG emissions, both within and outside the United States, which  
9 together contribute to the greenhouse effect," 732 F.3d at 1143, and that "global warming has  
10 been occurring for hundreds of years and is the result of a vast multitude of emitters worldwide  
11 whose emissions mix quickly, stay in the atmosphere for centuries, and, as a result, are  
12 undifferentiated in the global atmosphere." 696 F.3d at 868. Second, the court has recognized  
13 that "attempting to establish a causal nexus . . . may be a particularly challenging  
14 task [. . .] because there is a natural disjunction between Plaintiffs' *localized* injuries and the  
15 greenhouse effect." 732 F.3d at 1143 (emphasis added). Third, the court has accepted that "there  
16 is limited scientific capability in assessing, detecting, or measuring the relationship between a  
17 certain GHG emission source and *localized* climate impacts in a given region." *Id.* at 1143  
18 (emphasis added).

19 The States argue that they have satisfied the traceability element of standing merely  
20 "because landfill emissions contribute to climate change and other adverse effects, [and] EPA's  
21 failure to implement the Emission Guidelines "at a minimum . . . 'contributes' to [the States']  
22 injuries," Pls.' Mot. at 12 (citations omitted), without overcoming the substantive quantification  
23 hurdle in *Bellon*. They do not demonstrate that the methane reductions attributable to the  
24 Emission Guidelines are significant or meaningful, instead simply asserting that implementation  
25

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26 <sup>7</sup> See also *Bellon*, 732 F.3d at 1143 (citing *Barnes v. United States Dep't of Transportation*, 655  
27 F.3d 1124, 1140 (9th 2011), as "stating that aviation activities accounting for .03% of U.S.-based  
28 greenhouse gas emissions do 'not translate into locally-quantifiable environmental impacts  
given the global nature of climate change'").

1 will “reduce hundreds of thousands of metric tons of methane emissions.” Pls.’ Mot. at 12. The  
2 States allege a litany of climate-related injuries, many described as being suffered by the United  
3 States at large, Pls.’ Mot. at 7-8, and some to particular states: sea level rise in Oregon and  
4 Maryland, Mote Decl. ¶¶ 5, 10; Aburn Decl. ¶ 8; and increased intensity of fires in California,  
5 Patterson Decl. ¶¶ 6-8. EDF similarly contends that the Guidelines “would result in reductions  
6 of . . . 436,100 [megagrams/year] of methane in 2025” without explaining how that reduction  
7 will address the alleged injuries of more frequent or intense extreme weather events, increased  
8 risk of drought, or elevated temperatures. Fort Decl. ¶¶ 5, 8-10. Plaintiffs have alleged climate-  
9 related harms, but have failed to connect the implementation of the Emission Guidelines to  
10 those alleged injuries or show that implementation would have any meaningful impact on those  
11 injuries. Plaintiffs’ supporting declarations fail to state with specificity how the State-specific  
12 and localized injuries alleged are fairly traceable to EPA’s inaction, and instead largely present  
13 broad statements regarding the general impact of changing climate. *See, e.g.*, Rupa Decl. ¶¶ 9-  
14 10 (Dkt. No. 87-14); Mote Decl. ¶¶ 3-10 (Dkt. No. 87-15).

15         The requirement that the alleged injury be fairly traceable to the alleged harm overlaps  
16 with requirement that Plaintiffs demonstrate redressability, i.e., that the relief requested would  
17 redress their alleged injuries. *See* 732 F.3d at 1146. Here, Plaintiffs assert in a conclusory  
18 fashion that if EPA is required to take action on state plans and promulgate a federal plan,  
19 methane emissions within the United States would be decreased, thereby decreasing GHGs  
20 emitted, “‘reduc[ing] to some extent’ the States’ risk of injury by resulting in a reduction in these  
21 significant emissions.” Pls.’ Mot. at 13 (citing *Mass. v. EPA*, 549 U.S. at 526). Plaintiffs have not  
22 met their burden to demonstrate that the requested relief will redress their alleged injuries.

23         As noted above, the Ninth Circuit found that a regulation that might reduce GHG  
24 emissions estimated to be 5.9% of state-wide emissions was insufficient to support standing.  
25 *Bellon*, 732 F.3d at 1143-44. Here, the Emission Guidelines are expected to result in reductions  
26 of 285,000 metric tons of methane (7.1 million mtCO<sub>2e</sub>), over baseline emissions in 2025. 81  
27 Fed. Reg. at 59,305. In 2016, the United States emitted an estimated 6,511 million mtCO<sub>2e</sub>.  
28 Lassiter Decl. ¶ 7 & n2. Therefore, a reduction of 285,000 metric tons of methane (7.1 million

1 mtCO<sub>2</sub>e) would amount to a 0.109% reduction in nationwide GHG emissions and an even  
2 smaller percentage of global greenhouse gas emissions, 0.014%. Lassiter Decl. ¶ 7. Under  
3 *Bellon*, this incremental decrease in emissions is insufficient to establish causality, and Plaintiffs  
4 have accordingly failed to carry their burden to establish standing. 732 F.3d at 1145  
5 (considering whether the potential reduction from implementation of RACT standards could be  
6 a “meaningful contribution to GHG concentrations, and thus, to global warming”) (citing *Mass.*  
7 *v. EPA*, 549 U.S. at 525).

8 To summarize, under Plaintiffs’ theory, if they were to obtain *any* reduction in emissions  
9 that bears *any* relationship to climate change, they have standing. Plaintiffs cannot rely on their  
10 broad assertions that climate change has negative environmental impacts to show causality,  
11 especially when they fail to explain what impact the implementation of the Emission Guidelines  
12 would have on the injuries claimed. “While Plaintiffs need not connect each molecule to their  
13 injuries,” 32 F.3d at 1142-43, they must do more than state that implementation of the Emission  
14 Guidelines will have some effect on GHG emissions, that GHGs cause climate change, and that  
15 there are many alleged climate impacts. Similarly, Plaintiffs must present evidence that  
16 potential decrease in methane emissions from implementation of the Guidelines will address  
17 their alleged injuries from climate change. Without more, Plaintiffs fall far short of  
18 demonstrating Article III standing on the basis of alleged climate-related injuries.

19 2. Plaintiffs Have Not Met Their Burden to Demonstrate Standing for All  
20 Claims and Remedies on the Basis of Alleged Injuries from Non-  
21 Methane Organic Compounds.

22 Aside from climate-related injuries, the States and EDF allege injuries related to the  
23 emission of non-methane organic compounds (referred to as “NMOC”), such as VOCs and  
24 hazardous air pollutants, from landfills. *See* Pls.’ Mot. at 13-14. These allegations related to  
25 injuries from VOC and hazardous air pollutants do not demonstrate standing. The States’  
26 allegations of injuries to its citizens from alleged exposure cannot support standing as *parens*  
27 *patriae*. *Snapp*, 458 U.S. at 610 n.16. That leaves EDF’s alleged injuries as the only possible  
28 support for standing based on injuries to individuals from non-GHG landfill emissions. *Town of*  
*Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (“At least one plaintiff must

1 have standing to seek each form of relief requested in the complaint.”); *see also Davis v.*  
2 *Federal Election Comm’n*, 554 U.S. 724, 734 (2008).

3 EDF must demonstrate that its members would otherwise have standing to sue in their  
4 own right. *Hunt*, 432 U.S. at 342-43; *United Union*, 919 F.2d at 1400. That is, EDF has the  
5 burden to prove that its members have sustained an injury in fact, that causality exists linking  
6 their injury to the harm complained of, and that their injury is likely to be redressed by a  
7 favorable outcome. *Lujan*, 504 U.S. at 560-61. Further, EDF must demonstrate standing for  
8 each claim and aspect of its requested relief.

9 Unlike the alleged injuries from greenhouse gases described above, EDF alleges  
10 *localized* injuries from proximity to covered landfills. EDF alleges that many “EDF members  
11 live in such close proximity to covered landfills that they suffer from the localized health  
12 impacts and increased cancer risk associated with their exposure to hazardous air pollutants.”  
13 Pls.’ Mot. at 14. EDF further alleges that landfills emit VOCs, which in turn can contribute to  
14 the creation of ozone, and that its members who live in areas that do not attain the national  
15 ambient air quality standard for ozone will suffer health effects. *Id.* EDF states that it has: 47  
16 members living within a quarter mile, 1,413 members within one mile, and 21,082 members  
17 within three miles of a covered landfill. Pls.’ Mot. at 14; Stith Decl. ¶ 12. Without more detail  
18 or specificity, EDF concludes that its “members will continue to be harmed by emissions of  
19 dangerous pollutants from these sources that these emissions standards would otherwise help  
20 address.” *Id.* ¶ 12. Standing cannot be based on a conclusory allegation that all EDF members  
21 will be harmed. That runs afoul of the requirement to identify a particularized and concrete  
22 injury. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (declining to base  
23 standing on a statistical probability that some members will be affected). Thus, the general  
24 allegations regarding health effects to all members living near landfills are insufficient to  
25 demonstrate standing for the broad relief requested by Plaintiffs: action on several state-  
26 submitted plans and promulgation of a federal plan.

27 The only concrete and particularized injuries identified by EDF are found in the Fort and  
28 Sheehan declarations. EDF member Fort states that she is “concerned about the health risk

1 posed by landfill gas emissions from MSW landfills.” Fort Decl. ¶ 14. She notes that “EPA has  
2 determined that MSW landfill emissions guidelines would result in reduction of 2,770  
3 Megagrams per year (Mg/yr) of non-methane organic compounds.” *Id.* ¶ 5. Fort further states  
4 that “[a]pproving state implementation plans . . . is necessary to . . . protect human health, and  
5 reduce harmful air pollution in New Mexico.” *Id.* ¶ 15.

6 Fort identifies alleged injury from “hazardous and even carcinogenic compounds”  
7 emitted from landfills. *Id.* ¶ 5. She also identifies alleged injury from landfill gases that can  
8 result in increased ground-level ozone formation. *Id.* Though not entirely clear, EPA assumes  
9 that the alleged injury from hazardous or carcinogenic compounds in landfill emissions is  
10 localized harm – that is, harm that is a function of proximity to a covered landfill. Despite  
11 alleging such localized harm from MSW landfills, Fort does not state that she lives anywhere  
12 near a covered landfill. While a “casual chain does not fail simply because it has several ‘links,’  
13 provided those links are ‘not hypothetical or tenuous’ and remain ‘plausib[le],” Plaintiffs bear  
14 the burden of demonstrating each link and the connection between them, but have failed to do  
15 so in the Fort Declaration. *See Native Vill. of Kivalina*, 696 F.3d at 867 (citation omitted).  
16 Although Fort identifies her concerns with health risks from landfills, she fails to show that  
17 EPA’s failure to act on New Mexico’s plan is the cause of her alleged injuries because she does  
18 not even allege that she is near a covered landfill. *See Summers*, 555 U.S. at 499. Similarly, the  
19 declarant fails to show a link between the alleged dangers of landfills generally and the  
20 requested relief of an order that EPA take final action on the New Mexico plans.

21 Fort also alleges that landfill emissions “can result in increased ground-level ozone  
22 formation.” Fort Decl. ¶ 6. Here, EDF alleges that EPA’s failure to act precludes a decrease in  
23 landfill emissions including VOCs or other unspecified ozone precursors (compounds that are  
24 converted to ground-level ozone in the low atmosphere), which in turn could limit ozone  
25 production to some unspecified degree, which would then impact EDF member Fort’s alleged  
26 injuries. This chain is too conclusory and speculative to sustain standing. EDF does no more  
27 than suggest the possibility that Fort could be exposed to less ground-level ozone if EPA acts on  
28 New Mexico’s plan and that is insufficient to meet Plaintiffs’ burden.



1 In contrast, EDF member Sheehan states that she lives approximately seven miles from a  
2 covered landfill. Sheehan Decl. ¶ 3. Sheehan states that she is aware that landfills emit VOCs  
3 “that contribute to ground level ozone formation” and hazardous air pollutants such as benzene,  
4 a known carcinogen. *Id.* ¶ 4. Though Sheehan mentions the emission of hazardous air  
5 pollutants, her declaration only describes impacts to her family from ground-level ozone which  
6 allegedly causes her to limit her children’s time outside. As noted above, the chain of causation  
7 from landfill emissions of VOCs to ground-level ozone to EPA’s inaction is too speculative to  
8 meet Plaintiffs’ burden. The Sheehan Declaration assumes that any decrease in VOC emissions  
9 from landfills would address alleged injuries from ground-level ozone, a pollutant caused by  
10 emissions from many sources. Plaintiffs do not present evidence to meet their burden to  
11 demonstrate that any decrease in landfill VOC emissions resulting for implementation of the  
12 Guidelines would then decrease creation of ground-level ozone in a manner that would impact  
13 Plaintiffs’ alleged injuries. *See Bellon*, 732 F.3d at 1144.

14 Even if the Court finds the declarations of two EDF members who live in New Jersey  
15 and New Mexico sufficient to confer standing, the limited scope of those alleged injuries limits  
16 the relief that the Court can order. Plaintiffs seek broad relief with nationwide applicability in  
17 that they seek an order requiring EPA not only to take action on several state-submitted plans,  
18 but also to issue a federal plan that would have applicability across the United States. The  
19 central teaching of *Lujan* is that a federal court may not grant a remedy broader than that needed  
20 to redress the injury that forms the basis for a plaintiff’s standing. *See DaimlerChrysler Corp. v.*  
21 *Cuno*, 547 U.S. 332, 353 (2006) (limiting remedy “to the inadequacy that produced the injury in  
22 fact that the plaintiff has established”).

23 While the Constitution poses no absolute bar to the adjudication of large-scale  
24 environmental challenges, any relief must be tailored to the injuries for which a plaintiff has  
25 demonstrated standing. Here, at most, those injuries relate only to New Mexico and New Jersey.  
26 If the Court finds the Plaintiffs have demonstrated standing, it should limit relief at most to  
27 ordering EPA to take final action on the New Mexico plans and, pursuant to 40 C.F.R §  
28 60.27(d), a federal plan applicable to New Jersey.



1           **B. Plaintiffs' Proposed Deadlines are Not Feasible.**

2           1.       The Court Should Order EPA to Take Final Action on State Plans Within  
3                    Four to Twelve Months.

4           Under the current Emission Guidelines, any state with one or more existing MSW  
5 landfills that commenced construction, modification, or reconstruction on or before July 17,  
6 2014, was required to submit a plan to EPA by May 30, 2017. 40 C.F.R. § 60.30f(a)-(b). As  
7 noted above, only two states submitted state plans by the deadline: California and New Mexico.  
8 Three states submitted state plans after the deadline: Arizona, Delaware, and West Virginia.  
9 Lassiter Decl. ¶ 15.

10           After receipt of a plan, EPA is to propose to approve or disapprove the plan “within four  
11 months after the date required for submission” of the plan. 40 C.F.R. § 60.27(b); *see* Lassiter  
12 Decl. ¶ 6. EPA concedes that more than four months have passed since the submission date.  
13 However, Plaintiffs' request for an order directing EPA to take final action within 30 days is  
14 patently unreasonable. As explained below, even if EPA were to be able to immediately act on  
15 those plans, the required public notice and comment period and response to public comments  
16 cannot be completed in less than 45 days.

17           With respect to the later-submitted state plans, EPA's regulation does not specify a  
18 deadline for EPA action; instead, the failure of a state to timely submit a plan triggers EPA's  
19 obligation to issue a federal plan to implement the Guidelines in the states that failed to submit a  
20 plan on time. *See* 40 C.F.R. § 60.27(c)-(d). The only regulatory touchstone regarding the  
21 appropriate timeframe for EPA to take final action on late-submitted state plans is four months.  
22 Absent complicating factors, four months is a presumptively reasonable time for EPA to take  
23 final action on submitted plans. *See Sierra Club v. McCarthy*, Case No. 15-cv-01165-HSG,  
24 2016 WL 1055120 (N.D. Cal. Mar. 15, 2016) (setting the deadline for EPA action on eight-year  
25 reviews of emission standards under 42 U.S.C. § 7412(d)(6) with reference to the statutory  
26 period for EPA to issue the initial emission standards in the first instance, 42 U.S.C. §  
27 7412(e)(1)(A)). Moreover, as EPA explained in earlier filings, it has proposed to revise the time  
28 frame for action on state plans to one year after the state plan has been determined to or deemed

1 to be complete under the revised regulations. Stay Mot. at 2-5; Lassiter Decl. ¶¶ 30-33.

2 The Lassiter Declaration explains that action on state plans is completed at EPA's  
3 regional offices located around the country. For example, EPA Region 3 is responsible for Mid-  
4 Atlantic States (including Delaware and West Virginia) and will be responsible for taking action  
5 on those State's plans and Region 6 will be responsible for taking action on the two plans  
6 submitted by New Mexico. Lassiter Decl. ¶ 15; 40 C.F.R. §§ 1.7(b)(3), 1.61. For plans from  
7 Delaware, New Mexico, and West Virginia, the "minimum timeframes to complete . . . review  
8 and approval or disapproval" should be four months from entry of the Court's order. Lassiter  
9 Decl. ¶ 13. The tasks required to conduct rulemakings for final action on state plans can be  
10 divided into five phases, I through V.

11 In Phase I, the EPA regional office must review and analyze the plan to determine if it  
12 meets the requirements of the Emission Guidelines. *Id.* ¶ 18. A state plan submittal contains at  
13 least 10 elements, comprising both process and technical steps, and takes approximately two  
14 weeks for EPA regional offices in Regions 3 and 6 to review. *Id.* Even if a state incorporates the  
15 technical requirements of the Guidelines rather than developing their own regulations detailing  
16 how MSW landfills in the state will meet the substantive requirements of the Guidelines, that  
17 only impacts one of the 10 elements and overall does not change the amount of time Regions 3  
18 and 6 need for Phase I. *Id.* A model rule, or an example of a state plan that could be used to  
19 satisfy a state's obligation to an emission guideline, was not developed for Emission Guidelines,  
20 nor was any uniform guidance provided. So the only tools available to assist the Regions with  
21 review of state plan are the Guidelines themselves and the provided guidance from the 1996  
22 Subpart Cc MSW landfills emission guidelines. *Id.*

23 Final action on state plans requires that EPA prepare a proposed rule for publication by  
24 notice in the Federal Register with an opportunity for public comment. 40 C.F.R. § 60.27(b); 42  
25 U.S.C. § 7607(d(5)). In Phase II, EPA prepares the proposed rulemaking, which includes  
26 drafting a preamble, regulatory text, and supporting documentation to present and describe the  
27 included technical analyses. The Regional Administrator is briefed on and signs the proposed  
28 rule. The proposed rule is then submitted to the Office of the Federal Register ("OFR") for

1 publication. Lassiter Decl. ¶ 19. This phase will take approximately 4 weeks (one month) for  
2 Regions 3 and 6. *Id.*

3 Phase III is the publication and public comment period that begins on the date that the  
4 proposed rule is published in the *Federal Register*. Publication typically takes up to two weeks  
5 following signature of the proposed rule. Lassiter Decl. ¶ 20. EPA expects to provide a 30 day  
6 public comment period. *Id.* Absent good cause for a shorter period, the Administrative  
7 Procedure Act (“APA”) requires that EPA provide at least 30 days between notice of a proposed  
8 rulemaking and the effective date of the final action. 5 U.S.C. § 553(d). “Although the APA  
9 mandates no minimum comment period, some window of time, usually thirty days or more, is  
10 then allowed for interested parties to comment.” *Riverbend Farms, Inc. v. Madigan*, 958 F.2d  
11 1479, 1484 (9th Cir. 1992); *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir.1984) (noting that  
12 the “Administrative Conference of the United States has opined . . . that the shortest period in  
13 which parties can meaningfully review a proposed rule and file informed responses is thirty  
14 days”). Thus, EPA estimates approximately six weeks for Phase III, two weeks for following  
15 signature for the proposal to be published and then a 30 day (approximately four weeks) public  
16 comment period. *Id.* This necessary time period alone is more than the 30 days requested by  
17 Plaintiffs.

18 In Phase IV, EPA reviews the public comments and prepares responses to the comment,  
19 a required element of the final rule. Lassiter Decl. ¶ 21. APA Section 553(c) provides that after  
20 notice of a proposed rule, the agency must “give interested persons an opportunity to participate  
21 in the rule making through submission of written data, views, or arguments with or without  
22 opportunity for oral presentation” and “[a]fter consideration of the relevant matter presented  
23 [must] incorporate in the rules adopted a concise general statement of their basis and purpose.”  
24 5 U.S.C. § 553(c). This section requires an agency to “consider and respond to significant  
25 comments received during the period for public comment.” *Perez v. Mortg. Bankers Ass’n*, 135  
26 S. Ct. 1199, 1203 (2015); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1251 (9th Cir.  
27 2018) (same). EPA estimates approximately two weeks for this phase for Regions 3 and 6,  
28 depending on the number of comments received. Lassiter Decl. ¶ 21.

1 In Phase V, EPA develops the final rulemaking package including drafting any  
2 regulatory changes to the rule based on public comments received and briefing regional office  
3 and/or EPA headquarters management on the changes. The final rulemaking package includes  
4 the agency's response to comments and explanation of changes between the proposed and final  
5 rules and the regulatory text to be codified. *Lassiter Decl.* ¶ 22. The final rule is then submitted  
6 to the OFR for publication. EPA estimates that the minimum time required for Phase V for  
7 Regions 3 and 6 is approximately two weeks. *Id.*

8 Thus, the minimum time required for EPA to complete the tasks described above, and in  
9 accordance with the requirement of the Administrative Procedures Act is four months (16  
10 weeks) from entry of the Court's order. EPA therefore requests that the Court enter any order  
11 requiring it to take final action on state plans submitted by New Mexico, Delaware and West  
12 Virginia to allow EPA four months to take such action. This time is reasonable, consistent with  
13 the timeframe allowed by the current regulation, 40 C.F.R. § 60.27(b), and uncontroverted by  
14 any evidence submitted by Plaintiffs. Plaintiffs' requested deadline of 30 days is arbitrary and  
15 fails to account for the actual time required to complete the tasks detailed above and should be  
16 rejected by the Court.

17 Similarly, for review and final action on the plans from Arizona and California that is  
18 expected to be conducted by EPA's Region 9, the time for the Phase I plan review varies with  
19 the nature of the plan. As explained in the *Lassiter Declaration*, resource constraints, a  
20 significant backlog of state implementation plan ("SIP") submittals to complete (168 of 250  
21 pending SIP actions), and limited staff expertise in the MSW landfills will prevent Region 9  
22 from completing this phase in two weeks, the time noted above for other plans. *Lassiter Decl.* ¶  
23 16. It is expected that review of the Arizona plans, which incorporate the federal standard by  
24 reference, will take approximately 35 days. *Id.* ¶ 17. Even though Arizona plans adopt the  
25 Guidelines, that is only one of the 10 essential elements that must be thoroughly reviewed. *Id.* ¶  
26 18. California's plan presents proposed state regulations and does not incorporate the federal  
27 standard. *Id.* ¶ 16. As a result, EPA will need to determine if the California regulations are  
28 equivalent to or more stringent than the federal standard. EPA believes that "a line-by-line

1 analysis [of the California plan] will be necessary to determine if California's existing program  
2 meets the very detailed program in subpart Cf." *Id.* That review will take approximately 65  
3 days. *Id.* ¶ 17.

4 Phase II, development of proposed rules, is expected to take 40 and 75 days  
5 respectively, for the Arizona and California plans. *Id.* This estimate is the result of resource  
6 constraints within Region 9, as well as a backlog of actions related to state implementation  
7 plans, and limited staff expertise in the MSW landfill source category. *Id.* ¶ 16. Phase III,  
8 publication of the proposed rules, is estimated to take the same amount of time for Region 9  
9 actions as for plans being reviewed by other regional offices as described above. *Id.* ¶ 17. As a  
10 result of resource constraints and the equivalency determination required for the California plan,  
11 Phase IV, summarizing public comments and developing comment responses, will take 60 and  
12 120 days, for the Arizona plans and the California plan, respectively. *Id.* For the same reasons,  
13 Phase V, development of final rule package, is estimated to take 60 days. *Id.*

14 The Lassiter Declaration provides a chart comparing the estimated times for each phase  
15 for each of the categories of state plans described above. *Id.* ¶ 17. If additional state plans are  
16 received, EPA will promptly advise the Court.

17 2. The Court Should Order EPA to Promulgate a Federal Plan Within  
18 Twelve Months

19 If a state does not submit a plan (or if EPA disapproves a state plan), EPA must  
20 promulgate a federal plan within six months after the deadline for the state to submit a plan. 40  
21 C.F.R. § 60.27(d). The same five general phases of work described above for action on state  
22 plans are required for EPA to promulgate a federal plan plus a prefatory project kick-off phase.  
23 Lassiter Decl. ¶ 23-24. The minimum time required for promulgation of a federal plan is 12  
24 months. *Id.* ¶ 13. In Phase I, the project kickoff phase, EPA establishes a project team and an  
25 intra-agency workgroup and develops an overall project plan and schedule. Lassiter Decl. ¶ 24.  
26 This effort will take approximately one month and also includes identification of potential  
27 stakeholders, such as regulated entities that have not submitted MSW landfill plans and public  
28 interest groups interested in the rule development, as well as preparation of written materials,

1 briefing stakeholders on the general plans for the project, and conducting meetings with the  
2 stakeholder groups. *Id.*

3 In Phase II, EPA will determine a federal plan inventory based on the status of state  
4 plans. This effort includes determining the draft or final state plans submitted to EPA, states  
5 with EPA-approved plans, negative declarations currently received, states from which EPA has  
6 not received a draft or final plan or negative declaration, and states anticipated to accept a  
7 negative declaration from EPA. This phase will take approximately one month. *Id.* ¶ 25.

8 In Phase III, EPA drafts the proposed rule package. Lassiter Decl. ¶ 26. This process  
9 begins with drafting the proposed preamble and regulatory text and supporting documentation  
10 to present and describe the technical analyses completed. *Id.* Plaintiffs suggest that EPA will  
11 only need to modify the 1999 federal plan, 64 Fed. Reg. 60,689 (Nov. 8, 1999) (codified at 40  
12 C.F.R. pt. 60, subpt. GGG), “to incorporate lower thresholds for control” from the Guidelines  
13 and that “the regulatory text contained in the Emission Guidelines would likely be the basis for  
14 any federal plan.” Pls.’ Mot. at 20. The work on drafting the regulatory package includes  
15 developing a new subpart to provide regulatory clarity for affected sources. While the  
16 Guidelines serve as the basis for developing the regulatory package, additional work is  
17 necessary to develop sections on applicability, definitions, compliance schedules, emission  
18 standards, monitoring requirements, recordkeeping and reporting, and operating permits.  
19 Lassiter Decl. ¶ 23. For owners or operators of an affected source located within a state that  
20 either chose not to develop a state plan or submitted a plan that was not approved, EPA  
21 develops a federal plan which applies directly to the owner or operator. *Id.* This is particularly  
22 challenging because there are new provisions in the Guidelines regarding applicability,  
23 compliance schedules, emission standards, monitoring and recordkeeping, and operating  
24 permits that EPA has to consider for applicability to owners and operators. *Id.* Typically, the  
25 agency develops a model rule in conjunction with promulgation of emission guidelines, but one  
26 has not been developed for the Emission Guidelines. *Id.*

27 The proposed rulemaking package is reviewed by the EPA workgroup, which includes  
28 staff members with a wide range of expertise, including attorneys, compliance and enforcement

1 staff, and regional office representatives, to ensure legal sufficiency, sound scientific support,  
2 and consistency with other EPA programs. *Id.* ¶ 26. After revisions to the proposed rule based  
3 on workgroup input, the proposed rule package is reviewed by various levels of EPA  
4 management. *Id.* Significant regulatory actions, such as any federal plan that EPA might issue  
5 here, are reviewed by the Office of Management and Budget (“OMB”). The Administrator then  
6 signs the proposed rule and it is sent to the OFR for publication. *Id.* EPA estimates that Phase  
7 III will take approximately three and a half months. *Id.*

8         The time required for Phase IV, proposed rule publication and public comment and  
9 opportunity to be heard, is constrained by regulatory and statutory requirements. EPA has  
10 limited influence over when the proposed rule is published in the Federal Register, but expects  
11 that it could take as long as 15 days after signature based on EPA’s experience. *Id.* ¶ 27. EPA  
12 regulations require that prior to promulgation of a federal plan, must “provide the *opportunity*  
13 *for* at least one public hearing.” 40 C.F.R. § 60.27(f) (emphasis added). Further, for  
14 promulgation of a federal plan, CAA section 307(d)(5) requires EPA to provide the public with  
15 an opportunity to provide an oral presentation at a public hearing. 42 U.S.C. § 7607(d)(5). The  
16 Federal Register Act also requires that EPA provide sufficient notice of a public hearing. 44  
17 U.S.C. § 1508. That requirement is presumptively satisfied if the EPA provides 15 day prior  
18 notice (approximately 2 weeks). *Id.* Section 307(d)(5) further provides that the EPA must keep  
19 the record for the proposed rulemaking open for public comment for 30 days after any public  
20 hearing. 42 U.S.C. § 7607(d)(5). Considering each of those requirements, the minimum time to  
21 complete Phase IV is approximately two months (approximately 60 days). *Lassiter Decl.* ¶ 27.

22         As described above with regard to state plans, in Phase V, after the opportunity for  
23 public comment, EPA must develop responses to comments for inclusion in the final  
24 rulemaking package. EPA must evaluate each relevant comment and both determine whether  
25 adjustments to the proposal are necessary and determine an appropriate response. *Id.* ¶ 28.  
26 Assuming that an excessive number of comments are not received, EPA estimates that the  
27 minimum time required to complete Phase V is two months (approximately 60 days).

28         The last phase, Phase VI, is again development of the final rulemaking package. First,



1 the review of public comments described above might generate the need for changes to the rule  
2 text. *Id.* ¶ 29. If so, EPA staff will provide a briefing to the workgroup and then recommend  
3 changes for Office of Air and Radiation management. Next, EPA staff prepares the draft final  
4 rule preamble and regulatory text and, if necessary, updates or drafts additional supporting  
5 documentation, and compiles the response to public comments. *Id.* This draft is reviewed by  
6 intra-agency workgroup, and then by EPA management prior to OMB review, if required. *Id.*  
7 After these reviews and implementation of any revisions, the final rule is signed and sent to the  
8 OFR for publication. Phase VI is estimated to require two and one half months (approximately  
9 75 days). *Id.*

10 Thus, the minimum time necessary for EPA to promulgate a federal plan is 12 months.  
11 *Id.* ¶¶ 13, 23. EPA concedes that the minimum time required to promulgate a federal plan  
12 exceeds that allotted in its 1975 regulations. However, EPA has proposed changes to that dated  
13 regulation that, if finalized, would increase the time for EPA to promulgate a federal plan to two  
14 years. *Id.* ¶¶ 30-33. Further, the minimum time required for a federal plan here is severely  
15 restricted by the limited specialized experience by staff that are available in the EPA office  
16 responsible for these rulemakings. *Id.* ¶¶ 10-12. Technical work on the regulation of MSW  
17 landfills is highly specialized and particularly complex, requiring specialized expertise and  
18 knowledge due to its breadth, extreme variability in emissions, and lengthy source operational  
19 life of landfills. *Id.* ¶ 11. Staff in the Natural Resources Group (“NRG”) of the SPPD who  
20 would work on the federal plan must possess not only the technical expertise and knowledge of  
21 the CAA sections 111 and 112 rulemaking, but also specialized expertise and knowledge of  
22 MSW landfills. *Id.* Although NRG has six staff members with responsibility for rule writing,  
23 only two staff members have the technical and regulatory expertise and knowledge required for  
24 the development of a federal plan and those two staff members are working on residual risk and  
25 technology reviews (“RTRs”) of the hazardous air pollutant emission standards promulgated  
26 under 42 U.S.C. § 7412 for five source categories including the MSW landfills category. *Id.* ¶¶  
27 10, 12. Completion of these RTRs are subject to a March 2020 court-ordered deadline for  
28 completion of reviews for 20 source categories. *Id.* ¶ 10. Between now and March of 2020, all



1 NRG staff are fully committed, primarily to these court-ordered risk and technology reviews. *Id.*  
2 ¶¶ 10, 12. This resource constraint limits the when NRG can complete a federal plan. *Id.* ¶¶ 9-  
3 12.

4 Further, EPA recently proposed to revise the timeframes allotted to take action on state  
5 plans and promulgate federal plans to allow EPA reasonable timeframes to act. Lassiter Decl. ¶¶  
6 30-33. These proposed rulemakings were expected to be finalized by April, but were delayed by  
7 the recent government shutdown. *Id.* If finalized as proposed, EPA’s obligation to issue a  
8 federal plan would not arise until two years after either a state failed to submit a plan or EPA  
9 disapproved the state plan. *Id.* ¶ 32.

10 3. The Court Lacks Jurisdiction to Order EPA to Take Action on Future  
11 Submitted State Plans In Advance of Nondiscretionary Duty Claim  
12 Accruing

13 Plaintiffs ask the Court to “order EPA to respond to any future state plan submissions  
14 within two months.” Pls.’ Mot. at 21. As to state plans submitted in the future, EPA has not  
15 missed any deadline to take final action on such plans. Because a district court’s “limited  
16 statutory authority under [the citizen-suit provision] vests only *after* EPA has failed to  
17 undertake some mandatory action prior to a certain deadline,” this Court lacks statutory  
18 authority to grant relief. *Sierra Club v. Browner*, 130 F. Supp. 2d at 93 (stating that “in advance  
19 of a deadline’s expiration, the agency has not yet failed to undertake its duty”); 42 U.S.C. §  
20 7604(a). Therefore, the Court should deny this aspect of Plaintiffs’ requested relief.

21 **V. CONCLUSION**

22 In the event the Court reaches a remedy, for the reasons explained above and presented  
23 in the Lassiter Declaration, the Court should allow EPA four months to take final action  
24 approving or disapproving the state plans submitted by Delaware, New Mexico, and West  
25 Virginia. The Court should allow EPA eight months to take action on the Arizona plans and 12  
26 months to take action on the California plan. The Court should allow EPA 12 months to  
27 promulgate a federal plan. The Court should deny Plaintiffs’ request that the Court require EPA  
28 to take action on state plans not yet submitted.

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1 Respectfully submitted,

2 Date: February 19, 2019

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/s/ Leslie M. Hill

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