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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*, **Plaintiffs,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,** **Defendants.**	Case No: 4:18-cv-03237-HSG **PROPOSED-INTERVENOR'S RESPONSE TO EPA'S MOTION TO DISMISS** Date: October 25, 2018 Time: 2:00pm Courtroom: 2, 4th Floor, 1301 Clay Street, Oakland, CA

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INTRODUCTION

This Court has jurisdiction to review the Environmental Protection Agency's ("EPA" or "the Agency") open and flagrant violation of its mandatory duties to review state plans and promulgate federal plans to reduce dangerous pollution from landfills. EPA does not deny that its duties are not discretionary, nor that it has flouted them by ignoring specific deadlines. Instead, it argues that the States cannot bring this suit because the Clean Air Act's citizen suit provision—authorizing suits against the Administrator for failure to perform "any act or duty under this chapter which is not discretionary" only permits suits for violation of statutory duties. As courts, including this one, have held, "*under* this chapter" means exactly what it says: any duty that arises under the Clean Air Act, including regulations promulgated there*under*. Where Congress wanted to limit its reference to requirements delineated *in* the Clean Air Act, it used precisely that phrase—"*in* the statute." The cases EPA cites in taking a contrary position are either irrelevant or comprise unpersuasive dicta. The Agency's view would fundamentally undermine Congress's scheme—allowing EPA to avoid liability for disregarding duties Congress mandated the Agency to fulfill. Here, that ultimately means permitting landfills to avoid utilizing common-sense controls for harmful landfill gas, resulting in emissions of hundreds of thousands of metric tons of methane and other dangerous air pollutants.

The States' complaint also easily passes the bar for stating a plausible claim, and giving EPA fair notice, with respect to EPA's failure to promulgate federal plans for states that did not submit plans. Indeed, EPA has admitted that it is not "working to issue a Federal [implementation] plan for states that failed to submit a plan." States' Compl. ¶ 58. Pleading which specific states have submitted or failed to submit plans, information within EPA's knowledge, is not necessary to state a claim.

This Court should deny EPA's motion to dismiss the States' complaint.

BACKGROUND

I. The Clean Air Act requires EPA to regulate existing sources of dangerous pollutants by dates certain, and permits citizens to bring suit to enforce EPA's duties.

The Clean Air Act requires the Administrator to regulate new and existing stationary sources that emit pollutants that endanger human health and welfare. 42 U.S.C. § 7411. For existing sources, the Act provides 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" establishing standards of performance. *Id.* § 7411(d)(1). Section 7410, which describes the process to implement the nation's health-based air quality standards, establishes dates certain by which the Administrator must approve or disapprove state plans to achieve these standards or promulgate federal plans to achieve them. *Id.* § 7410(k).

Similar to the section 7410 procedure, EPA's regulations implementing section 111(d) establish binding deadlines for implementing emission guidelines. "Within nine months" after EPA publishes an emission guideline, "each State shall adopt and submit to the Administrator . . . a plan" to implement the guideline. 40 C.F.R. § 60.23(a)(1). Then, "[t]he Administrator will, within four months after the date required for submission of a plan or plan revision, approve or disapprove such plan or revision." *Id*. § 60.27(b). Finally, if there are states that do not submit a plan or whose plan was disapproved, "the Administrator will, within six months after the date required for submission of a plan or plan revision, promulgate [a federal plan]" to implement the guideline. *Id*. at § 60.27(d).

The Clean Air Act also authorizes "any person" to "commence a civil action on his own behalf" "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

II. In 2016, EPA promulgated revised emission guidelines to control pollution from landfills, triggering a series of deadlines to implement the guidelines.

EPA first promulgated emission guidelines for Municipal Solid Waste ("MSW") landfills in 1996. *Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills*, 61 Fed. 8 Reg. 9,905 (Mar. 12, 1996) (codified at 40 C.F.R. Parts 51, 52, and 60). The Agency adjusted and clarified certain aspects of these guidelines in 1998,[1] 1999,[2] and 2000.[3] In 2015, EPA proposed revisions to the emissions guidelines for MSW landfills. *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, Proposed Rule, 80 Fed Reg. 52,100 (Aug. 27, 2015). EPA issued this proposal in response to a lawsuit challenging the agency's long-overdue failure to review and, if appropriate, revise its regulations every eight years, as required by section 111(b)(1)(B) of the Act. *See* 42 U.S.C. § 7411(b)(1)(B); *Envtl. Def. Fund v. Perciasepe*, No. 11-cv-04492-KBF (S.D.N.Y.).

On August 29, 2016, EPA promulgated the final rule *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 81 Fed. Reg. 59,276 (Aug. 29, 2016) ("Landfill Emissions Guidelines") for MSW landfills. The Landfill Emissions Guidelines update and modernize requirements for existing MSW landfills, and the agency projected that these improvements would significantly reduce emissions of landfill gas, which includes methane, hazardous air pollutants ("HAPs"), and volatile organic compounds ("VOCs"). 81 Fed. Reg. at

[1] *Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills*, 63 Fed. Reg. 32,743 (June 16, 1998).

[2] *Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction Prior to May 30, 1991 and Have Not Been Modified or Reconstructed Since May 30, 1991,* 64 Fed. Reg. 60,689 (Nov. 8, 1999).

[3] *Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills* 65 Fed. Reg. 18,906 (April 10, 2000); *Amendments for Testing and Monitoring Requirements*, 65 Fed. Reg. 61,744 (Oct. 17, 2000).

59,276. Methane is a "potent greenhouse gas," and landfills are the nation's third largest source of methane emissions. *Id.* at 59,276, 59,279. HAPs are known to cause cancer and other negative health impacts. *Id.* at 59,281. VOCs are precursors to ground–level ozone, a pollutant which is "associated with public health effects, including hospital and emergency department visits." *Id.* at 59,281. EPA estimated that, in 2025, the Landfill Emissions Guidelines would reduce methane emissions by an estimated 285,000 metric tons per year and non-methane organic compounds (including HAPs and VOCs) by roughly 1,810 metric tons per year. *Id*. at 59,305.

The Landfill Emissions Guidelines became effective on October 28, 2016. *Id*. Accordingly, pursuant to EPA's regulations, states were required to submit their implementation plans by May 30, 2017. 40 C.F.R. § 60.23(a)(1). EPA was required to approve or disapprove submitted plans by September 30, 2017. 40 C.F.R. § 60.27(b). And the Agency was required to promulgate a federal plan for states that did not submit state plans (or whose plans it had disapproved) by November 30, 2017. 40 C.F.R. § 60.27(d). *See* 81 Fed. Reg. at 59,304 (calculating deadlines).

III. EPA delayed, and then openly violated, its duties to implement the regulations.

On May 31, 2017, just one day after the deadline for state plan submissions, the newly-confirmed Administrator Pruitt published a 90-day stay of the Landfill Emissions Guidelines. *Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 82 Fed. Reg. 24,878 (May 31, 2017). Soon thereafter, EPA submitted a proposed rulemaking to further suspend the Guidelines to the Office of Management and Budget,[4] but, following a string of losses in its attempts to suspend rules, *see, e.g.*,

[4] Stay of Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, *available at* https://reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT64 (last visited Sept. 17, 2018).

Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017), ultimately abandoned that effort.[5]

Instead, Administrator Pruitt found another way to achieve the same result, determining that in lieu of a new rulemaking, the agency would simply assure states and regulated entities that it had no intention of implementing the Landfill Emissions Guidelines. Through the industry trade press, an EPA spokesperson communicated that "[s]ince the Agency is reconsidering various issues regarding the landfill regulations, at this time we do not plan to prioritize the review of these state plans, nor are we working to issue a Federal Plan for states that failed to submit a state plan," and assured states that had not submitted plans that they "are not subject to sanctions."[6] Behind the scenes, EPA sent a similar message. *See, e.g.*, Proposed-Intervenor Envtl. Def. Fund's App'x at 22, ECF 36-2 (Sept. 13, 2018).

EPA openly flouted its obligations (and encouraged states to flout theirs) despite admitting to the D.C. Circuit that these same obligations remained in full force and effect because "the Stay Decision only affects deadlines . . . that would have otherwise applied during the 90 days in which the stay was in effect." Stipulation at 2, Docket No. 17-1157 (D.C. Cir. Jan. 31, 2018) (internal quotation marks omitted). Consequently, EPA conceded that "the Stay Decision by its express terms began on May 31, not May 30, and therefore did not alter the May 30 deadline for states to submit implementation plans," and that EPA "had four months, until September 31, 2017, to approve or disapprove any state plans that were timely submitted by May 30, and six months, until November

[5] Extension of Deadline for Submission of State Plans to Meet Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, *available at* https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2060-AT64 (last visited Sept. 17, 2018) (Spring 2018 Unified Agenda noting that EPA was "no longer pursuing to stay the rule[s]. No further action is planned.").

[6] Cody Boteler, *EPA Offers Public Clarification on Timeline for NSPS, EG Landfill Rules Months After Stay Expires*, Waste Dive (Oct. 31, 2017), *available at* https://www.wastedive.com/news/epa-offers-public-clarification-on-timeline-for-nsps-eg-landfill-rules-mon/508484/ (last visited Sept. 17, 2018).

30, 2017, to promulgate a federal plan for states that did not timely submit state plans." *Id.* (internal quotation marks omitted). EPA admitted to the court that these deadlines "have come and gone," and "EPA has neither approved nor disapproved the state plans that were timely submitted, nor has EPA promulgated any federal plans." Resp'ts' Initial Br. at 36-37, Docket No. 17-1157 (D.C. Cir. Jan. 22, 2018). EPA urged that "any remedy for EPA's failure to act in this regard would lie in district court," specifically citing 42 U.S.C. § 7604(a)(2)—the Act's citizen suit provision. *Id.* at 37.

On May 31, 2018, Plaintiff States filed the instant citizen suit pursuant to 42 U.S.C. § 7604(a)(2), for EPA's failure to fulfill its mandatory obligations under the Act and its implementing regulations.

ARGUMENT

I. Clean Air Act section 111(d) and the implementing regulations promulgated thereunder create a non-discretionary duty, thereby waiving sovereign immunity.

The Clean Air Act permits "any person" to "commence a civil action on his or her own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). The Administrator's duties to approve or disapprove state plans and promulgate federal plans under section 111(d) and its implementing regulations are non-discretionary duties under the Clean Air Act and thus actionable under section 304(a)(2). *Id*.

Section 111(d)(1) provides 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 which (A) establishes standards of performance for any existing source for [certain air pollutants]." 42 U.S.C. § 7411(d)(1) (emphasis added). Section 111(d)(2)(A) further provides that "[t]he Administrator *shall* have the same authority to prescribe a

plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan." *Id.* § 7411(d)(2) (emphasis added). The plain language of this provision imposes upon EPA an obligation to promulgate a regulatory framework under which states are required to submit state plans that establish standards of performance, and under which EPA promulgates federal plans for non-compliant states. That regulatory regime is plainly promulgated "under this chapter," i.e., under the Clean Air Act. Furthermore, mirroring section 110's date certain deadlines for state planning and EPA review, that regulatory regime establishes specific, binding deadlines for states to submit their plans and for EPA to approve or disapprove of those plans and promulgate federal plans for non-compliant states. 40 C.F.R. §§ 60.23, 60.27.

EPA does not appear to disagree that the statute required it to set up a regulatory regime to implement section 111(d), nor that that regulatory regime sets specific, mandatory deadlines, which EPA has flouted. Nor could it. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("[A]ny contention that the relevant provision of 16 U.S.C. § 1536(a)(2) is discretionary would fly in the face of its text, which uses the imperative 'shall.'"); *Allied Pilots Ass'n v. Pension Benefit Guar. Corp.*, 334 F.3d 93, 98 (D.C. Cir. 2003) ("the word 'shall' is ordinarily the language of command.") (citations and internal quotation marks omitted).[7] Instead, EPA conflates the terms "under" and "in" to argue that its mandatory duty is not actionable under the Clean Air Act's citizen suit provision because the regulatory deadlines that arise from provisions of the Clean Air Act are not actually duties "under

[7] *See also United States v. Nixon*, 418 U.S. 683, 696 (1974) ("[S]o long as [a] regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it."); *Raymond Proffitt Found. v. U.S. EPA*, 930 F. Supp. 1088, 1104 (E.D. Penn. 1996) ("Where judicial review includes action taken pursuant to agency regulations, validly promulgated regulations have the force of law. When an agency fails to act in compliance with its own regulations, such actions are not in accordance with law.") (citations and internal quotation marks omitted).

this chapter." This argument, to which EPA is owed no deference, *see Our Children's Earth Found. v. EPA*, 527 F.3d 842, 846 (9th Cir. 2008) ("Agency's position on [court's] jurisdiction is not entitled to deference."), is contrary to the plain language of the Act, the case law construing it, and the purposes of the Act.

A. The plain language of the Act demonstrates that "under this chapter" includes regulations promulgated under the requirements of the statute.

The most natural understanding of the phrase "any act or duty under this chapter" is that it encompasses all acts or duties required pursuant to the Act, including pursuant to regulations that Congress required EPA to promulgate. The word "under" "can mean both '[e]xtending or directly below' or '[c]ontrolled, managed, or governed by.' *Under*, Oxford Living Dictionary, North American English (last visited Feb. 14, 2018), *available at* https://perma.cc/S2FV-866C; *see also Under*, Merriam–Webster's Collegiate Dictionary (11th ed. 2003) ('subject to the authority, control, guidance, or instruction of,' 'within the group or designation of,' and 'in or into a position below or beneath something')." *Nat. Res. Def. Council, Inc. v. Perry*, 302 F. Supp. 3d 1094, 1097 (N.D. Cal. 2018), *appeal docketed*, No. 18-15380 (9th Cir. Mar. 7, 2018). The regulations are plainly "governed by" and "subject to the authority" of the Clean Air Act.

The text of section 304 and the structure of the Clean Air Act confirm that Congress intended the phrase "under this chapter" to encompass *all* duties that arise under the Act—both statutory and regulatory. In the sentence directly preceding subsection 304(a)(2), Congress provided for citizen suits to enforce "an emission standard or limitation *under this chapter*." 42 U.S.C. § 7604(a)(1) (emphasis added). Later in the same section, subsection 304(f) defines "an emission standard or limitation under this chapter," to include regulatory requirements. *Id.* § 7604(f). There is "no reason to believe that Congress meant the term . . . to mean one thing in" one section of the statute "but to

mean something else altogether in the very next section of the statute." *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 249-50 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citation and internal quotation marks omitted).

Outside of section 304, the phrase "under this chapter" appears pervasively throughout the Clean Air Act, and its usage makes clear Congress's view that the phrase encompasses regulations enacted pursuant to Clean Air Act authority. *See, e.g.*, 42 U.S.C. § 7478(a) ("applicable regulations under this chapter"); § 7479(3) ("subject to regulation under this chapter"); § 7503(a)(3) ("applicable emission limitations and standards under this chapter"); § 7506(c)(2) ("applicable implementation plan in effect under this chapter"); § 7604(a)(1) ("an emission standard of limitation under this chapter"); § 7661a(b)(5)(A) ("standard, regulation or requirement under this chapter").[8]

Conversely, when Congress intended to limit the scope of the reference exclusively to the text of the statute, it specified that it meant to include only "statutory" duties, *see, e.g.*, 42 U.S.C. § 7607(b)(2) (describing deferral of "any nondiscretionary *statutory* action") (emphasis added), or used the phrase "*in* this chapter," *see, e.g.*, *id*. § 7602 (defining statutory terms used "in this

[8] It is no response to say that where Congress intended to include regulatory duties it did so explicitly. Where Congress refers specifically to "regulations under this chapter," those references single out regulatory requirements, to the exclusion of other obligations that fall "under this chapter." These phrases simply demonstrate that Congress considered regulatory duties to be among the duties that arise "under this chapter." Similarly, as explained *infra* p. 9, where Congress wished to limit the scope of the reference to statutory duties, it also said so explicitly. Where, as in section 304(a)(2), Congress intended to refer broadly to duties "under this chapter," it had no need to specifically enumerate all of the duties that the broad reference encompasses.

Congress's use of the broad term "any" underscores that it intended section 304(a)(2) to reach "act[s]" and "dut[ies]" broadly. Congress's "use of the word 'any'" "underscores [its] intent" to embrace duties of "whatever stripe." *See Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) (describing the Act's definition of "air pollutant," which repeatedly uses the term "any" as "capacious'" and "sweeping").

chapter"). Section 307(e), for example, juxtaposes the two concepts in one sentence: "[n]othing *in this chapter* shall be construed to authorize judicial review of regulations or orders of the Administrator *under this chapter* …." *Id.* § 7607(e) (emphasis added). *See also id*. § 7661c(b) ("the Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated *under this chapter* … [but] [n]othing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere *in this chapter*.") (emphasis added). "[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

EPA's interpretation of "under this chapter" to mean "in this chapter" is directly at odds with the text of the Clean Air Act and settled principles of statutory construction. Even EPA undermines its argument in its own motion, explaining that "EPA has promulgated implementing regulations *under Section 111(d)* with respect to existing sources' emissions …." EPA Mot. 3 (emphasis added).

B. Courts that have considered the question, including this one, have concluded that regulations can create mandatory duties actionable in citizen suits.

The first court to fully consider and decide this question concluded that "[u]pon examination of the various statutory provision of the Clean Air Act, it is clear that the phrase 'under this chapter' encompasses both the statutory obligations imposed in the Act itself, and the regulatory obligations promulgated under the auspices of the Act." *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 556 (D.D.C. 2005). *Leavitt* presented the same question at issue here: "whether the duty created by [a] regulation is encompassed within the phrase 'under this chapter' as used in the Clean Air Act." *Id*. at

553. Pointing to the usage of the phrase "under this chapter" in section 304(a) itself and its "pervasive[]" use "throughout the Clean Air Act" to include regulatory obligations, the court found that "[a] literal reading of [the statute] demonstrates that Congress viewed … regulations as being considered 'under this chapter.'" *Id.* at 555-56. Accordingly, the Court explained that "applying the classic tool of statutory construction which dictates that 'identical words used in different parts of the same act are intended to have the same meaning,' calls for the conclusion that the phrase 'under this chapter' includes not only statutory duties but also duties created by regulations promulgated pursuant to the Clean Air Act." *Id.* at 556 (citing *Lundy*, 516 U.S. at 249-50). Moreover, that Court concluded that "when Congress intended to limit the definition of a term to only the Act itself, it sued the phrase '*in* this chapter,' rather than 'under this chapter.'" *Id.* at 556-57 (citing examples).

Subsequently, this Court agreed with the holding in *Leavitt*. *Diné Care v. EPA*, No. 12-03987, 2013 WL 6327530, at *2 & n.1 (N.D. Cal. Dec. 3, 2013) (rejecting EPA's argument that regulatory duties cannot give rise to actionable claims under section 304(a)(2) and citing *Leavitt*, though ultimately concluding that the regulatory duty at issue in that case was discretionary).

This and other courts have also concluded that regulations arise "under" a statute, giving rise to citizen suits, under similar statutory regimes. Indeed, just this year, after examining the Energy Policy and Conservation Act's almost identical language limiting citizen suits to failures "to perform any act or duty *under this part* which is not discretionary," this Court concluded that "[a] 'duty' can be imposed by a regulation as well as a statute." *Perry*, 302 F. Supp. 3d at 1097 (citing 42 U.S.C. § 6305(a)(2)). There, the Department of Energy "argue[d] that the citizen-suit provision of the Energy Policy and Conservation Act does not give citizens a means to sue the Department for failing to comply with a regulation adopted under the Act," but "only provides citizens a means to sue for failing to comply with the Act itself." *Id.* Pointing to the fact that "[a] 'duty' can be imposed by a

regulation as well as a statute," and that Congress used the word "in" when it intended to refer to obligations contained *in* the statute, the Court rejected this argument. *Id.* It concluded: "the only plausible interpretation of the citizen-suit provision is that it covers both regulatory and statutory obligations." *Id.*

C. The cases EPA cites do not support its narrow interpretation of section 304(a)(2).

EPA principally cites *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014), to bolster its position that a nondiscretionary duty may arise only from a command in "the text of the statute." EPA Mot. 7. *WildEarth Guardians*, however, did not address whether the phrase "under this chapter" in section 304(a)(2) includes regulatory obligations, nor did it address EPA's regulatory obligations at all. Instead, the controversy centered on a *different* limitation in section 304(a)(2)—the limitation that requires that the obligation be "not discretionary." 772 F.3d at 1182. The *WildEarth Guardians* court held that for a duty to be deemed "not discretionary" it "must be clear-cut." *Id.* Because the obligation at issue in that case was a statutory one, the court required that it be "readily ascertainable from the statute allegedly giving rise to the duty," *id.*, but the court simply did not address whether or not clear-cut regulatory obligations are actionable under section 304(a)(2). And there is no question that the binding, date-certain deadlines at issue here are "clear-cut" and, accordingly, not discretionary. *WildEarth Guardians*, 772 F.3d at 1182.

The cases cited by *WildEarth Guardians*, EPA Mot. 7, likewise do not support EPA's position. In *Our Children's Earth Foundation*—as in *WildEarth Guardians*—the court did not consider whether regulatory obligations could create non-discretionary duties, but instead determined that the statutory duty at issue there was insufficiently clear to establish a nondiscretionary duty. 526 F.3d at 851 ("Nothing in the [Clean Water Act] specifically obligates the

EPA to review the effluent guidelines and limitations using a technology-based approach."). *Farmers Union Central Exchange Inc. v. Thomas* actually suggests that regulatory duties are actionable under section 304(a)(2). 881 F.2d 757 (9th Cir. 1989). There, the court again determined that no non-discretionary duty was violated, but in making that pronouncement, it looked both at the agency's statutory *and regulatory* obligations. *Id.* at 760 (dismissal was appropriate because plaintiff could "point to nothing in either the statute *or the regulations*" that required the actions sought) (emphasis added); *id*. at 761 ("We fail to see in what way EPA ignored its own regulations.").

EPA's reliance on a footnote in *Maine v. Thomas,* 874 F.2d 883 (1st Cir. 1989), is likewise misplaced. EPA Mot. 7-8. The principal issue in *Thomas* was whether a 1980 EPA regulation that included the promise of future regulatory action constituted final agency challengeable under the Clean Air Act's judicial review provisions for final agency action, found in section 307 of the Act. In *Thomas*, the plaintiffs argued that the regulation was not final agency action (and, accordingly, plaintiffs could bring a citizen suit for EPA's failure to comply with its non-discretionary statutory duty), but the First Circuit disagreed, concluding that the 1980 regulations were final agency action that discharged EPA's statutory duty. 874 F.2d at 887. Plaintiffs in that case had not sought to enforce EPA's regulatory commitments, so the Court's passing reference to the appropriateness of doing so under section 304, *id.* at 888 n.7, was neither explained nor central to the holding in the case. For that reason, subsequent courts that have considered the *Thomas* footnote (including this Court) have variously characterized it as unpersuasive or dicta and declined to follow it. *See Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 n. 5 (D.C. Cir. 1997) (referring to the passage as "dicta in a footnote."); *Sierra Club v. Leavitt*, 355 F. Supp. 2d at 554 (rejecting EPA's argument that the First Circuit had concluded that a duty could only stem from the statutory language, and stating that "the First Circuit has made no such pronouncement"); *Diné Care*, 2013 WL 6327530, at *2 n.1

("The Court does not find persuasive or binding the dicta in the footnote of *Maine v. Thomas*, which indicates that the only non-discretionary duties under the CAA must be statutory and not regulatory." (citation omitted)).

Finally, EPA leans hard on the notion that a waiver of sovereign immunity cannot be implied, and any ambiguity must be resolved in favor of declining review. EPA Mot. 5-6, 8. As explained, *supra* pp.12-13, Congress's intent to include all duties that arise under the Clean Air Act within the citizen suit provision is crystal clear. Moreover, "[t]he sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and [the Supreme Court] has never held that it displaces the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008) (rejecting government's sovereign immunity argument that ambiguities in the word "fees" must be construed in favor of the government). Congress need not "use magic words" to waive immunity. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). Notably, the cases EPA cites for its muscular view of sovereign immunity were suits for money. EPA entirely ignores the contrary "'presumption favoring judicial review of administrative action.'" *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

D. EPA's narrow interpretation would subvert the purposes of the Clean Air Act.

The Clean Air Act unequivocally mandates that EPA develop a regime similar to that in section 110—a regime with clearly-delineated deadlines for state plan submissions and review—as part of its duties to regulate emissions of dangerous pollutants from stationary sources in section 111. And section 304 unequivocally gives citizens the ability to sue EPA for failure to comply with its non-discretionary duties. EPA's interpretation of section 304(a)(2) in this case would fundamentally undermine Congress's scheme.

Under the narrow interpretation EPA urges, the Agency could—without fear of

consequences—openly flout its statutory obligations to ensure that states submit plans establishing standards of performance for existing sources. It could do so despite Congress's clear intent that, as with the deadlines established in section 7410, EPA ensure that the state planning process proceeds expeditiously.[9] And it could do so without going through a notice-and-comment rulemaking process to amend its regulations to permit these delays. *See Air Alliance Houston v. EPA*, No. 17-1155, 2018 WL 4000490, at *12 (D.C. Cir. Aug. 17, 2018) (holding that an agency must give good reasons to delay implementation of a regulation; its mere desire to reconsider the regulation is insufficient).

More broadly, where Congress establishes mandatory statutory duties, EPA could simply defer them through regulations, and so long as that initial deferral was lawful (or went unchallenged), EPA could migrate the mandatory statutory obligation to a regulation where it is immune to enforcement by citizens. This is not hypothetical. In *Leavitt*, after Congress required EPA to promulgate mobile source air toxics regulations by a date certain, EPA promulgated a regulation deferring the issuance of the required air toxics regulation until a future date certain. 355 F. Supp. 2d, at 545-46. When plaintiffs challenged EPA's failure to promulgate a regulation by that new date certain, EPA argued that the suit was not authorized. *Id.* at 546.

EPA should not be permitted to so easily subvert Congress's mandates.

[9] *See Samuels v. Dist. of Columbia*, 770 F.2d 184, 197 n. 10 (D.C. Cir. 1985) ("We do not believe that the mandatory character of the grievance procedure is altered by the fact that Congress directed [the agency] to issue binding regulations implementing [the statutory provision]. Congress regularly assigns agencies the task of explicating statutory requirements through regulations," and the fact that Congress "directed [the agency] to specify the precise content of the required procedures in future regulations" does not mean they are "any less mandatory.").

II. If the Clean Air Act Does not provide jurisdiction, the Administrative Procedure Act does.

This Court has jurisdiction under Clean Air Act section 304(a)(2) to hear Plaintiffs' suit to enforce EPA's mandatory duties. But if it did not, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, would provide jurisdiction. The APA provides for jurisdiction where an agency has "unlawfully withheld" action and "there is no other adequate statutory remedy." 5 U.S.C. §§ 704, 706; *see* EPA Mot. 11. As explained, *supra* p. 4-6, EPA has unlawfully withheld action to approve and disapprove state plans and promulgate federal plans for non-compliant states. If the Clean Air Act's citizen suit provision does not provide a remedy for this unlawful act, then there is no other adequate statutory remedy. *See ASSE Intern., Inc. v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015) ("The default rule is that agency actions are reviewable … even if no statute specifically authorizes judicial review…. This presumption is overcome only in two narrow circumstances: (1) when Congress expressly bars review by statute; or (2) where an agency action is committed to agency discretion by law.") (internal quotation marks and citations omitted).

After telling the D.C. Circuit that Plaintiffs' "remedy for failure to act … would lie in district court," and specifically citing 42 U.S.C. § 7604(a)(2), Resp'ts' Initial Br. at 37, Docket No. 17-1157 (D.C. Cir. Jan. 22, 2018), EPA now obliquely suggests—without actually saying—that Plaintiffs have an "adequate remedy" in the form of an unreasonable delay suit under section 304(a). EPA Mot. 11. There is no reason to think EPA would not move to dismiss such a suit as well. Moreover, Congress added court authority to hear unreasonable delay claims after courts had construed section 304(a)(2) to only cover duties with date certain deadlines. *See Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). The duty EPA has failed to perform here does have a date certain deadline and thus falls comfortably within section 304(a)(2).

III. The complaint adequately states a claim for relief.

EPA halfheartedly suggests that the States' claim that the Agency failed in its nondiscretionary duty to promulgate federal plans must be dismissed because the States did not specifically identify all of the states that should have submitted plans but did not. EPA Mot. 12. EPA's argument lacks merit.

When evaluating a motion to dismiss, a court must "1) construe the complaint in the light most favorable to the plaintiff, and 2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them." *Nat. Res. Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist.*, 694 F. Supp. 2d 1092, 1103 (C.D. Cal. 2010), *aff'd*, 651 F.3d 1066 (9th Cir. 2011). To survive a motion to dismiss, a complaint "must contain sufficient factual matter … to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "This is not an onerous burden. 'Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what … the claim is and the grounds upon which it rests." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotation marks omitted)). There must simply be "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

State Plaintiffs' complaint easily meets this standard. The States' Complaint alleges that "by November 30, 2017, EPA was legally required to respond to impose a federal plan on noncomplying states," and that it "failed to do" so. States' Compl. ¶ 4. The Complaint identifies certain specific states that have submitted plans awaiting EPA approval. *See id.* ¶ 49 (describing California's and New Mexico's plan submissions); *id.* ¶ 50 (describing Florida's, Delaware's, and Maryland's plans). It further alleges that some states "made the … decision not to develop a state plan, and to instead

await EPA's federal plan." *Id.* ¶ 54. And it alleges that EPA admitted, five months after the submission deadline, that it is not "working to issue a Federal [implementation] Plan for states that failed to submit a state plan." *Id.* ¶ 52. This is more than enough to give EPA "fair notice of what … the claim is and the grounds upon which it rests." *Johnson,* 534 F.3d at 1122 (internal quotation marks omitted).

Indeed, EPA's argument verges on silly. Regardless of whether a state submitted a plan or not, EPA was required to take an action (approve the plan, disapprove the plan, and/or promulgate a federal plan), and, as the States' complaint alleges, the Agency has *admitted* that it has not taken these actions. States' Compl. ¶ 52. Specifying at the pleadings stage precisely which states have promulgated their own plans and which are awaiting a federal plan from EPA is unnecessary, because regardless of which *specific* nondiscretionary duty was violated with respect to each state, EPA nonetheless violated such a duty. EPA offers no plausible alternative explanation, but even if it did, "[p]laintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Here, Plaintiffs' explanation not implausible; to the contrary, it is the only plausible explanation that can be derived from the pleaded facts.

Finally, the specific details regarding which states have submitted plans and which have not are in within EPA's knowledge and control. Plaintiffs easily clear the burden on a motion to dismiss and should be given the opportunity to obtain the additional facts, which are in the Agency's possession, through discovery.

CONCLUSION

The Court should deny EPA's Motion to Dismiss the Plaintiffs' complaint.

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