

No. 14-72327

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANDRA L. BAHR AND DAVID MATUSOW,
Petitioners,

v.

GINA MCCARTHY, Administrator United States Environmental Protection Agency;
JARED BLUMENFELD, Regional Administrator, EPA Region IX; U.S.
ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

and

STATE OF ARIZONA
Respondent-Intervenor

and

MARICOPA ASSOCIATION OF GOVERNMENTS
Proposed Respondent-Intervenor

PETITION FOR REVIEW

PROPOSED RESPONDENT-INTERVENOR'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Maricopa Association of Governments is organized as a 501(c)(4) nonprofit corporation filed under the Arizona Corporation Commission. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

The Maricopa Association of Governments (“MAG”) is the Regional Air Quality Planning Agency for the Phoenix, Arizona metropolitan area.¹ As such, it has responsibility for protecting and enhancing air quality in Phoenix and its surrounding communities. The Phoenix area’s fine, highly erosive soil and unique meteorological conditions combine to make coarse particulate matter (“PM-10”) a significant challenge in this region, and MAG has devoted substantial resources in developing air quality plans and controls to address it. The MAG 2012 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area² at issue in this case is MAG’s most recent effort to further reduce PM-10 levels in the region’s air and reflects a well-reasoned, aggressive approach to reducing PM-10 in a challenging environment.

Pursuant to the Clean Air Act (“CAA” or “Act”), the U.S. Environmental Protection Agency (“EPA”) has established National Ambient Air Quality

¹ Per this Court’s Order dated November 6, 2014, MAG files this Proposed Respondent Intervenor’s Brief.

² ER109-190 (“MAG 2012 Five Percent Plan”). This brief refers to materials in the Petitioners’ Excerpts of Record as ER__, materials in the Respondents’ Supplemental Excerpts of Record as SER__, and materials in Proposed Intervenor’s Supplemental Excerpts of Record as PISER__.

Standards (“NAAQS”) for PM-10 that each airshed in a state must attain. Until 2012, the Maricopa PM-10 Nonattainment Area (“Maricopa Area”) could not demonstrate that its air quality complied with the 24-hour PM-10 NAAQS. As a result, the Act required MAG to develop several air quality plans to bring the area into attainment. The MAG 2012 Five Percent Plan was designed to set the Maricopa Area on an aggressive path toward attainment by forcing five percent annual reductions in local emissions of PM-10.

The MAG 2012 Five Percent Plan contains multiple rules and local ordinances designed to control or prevent emissions of PM-10. In developing the plan, the State of Arizona, MAG, and its member agencies devoted thousands of hours of staff time to reviewing emission inventories, conducting air quality monitoring and modeling, performing or contracting for various technical studies and engaging in a lengthy planning process. After a thorough review of the plan and supporting documentation, EPA approved the plan, including an “attainment demonstration” that air quality in the Maricopa Area complied with the PM-10 NAAQS.

Prior to its approval of the MAG 2012 Five Percent Plan, EPA also reviewed and concurred with Arizona’s request that certain air quality monitoring data from 25 days during a three year compliance period be excluded from determinations

with respect to exceedances or violations of the PM-10 NAAQS since the data resulted from high wind events that qualified as “exceptional events” under the applicable statutory and regulatory standards. Petitioners now challenge EPA’s approval of the Five Percent Plan and determination that the excluded air quality data qualify as exceptional events.

The exceptional events at issue in this litigation include high wind events and haboobs – high intensity dust storms that gather and transport large quantities of particulate matter and dust. When one of these events engulfs a monitoring station, it elevates air monitor readings for PM-10 far above historical norms. Petitioners argue that EPA determined that too many of these events – which MAG cannot control or prevent – were exceptional events. Petitioners argue that some, or all, of these events must be included in the determination of whether the Maricopa Area complied with the PM-10 standards.

But neither the CAA nor its implementing regulations limit the number of exceptional events that EPA can approve. The CAA defines an “exceptional event” to include “natural events,” like uncontrollable high winds that affect air quality. EPA regulations further provide that the Agency “shall” exclude data from natural events where a State demonstrates that the conditions for an exceptional event exist, without limitation. The lengthy administrative record

documents EPA's extensive review of available technical information, meteorological conditions, and many other factors underlying its exceptional events determinations. EPA's decision complied with the CAA, implementing regulations and relevant guidance on exceptional events, which recognizes that local air agencies and areas should not be held accountable for air quality conditions that are beyond their control. High Winds Guidance at ER113.

Petitioners also argue that the CAA requires certain nonattainment area plan requirements to be updated when revisions to a State Implementation Plan ("SIP"), like the MAG 2012 Five Percent Plan, are submitted to EPA. They argue that until the SIP's Best Available Control Measure ("BACM") requirements are updated, EPA cannot exclude high wind exceptional events. Here, again, Petitioners misconstrue the CAA and its implementation regulations. The CAA does not require BACM to be updated, and EPA is authorized to make exceptional event exclusions where a State demonstrates to EPA's satisfaction that an exceptional event caused a specific air pollution concentration and otherwise meets the requirements EPA has defined.

Finally, Petitioners argue that EPA cannot allow local communities to implement "contingency measures" contained in a SIP before a requirement to implement such measures is triggered by noncompliance. But there is no such

prohibition in the CAA, and EPA has approved SIPs for other states where contingency measures were implemented before they were required to be implemented.

Thus, none of Petitioners' arguments are supported by law or the administrative record. MAG complied with the CAA when it developed the MAG 2012 Five Percent Plan and worked with the State of Arizona to request EPA to treat air quality occurring on a limited number of days as being influenced by exceptional events. EPA complied with the CAA when it reviewed the extensive documentation supporting the exceptional event requests and determined that the MAG 2012 Five Percent Plan met relevant requirements.

STATEMENT OF JURISDICTION

MAG agrees with Respondent EPA that the court has jurisdiction over this matter as it relates to the approval of an implementation plan for the PM-10 national ambient air quality standard. *See* Resp. Br. at 1; *see also* 42 U.S.C. § 7607(b)(1); Ninth Circuit Rule 28-2.2.

STATEMENT OF ISSUES

1. Whether EPA properly reviewed submissions made by the State of Arizona in accordance with the procedures provided in CAA section 319(b), 42 U.S.C. § 7617(b), and implementing regulations (40 C.F.R. §§ 50.1(j), (k), (l),

50.14, 51.930), and determined that certain air quality data for the Maricopa County Nonattainment Area during 2010 to 2012 was influenced by “exceptional events” and therefore could be excluded from the data used to determine compliance with the PM-10 NAAQS.

2. Whether EPA reasonably approved Arizona’s plan to attain air quality standards in the Maricopa County area when the plan’s provisions satisfied all applicable CAA requirements and, consistent with EPA’s reasonable interpretation of the Act, did not revisit emission controls that were previously triggered, and approved by EPA in 2002.

3. Whether EPA reasonably approved the MAG 2012 Five Percent Plan although MAG and local authorities implemented contingency measures prior to the time that they are required to be implemented under the CAA.

STATEMENT OF THE CASE

The CAA requires that air quality in the Maricopa Area, as measured by multiple monitors, comply with the 24-hour NAAQS for PM-10. PM-10 generally consists of particles with a diameter of 10 micrometers and smaller. As EPA notes, the State of Arizona, MAG, and local governments “have adopted a series of successively more rigorous measures” to address PM-10 emissions. Resp. Br. at 4. These included approximately 77 measures contained in the Maricopa

Nonattainment Area SIP that EPA approved in 2002. *Id.* Additional measures to regulate various PM-10 generating activities (e.g., wood burning, leaf-blowing, vacant lots, off-road vehicle use) were part of the MAG 2012 Five Percent Plan submitted to EPA on May 23, 2012. *See* ER239-352 (MAG 2012 Five Percent Plan). These measures supported EPA's approval of the MAG 2012 Five Percent Plan and approval of an attainment demonstration for the area. ER9 (79 Fed. Reg. 33107, 33115 (June 10, 2014)).

The MAG 2012 Five Percent Plan describes annual reductions in PM-10 as required by the CAA for serious PM-10 nonattainment areas that have failed to attain the standard by the applicable deadline. *See* 42 U.S.C. § 7513a(d). Using a baseline inventory in the year 2007, the MAG 2012 Five Percent Plan incorporates annual reductions in emissions resulting from local control measures contained in the plan. Specifically, the MAG 2012 Five Percent Plan shows declining PM-10 emissions as follows:

2007 – 59,218 tons

2008 – 49,231 tons

2009 – 45,600 tons

2010 – 44,062 tons

2011 – 43,438 tons

2012 – 43,130 tons

ER216 (79 Fed. Reg. 7118, 7123 (Feb. 6, 2014) (EPA proposal to approve the MAG 2012 Five Percent Plan)). The cumulative reduction attributable to the measures is 16,088 tons, exceeding the “target reduction” of 14,805 tons (or the amount of reductions that would be achieved by achieving no more or no less than a five percent reduction in each year 2008 through 2012). *Id.* As described by EPA, “[t]hese annual totals show a steady downward trend in emissions that fulfills the milestone requirement of every three years.” *Id.*

Despite such efforts, on 25 out of 1,096 days during the years 2010 to 2012,³ high winds occurred that suspended and transported dust and crustal material in the Maricopa Area. Dust storms driven by high winds can result in abnormal readings at Federal Reference Monitors that are used to measure ambient air quality. When a monitor is engulfed or affected by a dust storm, the measurement of PM-10 can exceed the PM-10 24-hour standard of 150 micrograms per square meter (“ug/m³”)

³ 1,096 days represents all calendar days for the years 2010 to 2012. The number of days actually monitored at air quality monitors in the Maricopa Area can be less than the number of calendar days.

by a substantial amount. This can result in the level of exceedances noted in the Petitioners' brief. Pet Br. 33-34.

The CAA allows for air quality data generated during high wind events and other events that are classified as "natural event[s]" to be excluded from the consideration of whether a nonattainment area is in attainment or nonattainment for a NAAQS. 42 U.S.C. § 7619(b)(1)(A)(iii). EPA, however, requires a rigorous process of documentation, including supporting technical analysis of the exceptional event and its duration, in order for this to occur.

MAG was actively involved in the development of the exceptional event documentation the Arizona Department of Environmental Quality (ADEQ) submitted to EPA for the high wind dust event days in 2011 and 2012 that were approved by EPA. ER11-19 (Concurrence Letter dated Sept. 6, 2012); ER20-67 (Concurrence Letter dated May 6, 2013); and ER68-107 (Concurrence Letter dated July 1, 2013). This documentation included photographic evidence, such as that cited by EPA. Resp. Br. 6, 36. The exceptional event documentation also included a description of the event, relevant air monitoring information, discussion of the causal relationship between the air quality data experienced and the event, comparison of the event to the "historical norm" for the involved air quality monitors, control measures in place and implemented, relevant compliance and

enforcement activities, issuances of forecasts and dust storm warnings and public advisories and wind observations. SER23-SER45.

That exceptional events involve conditions that are abrupt and distinct from the “historical norm” is demonstrated by the charts below that were part of the supporting information for an exceptional event that occurred on August 11, 2012 approved by EPA. *See* ER68-69 (Concurrence Letter dated July 1, 2013). The first chart shows that there was a sudden “spike” in particulate matter recorded at the West Chandler PM-10 monitor in the Maricopa Area that was associated with wind gusts over 30 mph. The second chart shows that this spike, when averaged over the 24-hour period of the PM-10 standard, was far above normal or typical air quality measured at the monitor.

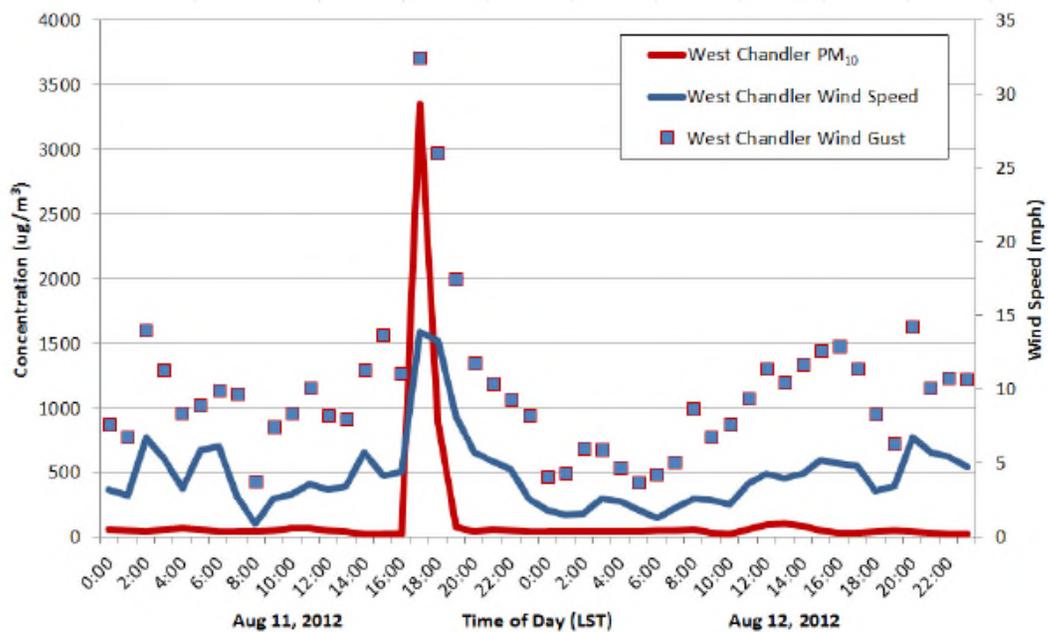


Figure 3-4. Hourly PM₁₀ concentrations and wind speeds at the West Chandler monitor on August 11 and 12, 2012. PM₁₀ concentrations and wind speeds sharply increased at 1700 LST on August 11, 2012, indicating the arrival of windblown dust.

SER29.

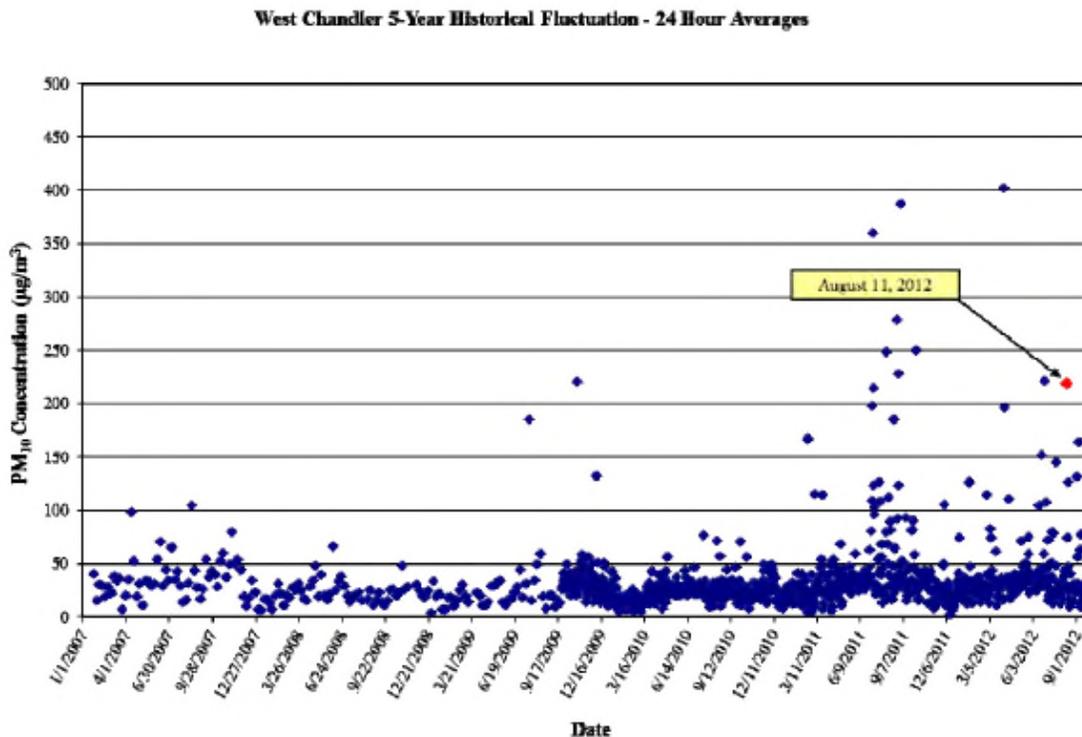


Figure 4-1. 24-hr average PM₁₀ concentrations at the West Chandler monitor (2007-2011). The 24-hr average PM₁₀ concentration on August 11, 2012, is shown in red and highlighted by the arrow.

SER37.

Each of the high wind dust events approved by EPA was thoroughly and uniquely documented. Documentation for the events is extensive (see Resp. Br. 34-39) and includes an explanation of the meteorological conditions that caused the event and a demonstration of the “clear causal relationship” between high winds and the exceeding PM-10 concentrations. The detailed analyses for each high wind event were prepared by ADEQ, MAG, and the Maricopa County Air

Quality Department (“MCAQD”) at a total estimated joint cost of \$675,000. PISER3 (ADEQ Comment Letter dated March 10, 2014). The exceptional event documentation submitted to EPA was submitted in accordance with the CAA and applicable regulations. *See* 42 U.S.C. § 7619(b), 40 C.F.R. §§ 50.1, 50.14, 51.930. EPA reviewed and concurred with this documentation, determining that PM-10 exceedances on 25 days in 2011 and 2012 were the result of high wind exceptional events. ER11-19 (Concurrence Letter dated Sept. 6, 2012); ER20-67 (Concurrence Letter dated May 6, 2013); and Concurrence Letter dated July 1, 2013 (ER68-107).

EPA subsequently proposed to approve the MAG 2012 Five Percent Plan. 79 Fed. Reg. 7118 (Feb. 6, 2014). Among other matters, EPA determined that inventories of PM-10 emissions used in the plan were “sufficiently comprehensive, covering all sources of PM-10 that have been found to be important sources of relevant emissions in this and other PM-10 nonattainment areas.” *Id.* at 7120. EPA also stated that “MAG and [the Maricopa County Air Quality Department] followed EPA’s 2005 guidance and recommendations regarding the use of emission factors, activity estimates, and control factors, and the other source specific emission estimation methodologies.” *Id.* at 7121. EPA “propose[d] to find that the MAG 2012 Five Percent Plan meets the requirement to demonstrate attainment by the appropriate attainment date.” *Id.* at 7122. EPA also proposed to

find that the “method of calculating the target for contingency measure reductions is consistent with CAA requirements and EPA guidance and [proposed] to approve [the] target value for contingency measures.” *Id.* at 7124.

EPA then issued a final rule to approve the MAG 2012 Five Percent Plan. 79 Fed. Reg. 33107 (June 10, 2014). Specifically, EPA approved the emission inventories for years 2007 to 2012 contained in the plan, the attainment demonstration for the PM-10 Nonattainment Area, the required annual reductions in five percent of baseline emissions, demonstrations that the plan met requirements for reasonable further progress and quantitative milestones, contingency measures and the motor vehicle emissions budget contained in the plan. *Id.* at 33115.

I. LEGAL BACKGROUND

Pursuant to Federal Rule of Appellate Procedure 28(i), MAG adopts the legal and regulatory background in EPA’s brief (Resp. Br. at 8-15) by reference and adds the following discussion of the legal standards for exceptional events.

As part of comprehensive amendments made to the CAA in 1990, Congress mandated that EPA take specific steps to address areas not in attainment with

NAAQS for PM-10.⁴ 42 U.S.C. § 7513a-b. These measures include the classification of PM-10 nonattainment areas as “moderate” or “serious” (42 U.S.C. § 7513a(a)-(b)), the requirement that serious PM-10 nonattainment areas achieve annual emission reductions of not less than 5 percent (42 U.S.C. § 7513a(d)), and the issuance of reasonably available control measures and best available control measures for certain areas and emissions (42 U.S.C. § 7513b).

The issues in this appeal relate to how PM-10 air quality is measured to demonstrate attainment and when the controls in a given air quality control plan should be implemented and when they should be reevaluated.

A. EPA Air Quality Monitoring System

The CAA provides authority for EPA to promulgate regulations for “an air quality monitoring system throughout the United States” to measure air quality, locate monitoring stations in “major urban areas and other appropriate areas” and to provide for analysis, reporting, and recordkeeping with respect to such data. 42 U.S.C. § 7619(a). Under this authority, EPA has promulgated extensive

⁴ 42 U.S.C. §§ 7513, 7513a, and 7513b (collectively known as “Subpart 4” of Subchapter I, Part D, Plan Requirements for Nonattainment Areas) were adopted by Congress as part of the 1990 Clean Air Act Amendments. Pub. L. 101-549, 104 Stat. 2399 (1990).

regulations regarding NAAQS monitoring to allow for the assessment of ambient air quality conditions and designation and classification of nonattainment areas.

See generally 40 C.F.R. Part 58.

EPA regulations provide for detailed monitor specifications, including specific placement and spacing criteria for monitoring probes, inlets and optical paths for PM-10 monitors. *See* Appendix E to 40 C.F.R. Part 58. In general, air quality monitoring data generated by monitors meeting EPA regulatory requirements is useable for determining compliance with a NAAQS. But EPA regulations provide for exceptions to this general rule. For example, 40 C.F.R. Part 58, Subpart C provides for “special purpose monitors.” If such a monitor is operated less than 24 months, EPA will not base a NAAQS violation determination for the PM-10 NAAQS solely on the basis of data from the monitor. 40 C.F.R. § 58.20(e).

B. Statutory Exceptional Events Provision

When Congress provided for a specific statutory provision to exclude air quality monitoring data influenced by exceptional events, it added these provisions to EPA’s general authority to provide for an air quality monitoring system, discussed above. Pub. L. 109-59, Title IV, Section 6103; 119 Stat. 1882. This

authority provides for two different types of exceptional events: those that are caused by infrequent human activity and natural events:

The term “exceptional event” means an event that –

- (i) affects air quality;
- (ii) is not reasonably controllable *or* preventable;
- (iii) is an event caused by human activity that is unlikely to recur at a particular location *or a natural event*; and
- (iv) is determined by the Administrator through the process established in the regulations promulgated under paragraph (2) to be an exceptional event.

42 U.S.C. § 7619(b)(1)(A) (emphasis added).

Congress provided specific direction to EPA to promulgate regulations “governing the review and handling of air quality monitoring data influenced by exceptional events.” 42 U.S.C. § 7619(b)(2)(A). Among other requirements, EPA was directed to provide for “criteria and procedures for the Governor of a State to petition the Administrator to exclude air quality monitoring data that is directly due to exceptional events from use in determinations by the Administrator with respect to exceedances or violations of the national ambient air quality standards.” *Id.* at (3)(B)(iv).

C. EPA’s Exceptional Events Rule

EPA promulgated regulations to implement 42 U.S.C. § 7619(b) in 2007. 72 Fed. Reg. 13,560 (Mar. 22, 2007), codified at 40 C.F.R. §§ 50.1(j), (k), (l); 50.14, and 51.930 (“Exceptional Events Rule”). These regulations were promulgated in

accordance with the statutory requirements contained in 42 U.S.C. § 7619(b)(3)(B) as well as five principles outlined in 42 U.S.C. § 7619(b)(3)(A). As EPA noted in its final rule, EPA had allowed for the flagging and exclusion of data attributable to exceptional events since 1977 pursuant to several guidance documents, including a 1996 policy to address data affected by natural events. 72 Fed. Reg. 13,560, 13,562. EPA also noted that “[u]nder the statutory scheme established by the CAA, states are primarily responsible for the administration of air quality management programs within their borders. This includes the monitoring and analysis of ambient air quality and submission of monitoring data to EPA States are responsible for ensuring data quality and validity and for identifying measurements that they believe warrant special consideration, while EPA is responsible for reviewing and approving or disapproving any requests for such consideration.” *Id.* at 13,562-13,563.

In promulgating regulations to provide for the review and handling of air quality monitoring data influenced by exceptional events, EPA was required to follow specified principles and requirements. 42 U.S.C. § 7619(b)(3). EPA addressed these requirements in its final regulations implementing 42 U.S.C. § 7619(b) with regard to PM. 72 Fed. Reg. 13,560. EPA specifically cited a set of five principles it was required “to follow in developing regulations to implement

section 319.” *Id.* at 13,561. The five principles were thus considered and incorporated into EPA’s final regulations implementing 42 U.S.C. § 7619(b).

EPA regulations provided additional detail and clarity to the statutory provisions enacted by Congress. Of particular importance in this litigation, since “natural events” were not specifically defined in the statute, EPA’s regulations provided a definition: “*Natural event* means an event in which human activity plays little or no direct causal role.” 40 C.F.R. § 50.1(k) (emphasis in original). The regulations further provided that air quality data attributable to exceptional events, like natural events, must be excluded from determinations as to whether an exceedance of a NAAQS has occurred:

EPA shall exclude data from use in determinations of exceedances and NAAQS violations where a State demonstrates to EPA’s satisfaction that an exceptional event caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of [section 50.14].

40 C.F.R. § 50.14(b)(1) (emphasis added). The time for challenging this regulatory exclusion of air quality data influenced by exceptional events has passed. *See* 42 U.S.C. § 7607(b).

D. EPA High Wind Guidance

In addition to regulations, EPA has also developed guidance for the preparation of state requests concerning exceptional events involving high winds.

See ER109-190 (EPA, Interim Guidance on the Preparation of Demonstrations in Support of Requests to Exclude Ambient Air Quality Data Affected by High Winds Under the Exceptional Event Rule (May 2013) (“High Winds Guidance”)). The guidance references the principle found at 42 U.S.C. § 7619 that air agencies should not be held accountable for events that were beyond their control at the time of the event. *Id.* at ER113. In this guidance, EPA indicates that the level of supporting documentation for a high wind event will vary on a case-by-case basis. *Id.* at ER113. Specifically, EPA has not “set pass/fail statistical criteria for the [High Wind] element, but will use a weight-of-evidence approach to assess each demonstration on a case-by-case basis.” *Id.* EPA has also indicated that high wind events, like other natural events, do not need to be “rare” to be considered exceptional events. *Id.* at ER114.

II. FACTUAL BACKGROUND

MAG is a Council of Governments composed of 27 cities and towns within Maricopa County and portions of Pinal County; the counties of Maricopa and Pinal; the Gila River Indian Community; the Salt River Pima-Maricopa Indian Community; Fort McDowell Yavapai Nation; Arizona Department of Transportation; and Citizens Transportation Oversight Committee. *See* PISER8 (MAG Comment Letter). In accordance with 42 U.S.C. § 7504(a), MAG was

designated by the Governor of Arizona in 1978 and recertified by the Arizona Legislature in 1992 as the Regional Air Quality Planning Agency to develop air quality plans to be submitted by the State as a SIP. ER251 (MAG 2012 Five Percent Plan). SIPs regarding the PM-10 NAAQS, as well as other NAAQS, are prepared through a coordinated effort among ADEQ, the Arizona Department of Transportation, and Maricopa County Air Quality Department. *Id.* MAG was directly involved in the development of the PM-10 SIP for the Maricopa County PM-10 Nonattainment Area, including the development of the MAG 2012 Five Percent Plan and its supporting technical analysis. *Id.* at ER251 and ER350.

In addition to the technical review, agency coordination, and public comment MAG conducts for a standard air quality plan,⁵ MAG undertook special efforts to develop the MAG 2012 Five Percent Plan at issue. First, a broad group of stakeholders formed by ADEQ met once every two weeks to discuss policy solutions to the technical approvability issues identified by EPA in the earlier version of MAG's Five Percent Plan. PISER1-2 (ADEQ Comment Letter);

⁵ MAG's carefully structured decision-making processes are described more fully in "Maricopa Association of Governments: Overview of the Organization" (Nov. 2014) *available at* http://www.azmag.gov/Documents/MAG_2014-11-21_MAG-Info-Book.pdf (last visited Dec. 30, 2014).

SER350 (MAG 2012 Five Percent Plan). By January 2012 this group had met 16 times. SER350 (MAG 2012 Five Percent Plan). This group worked to develop a new mechanism to reduce fugitive dust on high wind days, the Dust Action General Permit, which was ultimately adopted by the State in 2011. *Id.*

Separately, the Five Percent Plan Technical Committee produced a new, and updated emissions inventory upon which to accurately base the plan's emission reduction goals, conducted a high wind modeling attainment demonstration, and addressed other technical issues. *Id.* The Five Percent Plan Technical Committee worked closely with EPA to develop and agree upon a methodology to use when modeling attainment on high wind days. *Id.* By January 2012, the Five Percent Plan Technical Committee had met twenty times. *Id.* Representatives from EPA participated regularly in both the Five Percent Plan Technical Committee and the broad stakeholder group.

Once this technical foundation had been laid with the new emissions inventory and the new methodology to model attainment and after the new policy tool – the Dust Action General Permit – had been adopted, MAG was able to complete its work with ADEQ and the Maricopa County Air Quality Department to develop the MAG 2012 Five Percent Plan at issue. The MAG 2012 Five Percent Plan meets the requirements of 42 U.S.C. § 7513a(d) of the CAA by

reducing PM-10 emissions at least five percent each year until the standard was achieved in 2012. ER251 and ER305.

SUMMARY OF ARGUMENT

EPA properly reviewed requests from the State of Arizona to exclude certain air quality data in 2011 and 2012 as being influenced by exceptional events and reasonably determined that the data in question qualify for exclusion treatment as exceptional events as defined by the CAA, EPA's Exceptional Events Rule, and Agency guidance. Petitioners' arguments that the data should not have been excluded because high wind events in the Maricopa Area are frequent and sometimes severe are not supported by the statute, regulation, or guidance. Similarly, Petitioners' argument that if controls are not in place, data from a high wind event does not qualify for exclusion, is inconsistent with the statute, distorts EPA's guidance, and disregards controls that MAG and ADEQ have adopted.

EPA properly approved the MAG 2012 Five Percent Plan and the attainment demonstration included therein. Petitioners' argument that EPA was required to perform a new BACM demonstration prior to approving the MAG 2012 Five Percent Plan finds no support in the CAA, which expressly identifies elements of air quality plans that require periodic updates and does not designate BACM as such an element.

Finally, EPA properly approved the MAG 2012 Five Percent Plan with contingency measures that have been implemented. Doing so is consistent with EPA's past practice. In this case, the purposes of the CAA are supported by "early" implementation of the contingency measures because the specified contingency measures do not "count" toward the incremental five-percent reductions in PM-10 emissions the plan obtains each year. Such measures will also provide permanent, ongoing air quality improvements for the Maricopa Area.

STANDARD OF REVIEW

Pursuant to Federal Rule of Appellate Procedure 28(i), MAG adopts by reference the discussions of the standards of review in EPA's brief. *See* Resp. Br. at 26-30.

ARGUMENT

I. EPA PROPERLY EXCLUDED EMISSIONS DATA RESULTING FROM EVENTS WHERE LEVELS OF COARSE PARTICULATE MATTER (PM-10) WERE NOT REASONABLY CONTROLLABLE OR PREVENTABLE.

In 2010, the Maricopa Area recorded only one exceedance at one monitor for the PM-10 NAAQS. EPA noted that this was not attributable to a high wind event. Resp. Br. at 31. In 2011 and 2012, however, the Maricopa Area

experienced high winds and dust storms. Since compliance with the PM-10 NAAQS is based on 3 years of air quality data,⁶ the years 2010 to 2012 served as the basis for EPA's determination that the MAG 2012 Five Percent Plan demonstrated attainment in accordance with 42 U.S.C. §§ 7502(c) and 7513a(d). 79 Fed. Reg. 33,107, 33,115 (June 10, 2014).

After receiving requests from the State of Arizona to exclude certain air quality data in 2011 and 2012 as being influenced by exceptional events, EPA reviewed these requests under regulations promulgated pursuant to 42 U.S.C. § 7619(b). 79 Fed. Reg. 7118, 7122 (Feb. 6, 2014). EPA then determined that the events were properly classified as "exceptional events" and that air quality data occurring on 25 days out of the 1,096 day period (years 2010 to 2012) were excludable from comparison to the PM-10 NAAQS. *Id.* This was a reasonable exercise of EPA's statutory authority under 42 U.S.C. § 7619. Pursuant to Federal Rule of Appellate Procedure 28(i), MAG adopts by reference EPA's discussion of its legal and technical bases for concurring with Arizona's determination that air

⁶ 40 C.F.R. § 50.6(a); 40 C.F.R. Appendix K.

quality monitoring data from documented high wind events should be excluded from the Maricopa Area's attainment demonstration.

Petitioners claim that some, or all, of the exceptional event data in question do not qualify for exclusion and should be incorporated into the Maricopa Area's attainment demonstration. Petitioners' justifications for this position fail because they rest on "requirements" or limitations that are found in neither the statute nor the applicable regulation. MAG will address each in turn.

A. Frequent Natural Events, Such As High Winds, May Be Exceptional Events.

Petitioners attempt to create a volume limit on natural events that may qualify as an exceptional event. Petitioners contend that when 135 exceedances during the years 2010 to 2012 "are considered in the aggregate" and compared to exceptional events that the State of Arizona "flagged" for exclusion as exceptional events in previous years "there is a clear pattern that demonstrates that these are neither exceptional nor isolated events." Pet Br. at 35-36. Petitioners argue that "EPA's Proposal [sic] to Exclude 135 Exceedances . . . Is Contrary to Law." Pet. Br. at 28. However, it is the Petitioners' argument that does not have support in law.

The CAA does not place a limit on how many individual exceedances can be considered to be "natural events" like the high wind events that were the subject of

all of the exceptional event requests made by the State of Arizona to EPA. “Exceptional events” are specifically defined in 42 U.S.C. § 7619. To be an “exceptional event,” an event must: (a) affect air quality; (b) not be reasonably controllable *or* preventable; (c) be an event caused by human activity that is unlikely to recur *or* a natural event; and (d) be determined by the EPA Administrator, pursuant to regulations required under 42 U.S.C. § 7619(b)(2) to be an exceptional event. 42 U.S.C. § 7619(b)(1)(A). While 42 U.S.C. § 7619(b)(1)(A)(iii) conditions exceptional events caused by human activity on their ability to recur, no such limitation applies to a natural event, like a high wind event, by the plain terms of 42 U.S.C. § 7619(b)(1)(A)(ii). An exceptional event is either “an event caused by human activity that is unlikely to recur at a particular location *or* a natural event.” *Id.* (Emphasis added). “It is well settled that where 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 purposefully in the disparate inclusion or exclusion.” *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (internal quotation marks and alternations omitted)). This is particularly true when Congress treats two categories within the same subsection differently. EPA’s regulations to implement 42 U.S.C. § 7619 also recognize the distinction

between an event caused by human activity (or “anthropogenic event”) and natural events through the regulatory definition of an “exceptional event.” 40 C.F.R. § 50.1(j). EPA regulations do not impose any criteria or limitation regarding the frequency, or lack thereof, of natural events. This is distinct from exceptional events caused by human activity which must be “unlikely to recur at a particular location . . .” *Id.*

EPA has specifically recognized that natural events can occur frequently. “It is important to note that natural events, which are one form of exceptional events according to [42 U.S.C. § 7619(b)(1)(A)], may recur, sometimes frequently (e.g., western wildfires).” 72 Fed. Reg. 13,560, 13,563. EPA guidance also “acknowledges that natural events, such as high wind dust events, can recur and still be eligible for exclusion under the [Exceptional Events Rule]. Therefore, events do not necessarily have to be rare to satisfy [the historical fluctuation] element [of the analysis.]” ER131 (High Wind Guidance). Petitioners’ attempt to use the gross number of individual monitor exceedances to argue that EPA’s exclusion of these exceedances is “contrary to law” is thus unavailing and unsupported.

B. “Severe” Natural Events May Be Exceptional Events.

Petitioners claim that 46 of the 135 exceedances excluded by EPA as exceptional events were “severe.” Pet Br. at 33. The basis of this claim is that the 46 exceedances are above a threshold that EPA has identified in guidance as being “severe.” *Id.* But the “severity” of an exceedance (or lack thereof) is not a statutory criterion for an exceptional event. To the contrary, to the extent that the severity of an event demonstrates that the event was beyond that experienced in the “historical norm” for a particular nonattainment area, such severity supports the exclusion of the data as an exceptional event. EPA’s High Wind Guidance provides that air agencies seeking exceptional event determinations:

should include data showing historical fluctuations of concentration in the area in their demonstration package and make a conclusion as to whether the agency considers the data to be outside the normal historical fluctuations. This information satisfies the [Historical Fluctuations] criterion and serves as an important basis for the [Clear Causal Relationship], [No Exceedance But For the Event], and [Affects Air Quality] criteria . . . *The more a concentration stands out from historical concentrations, the more plausible it is that the event was the cause of the exceedence.* The objective of the [Historical Fluctuations] analysis is to give a full and accurate portrayal of the historical context of the claimed event day.

ER131 (High Wind Guidance at 20 (emphasis added)).

EPA’s regulations also require that exceptional event demonstrations include evidence that “[t]he event is associated with a measured concentration in excess of

normal historical fluctuations, including background.” 40 C.F.R. § 50.14(c)(3)(iv)(C). Thus, on balance, the fact that a subset of the exceptional events involved air quality data that were much above the normal air quality experienced in the Maricopa Area supports, rather than detracts from the determination that the events qualified as exceptional events. It serves as an indication that the events departed from the normal air quality experienced in the area making it more plausible that there was an intervening and external cause for the exceedance, such as an exceptional event.

C. Exceptional Events Are Events That Are Not Reasonably Controllable *or* Preventable.

42 U.S.C. § 7619(b)(1)(A)(ii) provides that an exceptional event is an event that “is not reasonably controllable *or* preventable.” (Emphasis added). Petitioners attempt to read the words “or preventable” completely out of the statute. They contend that controls must be in place for data from a high wind event to qualify for exclusion. *See* Pet. Br. at 35-36.

Courts must “give effect, if possible, to every clause and word of a statute.” *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Because Congress used “or” rather than “and,” it must have anticipated that there could be unpreventable circumstances that would qualify as exceptional events, regardless of whether they are reasonably

controllable. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (concluding that “terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise”); see also *In re Pac.-Atl. Trading Co. v. United States*, 64 F.3d 1292, 1302 (9th Cir. 1995) (“In construing a statute, a court should interpret subsections written in the disjunctive as setting out separate and distinct alternatives.”). An obvious example could be a tornado. Such a high-intensity event that appears with little notice would overwhelm existing controls, even if there were time to implement them.

The data MAG and ADEQ prepared to demonstrate that the exceedances in question were exceptional events reflect challenges that cannot be controlled. MAG and its member agencies cannot prevent high winds that create the dust storms that the Maricopa County PM-10 Nonattainment Area experiences. Nor can MAG prevent haboobs from rolling across the greater Phoenix metropolitan area. Moreover, while Arizona and MAG have taken great strides toward dust-risk management with the recently adopted Dust Action General Permit, the high wind events for which ADEQ has sought treatment as exceptional events are not preventable. PISER3-5 (ADEQ Comment Letter).

Petitioners, however, offer no arguments that the exceptional events at issue were preventable. As EPA notes, thunderstorms associated with two exceedances

of the PM-10 NAAQS occurring on August 11, 2012, generated wind gusts exceeding 30 miles per hour (mph). Resp. Br. at 35. Other exceptional events have generated measured winds in excess of 45 mph. *See, e.g.*, ER15 (Concurrence Letter dated September 6, 2012). Petitioners claim, without supporting evidence, that the 25 days on which exceptional events occurred are “seasonal in nature and could be significantly ameliorated if the State were to adopt appropriate control measures for windblown dust both within the attainment area and statewide.” Pet Br. at 36. But this argument is a bare assertion, lacking any support or quantification of what level of “significant” reduction in PM-10 levels might be achieved. In addition, this argument at most goes only to the issue as to whether the events might have been “reasonably controllable” and not whether the events were “preventable.”⁷

⁷ The High Wind Guidance utilizes combined criteria to consider whether an event is “not reasonably controllable or preventable.” ER121. But EPA also indicates that the inquiry is multifactorial by “taking into account controls in place *and wind speed, along with other factors.*” *Id.* (Emphasis added). Thus, EPA does not equate whether an event was “preventable” with whether local controls were in place and the event is “reasonably controllable.”

D. The CAA Does Not Require Controls On All Possible Sources For An Exceptional Event To Exist.

42 U.S.C. § 7619 makes a distinction between exceptional events that are “caused by human activity” and those that are not, *i.e.*, “natural events.” EPA has further defined a “natural event” as one where “human activity plays little or no direct causal role.” 40 C.F.R. § 50.1(k). Relevant EPA guidance indicates that “[e]xceedances caused in whole or in part by anthropogenic dust sources within the air agency’s control are unlikely to be eligible for treatment as exceptional events under the Exceptional Events Rule, even under conditions of elevated winds, unless the air agency shows that the event, including the emissions from the anthropogenic dust sources, was not reasonably controllable or preventable.” ER114 (High Winds Guidance). But this does not mean, as Petitioners argue, that such events will be considered exceptional events only if reasonable controls are in place. Pet. Br. 31. Moreover, EPA states that this guidance is not “binding on any party.” ER115 (High Wind Guidance). Rather, the Guidance emphasizes that the Exceptional Events Rule “is the source of regulatory requirements for exceptional events and exceptional event demonstrations.” *Id.* And the Exceptional Events Rule does not contain any requirement that specifically requires the implementation of controls, much less the absolute requirement that the Petitioners

assert: that an event will be considered an exceptional event only if controls are in place.

Petitioners also fail to acknowledge that EPA “generally considers dust entrained by high wind from undisturbed land (e.g., undisturbed desert) to be not reasonably controllable or preventable, because of the likely disturbance to natural ecosystems and the cost of treating large land areas.” ER122 (High Winds Guidance). As EPA explained, just such dust was involved in the exceptional events experienced in the Maricopa Area. *See* Resp. Br. at 56 (“dust was naturally occurring and likely originated over undeveloped lands south of Maricopa County”) (quoting SER23-24).

Nevertheless, MAG and its member agencies adopted appropriate control measures for the areas within their jurisdictions, approved them through a public process, and incorporated them into the MAG 2012 Five Percent Plan. These include Maricopa County Air Quality Department Rules 310, 310.01, 314, 316 to control fugitive dust from dust-generating activities, nontraditional sources, open outdoor fires and indoor fireplaces, and emissions from nonmetallic mineral processing. Maricopa County has also enacted ordinance P-26 to address residential wood-burning. All these measures have been approved by EPA. ER258-59 (MAG 2012 Five Percent Plan, Table ES-2). These measures

complement Arizona laws to address unpaved roads and shoulders, leaf blowers, activities involving vacant lots, requirements for street sweepers, off-road vehicle ordinances, no burn restrictions, dust action general permits, best management practices, and open burning. *Id.*

The existence or implementation of local control measures is not required for an exceptional event determination. 42 U.S.C. § 7619 does not require that regulations for exceptional events include a requirement that local control measures be developed or deployed. Instead, regulations are directed to provide, at a minimum, that the occurrence of an exceptional event is demonstrated by reliable, accurate data, that there is a “clear causal relationship” between an exceedance of air quality standards and the exceptional event, that there is a public process for determining whether an event is exceptional, and that there are criteria and procedures for a state to petition EPA to exclude the data. 42 U.S.C. § 7619(b)(3)(B).

Consistent with this statutory direction, EPA regulations specify that a demonstration to justify the exclusion of air quality data due to an exceptional event must include evidence of only the following four elements:

- (A) The event satisfies the criteria set forth in 40 C.F.R. 50.1(j)⁸;
- (B) There is a clear causal relationship between the measurement under consideration and the event that is claimed to have affected air quality in the area;
- (C) The event is associated with a measured concentration in excess of normal historical fluctuations, including background; and
- (D) There would have been no exceedance or violation but for the event.

40 C.F.R. § 50.14(c)(3)(iv). No requirement for the development and implementation of local control measures is specified.

EPA guidance documents describe how EPA intends to review requests for exceptional event determinations. Specifically, EPA states that

[a]lthough Reasonably Available Control Measures (RACM) and Best Available Control Measures (BACM) for windblown dust are not necessarily required to have been in place at the time of the event for all areas, they are measures that EPA and affected agencies have identified as being reasonable. The CAA requires BACM for serious PM₁₀ nonattainment areas and RACM in moderate PM₁₀ nonattainment areas. Therefore, for such areas, the EPA will use the local list of BACM or RACM measures (as applicable) as a reference point to review the reasonableness of controls.”

ER126 (High Wind Guidance). EPA also allows that “windblown dust from previously disturbed land that is being allowed to fully return to natural

⁸ This “criteria” is generally a restatement of the statutory definition of an “exceptional event” as contained in 42 U.S.C. § 7619(b)(1)(A).

conditions” is not reasonably controllable or preventable. ER122 (High Wind Guidance). Thus, even while EPA indicates that it will review controls in a SIP and other efforts in reviewing whether events may be considered “exceptional events,” it explicitly retained discretion to consider whether an event was “reasonably controllable” on a case-by-case basis.

Where, as here, EPA has made a reasoned determination on the basis of its regulations and published guidance that certain events in the Maricopa Area qualify as exceptional events, Petitioners bear a heavy burden to challenge this determination. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (en banc). As EPA notes, Petitioners have not identified any specific exceedance associated with a high wind event that should be excluded from consideration as an exceptional event. Resp. Br. at 35, n5. Petitioners have therefore not met their burden in challenging EPA’s approval of the event.

II. THE FIVE PERCENT PLAN COMPLIED WITH THE CAA, AND EPA PROPERLY APPROVED THE PLAN.

The two agency actions challenged by Petitioners – approval of the exceptional events demonstrations – and the MAG 2012 Five Percent Plan are linked. The attainment demonstration in the MAG 2012 Five Percent Plan is based upon the ambient air monitoring data approved by EPA. In this case, that ambient

air monitoring data set properly excludes data associated with documented high wind events.

A. Technical Information Provided by MAG, ADEQ, and MCAQD Supported EPA's Determination That Certain Events Were Exceptional Events.

MAG worked closely with ADEQ, MCAQD, and EPA Region 9 staff to assemble the required data and analyses necessary to satisfy the requirements of the Exceptional Events Rule. The comprehensive exceptional event documentation provided to EPA for each high wind dust event included a conceptual model explaining the specific meteorological conditions and weather patterns that caused the event; a thorough review of the measures in place to control PM-10 from anthropogenic sources; verification of the implementation and enforcement of PM-10 control measures through the evaluation of hundreds of "fugitive dust" inspections that occurred immediately before, during, and after each high wind event; and time-series maps, satellite data and visibility photos showing the connection between the onset of high winds and the subsequent increase in PM-10 concentrations. *See* Resp. Br. at 34-41. The resulting exceptional event documentation for the 25 high wind exceptional event days in 2011 and 2012 satisfied applicable requirements in the Exceptional Events Rule

(40 C.F.R. § 50.14(c)(3)(iv)) and provided the “weight of evidence” necessary for EPA to conclude the events were indeed high wind exceptional events.

Petitioners argue that “EPA simply took at face value the assertions by ADEQ that BACM level controls were in place at the time of the events . . .” Pet. Br at 35. But the administrative record proves otherwise. *See, e.g.*, ER68-107 (Concurrence Letter dated July 1, 2013 (analyzing in detail the demonstrations for several events)). EPA “considered a range of relevant factors, including whether anthropogenic sources had reasonable controls in place, meteorological data such as wind speed and direction, and the spatial extent of the events.” 79 Fed. Reg. 33,107, 33,111.

Extensive technical information supported EPA’s determination that the events on 25 days were excludable and that the MAG 2012 Five Percent Plan demonstrated attainment. EPA reviewed the documentation provided by ADEQ and determined that exceedances met the definition of an exceptional event. *See, e.g.*, ER29 (Concurrence Letter dated May 6, 2013). Petitioners’ citation to what they claim is “boilerplate language” contained in State submittals to EPA and EPA concurrence documentation (Pet. Br. at 40) proves nothing. It does not address whether EPA reviewed the State’s request for exceptional event determinations, considered the supporting technical information and made a reasonable judgment.

There is nothing in the administrative record that would indicate that EPA did not do what it said it did with regard to its review, consideration, and determination regarding exceptional event submissions that were approved.

B. Approved Controls in the Maricopa Area Do Not Require “Updating.”

The requirement for BACM is triggered by a specific event under 42 U.S.C. § 7513a(b)(1)(B): reclassification of moderate PM-10 nonattainment area to “serious” area. This event has already occurred, and Arizona has satisfied the requirement to submit BACM. *See* Resp. Br. at 61. Pursuant to 42 U.S.C. § 7513(e), the requirement for More Stringent Measures (“MSM”) is triggered by an EPA decision to grant a request to extend the attainment deadline. Again, this event has already occurred, and Arizona has already satisfied this requirement. Resp. Br. at 61.

That the relevant provisions related to attainment of the PM-10 standards in 42 U.S.C. §§ 7513-7513b do not require BACM and MSM to be updated is significant since it stands in contrast to other CAA provisions. Other provisions of the CAA include periodic reviews and/or specific “triggering” events. The fact that Congress provided for such updating in one part of the CAA and not in

another part of the CAA indicates that a requirement for updating cannot be “presumed” to apply throughout the Act. *See Walker*, 533 U.S. at 173.

There are several examples where the CAA imposes an explicit duty to update emission standards. EPA must review NAAQS every five years and “shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate . . .” 42 U.S.C. § 7409(d). 42 U.S.C. § 7411(b)(1)(B) imposes a duty to review and consider appropriate modifications to new source performance standards “at least every eight years.” 42 U.S.C. § 7412(d)(6) requires the Administrator to “review, and revise as necessary” emission standards for hazardous air pollutants. These examples demonstrate that Congress deliberately drafted the CAA to specify when there is a duty to update emission standards. Where the CAA does not include such an explicit duty, the duty does not exist. *See Barhart v. Sigmon Coal Co.*, 534, U.S. 438, 452-53 (2004) (declining to infer that a particular section of the Coal Act provides for successor liability and emphasizing that, “[w]here Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act”).

Petitioners make at least three arguments concerning EPA’s approval of the MAG 2012 Five Percent Plan and whether local controls – BACM – were

sufficient to support approval of the MAG 2012 Five Percent Plan. First, Petitioners argue that BACM measures may be insufficient unless they have recently been reviewed. Pet Br. at 37. Second, Petitioners claim that certain measures within the MAG 2012 Five Percent Plan are no longer BACM, alleging that EPA had “expressly found” that certain measures were no longer BACM for agricultural sources. Pet Br. at 38. Third, Petitioners claim that EPA’s decision to exclude the 105 exceedances that pre-dated the implementation of specific controls was at variance with earlier decisions on BACM controls for agriculture and that EPA needed to explain its “departure” from existing guidance regarding exceptional events. Pet Br. at 38-41.

Petitioners undercut the strength of their own arguments when they agree that the High Wind Guidance does not prevent EPA from relying on BACM measures more than three years old. Pet Br. at 43. But Petitioners’ assertions that EPA has approved the MAG 2012 Five Percent Plan without adequate BACM measures or departed from established guidance (and thereby at least owes an explanation for the deviation) also lack merit. First, as EPA explains, the CAA does not impose a requirement to update BACM. An update of BACM is not “triggered” by acceptance of a State’s request to exclude certain air quality data as exceptional event. *See* Resp. Br. at 60-68.

Second, EPA's guidance, while referencing BACM controls and indicating that EPA and affected agencies have identified such controls as being "reasonable" (ER126 (High Wind Guidance)), further explains that each determination must be made on a "case-by-case" basis. EPA's guidance explains that while it will generally consider BACM to constitute reasonable controls, "[i]n some cases, a lower level of control could be reasonable, while in other cases it could be reasonable to require controls more stringent than current BACM or RACM (e.g., upon start-up or identification of a significant new source of emissions)." *Id.*

Finally, EPA has adequately explained why its review of the MAG 2012 Five Percent Plan and related local controls was reasonable. EPA stated that significant sources of PM-10 in the Maricopa Area were included in the Agency's earlier BACM determinations and since these sources and control measures "have not significantly changed since 2002, we believe that our previous BACM determinations remain appropriate for the purposes of making exceptional event determinations." 79 Fed. Reg. 33,112. Moreover, EPA noted that although the State did not prepare a new BACM analysis, "Arizona has adopted revisions to rules regulating sources of windblown dust that EPA has approved into the SIP because they are more stringent." *Id.*

III. THE CAA DOES NOT PENALIZE NONATTAINMENT AREAS FOR PREVIOUS OR EARLY IMPLEMENTATION OF CONTROL MEASURES.

Petitioners argue that 42 U.S.C. § 7502(c)(9) requires that “contingency measures” in a SIP cannot be implemented by a State prior to the time that such are needed as a supplement to “core” control measures in a SIP. Pet Br. at 53. Petitioners claim that it is contrary to law to approve a SIP revision where contingency measures have already been implemented. At the same time, however, Petitioners acknowledge that contingency measures were not relied on “to achieve the required five percent reductions, reasonable further progress and attainment” in the MAG 2012 Five Percent Plan. *Id.* at 55.

Petitioners’ strained reading of 42 U.S.C. § 7502(c)(9) is not supportable. There is no CAA provision that prevents a nonattainment area from implementing control measures when it sees fit. To the contrary, the Act expressly reserves the right for states to implement more stringent control measures than required:

Except as otherwise provided . . . nothing in [the Clean Air Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions or air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7416. Petitioners' citation to a 22-year-old rulemaking for the proposition that contingency measures may not be implemented "early" actually disproves the argument they are seeking to make. In emphasizing that contingency measures are "additional control" measures, Petitioners point to preamble language emphasizing that such measures are those "*not contained in the applicable core control strategy.*" Pet. Br. at 54 (emphasis in brief). This key concept in the preamble shows that it is not the time when contingency measures are implemented, but rather the purpose for which they are implemented, which is important. Contingency measures must be strategies above and beyond those adopted by the plan to meet targets such as Reasonable Further Progress. The contingency measures in the MAG 2012 Five Percent Plan meet this requirement. They are "not those relied on for [Reasonable Further Progress] or attainment." 79 Fed. Reg. at 33114. That is, they are not part of the "core" strategy to reach attainment.

Petitioners' interpretation of the statute would also lead to absurd results. Any contingency measure implemented prior to when it was needed for attainment could potentially result in its disqualification as a contingency measure. This would mean nonattainment areas would be penalized for doing more than what is required under the CAA and that they would be loath to implement a contingency

measure “early” lest they be required to subsequently include additional contingency measures in their SIP.

Finally, public health is still protected under Petitioners’ scenario where attainment is not achieved and contingency measures are not “available” because they have been somehow “used.” As EPA explained, the benefits of the MAG 2012 Five Percent Plan contingency measures are permanent and ongoing. Resp. Br. at 68-86. These were not one-time reductions after which emissions would be expected to rise again in the future.

IV. REMEDY

Petitioners request a determination that EPA approval of the MAG 2012 Five Percent Plan was “an abuse of discretion and contrary to law,” but fail to specify what relief they seek. MAG requests that this Court uphold EPA’s approval of the successful MAG 2012 Five Percent Plan and deny the Petition for Review.

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

DATED this 31st day of December, 2014

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief contains 9,210 words and has been prepared in 14-point Times New Roman proportionally spaced typeface.

/s/ Chet M. Thompson

CERTIFICATE OF SERVICE

I certify that on December 31, 2014, I electronically filed a copy of this Proposed Respondent Intervenors' Brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case.

/s/ Chet M. Thompson

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Proposed Respondent Intervenor states that MAG is unaware of any related cases pending in this Court.

No. 14-72327

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANDRA L. BAHR AND DAVID MATUSOW,
Petitioners,

v.

GINA MCCARTHY, Administrator United States Environmental Protection Agency;
JARED BLUMENFELD, Regional Administrator, EPA Region IX; U.S.
ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

and

STATE OF ARIZONA
Respondent-Intervenor

and

MARICOPA ASSOCIATION OF GOVERNMENTS
Proposed Respondent-Intervenor

PETITION FOR REVIEW

**PROPOSED RESPONDENT-INTERVENOR'S SUPPLEMENTAL
EXCERPTS OF RECORD**

VOLUME 1

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Janice K. Brewer
Governor

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

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Henry R. Darwin
Director

March 10, 2014

Mr. Gregory Nudd
U.S. Environmental Protection Agency
Region IX, Mail Code: Air 2
75 Hawthorne Street
San Francisco, CA 94105-3901

Subject: Docket # EPA-R09-OAR-2013-0762

Dear Mr. Nudd:

The Arizona Department of Environmental Quality (ADEQ) is proud to provide you with this letter supporting the United States Environmental Protection Agency's (EPA's) proposed approval of the *Maricopa Association of Governments Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area* and the *Final 2012 Five Percent Plan for PM10 for the Pinal County Township 1 North Range 8 East* portion (2012 Five Percent Plan). ADEQ notes that the Notice of Proposed Rule Making includes Apache Junction and portions of Pinal County in the proposed approval. While we understand EPA's action appears to propose approval for the entire 2012 Five Percent Plan, including the Pinal County portions, we request that EPA make its actions regarding Pinal County explicitly clear in the Notice of Final Rule Making.

INTRODUCTION

EPA's proposed approval of the 2012 Five Percent Plan is the result of many years of plans, rules and efforts to reduce the emission of dust into the atmosphere. In fact, the Phoenix metropolitan area has been out of attainment with some form of a dust standard (e.g. total suspended particulates and PM-10) since the 1970 Clean Air Act. The constant effort to reduce the health impacts associated with dust has resulted in the area applying dust control measures that are among the most stringent in the Country.

The success of this most recent plan is the result of exceptional collaboration between air quality planning organizations, air quality regulatory agencies, the regulated community, members of the public and advocates for environmental improvement. Between January 1, 2011 and the submission of the plan to EPA in 2012, the Director of ADEQ, Henry Darwin, and the Chairwoman of the Arizona Legislature's House Environmental Committee, Amanda Reeve, hosted a series of stakeholder meetings with the sole purpose of fixing the problems that EPA identified in the *MAG 2007 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area* (2007 Five Percent Plan). These meetings generally took place once every two weeks to discuss potential developments that would improve upon the region's past efforts.

Southern Regional Office

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The resulting collaboration gave ADEQ, the Maricopa County Air Quality Department (MCAQD) and the Maricopa Association of Governments (MAG) the platform upon which to add innovative control strategies to address the dust issues that remained after the submission of previous plans.

In between stakeholder meetings, technical staff from ADEQ, MCAQD, MAG and representatives of the regulated community met with technical staff from EPA to ensure that the new plan would address all of the issues that EPA proposed to disapprove in the 2007 Five Percent Plan. The coordination between all of the parties in these meetings was the foundation for the success of this plan. Those that were responsible for developing the technical solutions were able to discuss strategies for resolving the problems, get immediate feedback from EPA technical staff, and work together to overcome new challenges that arose.

TECHNICAL WORK TO SUPPORT 2012 FIVE PERCENT PLAN

The most critical element that this group developed was the revised emissions inventory. Each non-attainment area State Implementation Plan is required to contain an accounting of all the emissions from the various sources of air pollution during the baseline year. Using information related to population and economic growth, this baseline emissions inventory is then grown to project emissions in future years. The 2007 Five Percent Plan included both the baseline emissions inventory and the projection of that inventory into the attainment year of 2010. Unfortunately, at the time that the 2007 Five Percent Plan was developed, no one could have predicted the economic recession that would occur in 2008 and 2009. As a result, the best possible predictions in 2007 were ultimately proved to be inaccurate at the time the plan was reviewed in 2010.

Despite the fact that the 2007 Five Percent Plan's crystal ball was inaccurate, the plan was still foundational to the work that has been accomplished in the 2012 Five Percent Plan. After redeveloping the 2008 and 2011 emissions inventories, the technical work demonstrated that the dust reduction strategies employed by the 2007 Five Percent Plan achieved sufficient reductions to satisfy the Clean Air Act's requirement of annual five percent emissions reductions between 2008 and the ultimate attainment year of 2012. This also meant that the technical work demonstrated reasonable further progress toward attainment of the 24-hour PM-10 standard.

Correction of the technical issues with the 2007 Five Percent Plan allowed the stakeholder group to focus on resolving the remaining dust issues that were reported by the monitors. In 2005 and 2006, the Maricopa County area's primary dust issues were the result of local generated air pollution remaining suspended during periods of air mass stagnation. The 2007 Five Percent Plan's focus was to reduce exceedances that occurred during stagnation periods. By 2010, it was clear that these efforts had great success, as the year was one of the cleanest on record. In 2011 and 2012, however, the area experienced exceedances during high wind events or large dust storms that are common during the monsoon season in the desert Southwest. Each of these events would either overwhelm the Best Available Control Measures and Most Stringent Measures that were employed to reduce dust within the area, or transport dust into the area from areas that were outside of the nonattainment area's boundaries.

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IMPACT OF EXCEPTIONAL EVENTS RULE

ADEQ, MCAQD and MAG had previously attempted to document exceptional events in accordance with EPA's Exceptional Events Rule (EER) in an effort to obtain EPA's approval of the 2007 Five Percent Plan; however, EPA disagreed with the demonstrations that had been provided. Between 2010 and 2012, EPA acknowledged the problems that existed within the EER and began developing a new policy and guidance document to provide additional clarity on how to make successful exceptional event demonstrations. In 2011 and 2012, ADEQ, MCAQD, and MAG worked closely with EPA to develop an exceptional event demonstration for the dust exceedances that occurred between July 2 and 8, 2011. This effort set national precedent in September 2012 when EPA concurred with the demonstration, marking the first time that an exceptional event demonstration was approved under the revised policy and guidance. By the middle of 2013, ADEQ, MCAQD and MAG repeated this feat an additional 16 times, demonstrating that the dust issues in the Maricopa County area were the result of natural conditions that either overwhelmed the stringent dust controls, or winds that blew large concentrations of dust throughout the region. Overall, EPA concurred that 131 of 133 exceedances were the result of dust that could not be reasonably controlled through the application of dust controls within the Maricopa County nonattainment area.

Throughout the development of these exceptional event demonstrations, ADEQ, MCAQD, MAG and EPA looked for additional methods to reduce the overall effort necessary to successfully make an exceptional event demonstration. Prior to EPA's revised guidance, ADEQ, MCAQD and MAG spent hundreds of staff hours and created more than 400 pages of technical information to support the demonstration that a single day's exceedance was the result of an exceptional event. As previously noted, EPA did not concur with this demonstration. The entire exceptional event demonstration for July 2 through 8, 2011, still required hundreds of staff hours, and seventy-five thousand dollars of contractor assistance, but significantly reduced the overall number of pages necessary to make a successful demonstration. This effort also identified additional efficiencies, and the next 17 demonstrations were made using fewer staff hours and contractor support. Ultimately 16 of these demonstrations were approved. Still, the overall costs to the State and its partners were not insignificant, as demonstrated below.

Phoenix Event	Total Staff Hours/Event	Staff Cost Estimate/Event	Contractor Cost Estimate/Event	Subtotal Cost Estimate
July 2-8, 2011	615	\$31,000	\$75,000	\$100,000
17 Additional Events	175	\$8,800	\$25,000	\$575,000
Total Estimated Costs for Phoenix Exceptional Events To Date				\$675,000

Note: "Total staff hours/event" include time estimates from ADEQ, MCAQD and MAG

It should be noted, that ADEQ has no information regarding how much time or money EPA has spent providing technical consultation and reviewing the 18 successful demonstrations. In addition, should EPA finalize approval for the 2012 Five Percent Plan, ADEQ expects to submit an unpredictable number of exceptional event demonstrations each year throughout the 20-year maintenance period as Arizona's natural dust storms continue to impact the Maricopa County Nonattainment area.

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Despite the successful efforts to reduce the cost and time spent making an exceptional event demonstration, the process remains unsustainable. The \$675,000 and thousands of staff-hours spent making these demonstrations do nothing to further ADEQ or EPA's mission of protecting public health or the environment. ADEQ's air quality division is primarily funded by fees for the services it provides, with less than ten percent of its overall revenue coming from EPA grants. These resources are best spent doing work that protects public health and the environment from controllable sources of air pollution, rather than simply providing technical proof for something that most Arizonans know for fact - that natural events will, from time-to-time, create uncontrollable large dust storms in Arizona, especially during the monsoon season. Absent the burden of documenting the well-known, ADEQ's money and staffing resources could be better spent on more proactive efforts such as forecasting and providing the public with advanced notification of dust issues so that people can take action to protect themselves.

ADEQ maintains that additional streamlining and correction need to be made to the Exceptional Events Rule and its guidance. ADEQ has previously provided recommendations in other forums regarding the need for clear deadlines for EPA decisions, the need for a clear evidentiary threshold, the need for specific criteria for determining what constitutes an exceptional event, and the need for a dispute resolution process. Instead of repeating the details of those recommendations here, it is sufficient to note that States continue to need transparency, predictability and certainty regarding EPA's decisions. EPA has shown a high degree of partnership in beginning to address these issues, and that effort is greatly appreciated, but additional work needs to be done given the unsustainable levels of effort that are required to develop such demonstrations.

AIR POLLUTION FORECASTING AND THE DUST ACTION GENERAL PERMIT

Technical fixes to the 2007 Five Percent Plan and Exceptional Event Demonstrations were not the only efforts that resulted in the proposed approval of the 2012 Five Percent Plan. ADEQ, MCAQD, MAG, the stakeholder community and the public also pioneered other strategies to reduce dust emissions and their impact to both public health and the environment.

The first such strategy is an increased reliance on air pollution forecasting. Most people are familiar with weather forecasting. It helps us all to make decisions regarding outdoor activities, the type of clothing to wear during the day, and whether carrying an umbrella might be appropriate. In a similar approach, ADEQ has a history of doing voluntary air pollution forecasts to help the public to know what to expect in terms of air pollution episodes, and whether they should plan activities to avoid exposure to unhealthy concentrations of air pollution. As noted above, the vast majority of elevated dust concentrations occur as a result of natural or otherwise uncontrollable conditions. Because these conditions can be predicted, the public is empowered to protect their own health. If a known poor air quality day is coming up, those that are sensitive to the air pollution can take early action to mitigate exposure, and lessen the risk of a health-episode.

As part of the 2012 Five Percent Plan, ADEQ is now required to provide the public and the regulated community with a dust risk forecast that identifies the risk of dust generation for the

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next five days. If there is a high risk of dust generation, A.R.S. 49-457.05 requires owners and operators of a dust generating activity to employ best management practices to reduce dust as soon as practicable before and during a day forecast to be at high risk. Sources that already have air quality permits must employ the best management practices already identified in the permit. Sources without an air quality permit must meet the best management practices that are identified in the Dust Action General Permit.

The Dust Action General Permit is unique in that its dust control requirements are applicable even if the owner or operator of the dust generating activity is not required to operate under the permit. The 2007 Five Percent Plan focused heavily on achieving emissions reductions from activities that generally require an air quality permit. Through the stakeholder process for the 2012 Five Percent Plan, it was determined that unpermitted sources remained an area of concern, especially on days with high wind. This permit was designed to identify Best Management Practices for unpermitted dust generating activities and to add additional enforceability through the requirement to operate under the permit if it was demonstrated that Best Management Practices were not employed as soon as practicable before and during a day forecast to be at high risk of dust generation. The permit adds new monitoring, record keeping and reporting requirements to the previously unpermitted source of dust, as well as ensures more timely pursuit of penalties for additional violations.

Because the Dust Action General Permit is an innovative and emerging control practice, the only way that the 2012 Five Percent Plan could demonstrate its benefit was through increase compliance with the dust control requirements for unpermitted sources. The plan itself relied upon a one percent increase in the effectiveness of Maricopa County Rule 310.01, and, as noted in MCAQD's comments regarding the plan, a two percent increase was observed.

To ADEQ's knowledge, this is the first time that an air pollution control program has used a forecasting tool as a regulatory trigger, making the program innovative in its approach. In addition to the innovation, however, the program makes sense for Arizona, where air quality is not the only environmental concern. Water is often times one of the best controls for mitigating the generation of dust. In a desert environment, however, this commodity is precious and must also be conserved. Using the forecast as a trigger for the use of controls allows the regulated community to use this precious resource in the most effective way, ensuring that the best controls are employed when there is a significant risk of dust generation. Both the requirement to do forecasting and the Dust Action General Permit are critical components of the 2012 Five Percent Plan, and ADEQ encourages EPA to fully approve the Dust Action General Permit as soon as practicable.

INNOVATIVE VOLUNTARY EFFORTS TO REDUCE DUST CONCENTRATIONS

In addition to mandatory new controls that have been included in the 2012 Five Percent Plan, other programs were not included in the plan as commitments because of their emerging nature, and the inability to predict whether those efforts were sustainable. Although they were not included in the plan, it is important to highlight those measures in an effort to show the area's commitment to clean air.

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MCAQD and MAG have been on the leading edge of providing real time air quality information to the public through MCAQD's web site. While many states and agencies provide the public with access to air quality data, MCAQD and MAG have pioneered a method of reporting current air pollution concentrations on five-minute intervals. MCAQD has taken this a step further by developing an alert system called the Rapid Response network to let its inspectors and the public know when unusually high concentrations of air pollution are observed. Should an unusually high concentration be observed, Maricopa County staff is alerted to the concentration. If the cause cannot be quickly attributed to a regional event, Maricopa County staff uses an e-mail and text alert system to deploy inspectors to the area, inform the regulated community that action to reduce dust concentrations should be taken, and inform the public that they should take measures to protect their own health.

By providing this real time information to everyone near the specific monitor, MCAQD and its partners have successfully taken action to quickly identify the cause of the high concentrations and reduce dust within the area. In addition, ADEQ has heard testimony that cities have employed their public works departments and other city staff to reduce dust from activities that are not near monitors, as the alerts have heightened the general awareness of the problem.

Although the implementation of the network has not stopped every exceedance from occurring, it has improved the entire community's efforts to take corrective action quickly and improved efforts to maintain compliance with EPA's 24-hour health based PM-10 standard.

ONGOING CONTROL STRATEGIES

ADEQ and its partners are well aware that proposed approval of the 2012 Five Percent Plan does not mean that air pollution control planning for the area has ended. In truth, the forty-five years of planning that has already occurred can be considered training for the next twenty-years where maintenance of our efforts must occur.

One of the challenges for the Maricopa County area will be the growth that is expected to occur. With new people comes additional dust generating activities, more vehicular traffic, and more potential for disturbing sources of dust. The area is already subject to some of the most stringent dust controls throughout the Country, and the continued application of these controls will be central to the effort to maintain attainment with the 24-hour PM-10 standard. Other strategies outlined within the MAG Transportation Improvement Plan and Regional Transportation Plan will also be employed to ensure that dust from unpaved roads and vehicular traffic is minimized.

ADEQ and its partners will also continue to improve outreach and continuing education of the community regarding the importance of dust controls and methods that can be used to identify and then reduce exposure to high concentrations of air pollution. MCAQD, Pinal County Air Quality Control District (PCAQCD) and ADEQ all operate school flag programs that are tied to the air quality forecast to help inform children and the community about the potential daily dangers of air pollution. ADEQ has educated many school districts regarding the air pollution impacts of school bus idling at schools. MCAQD has developed a free smart phone app to provide the public with automatic access to ADEQ's pollution forecast. MCAQD's www.cleanairmakemore.com web site also provides information about the daily air pollution

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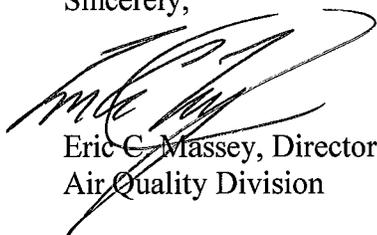
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requirements and tips for protecting public health and reducing emissions. These are but a few examples of the efforts that our agencies will build upon in the coming years.

In conclusion, ADEQ provides its unequivocal support for EPA's proposed approval of the 2012 Five Percent Plan, and recommends final approval of the plan. This letter serves only to highlight some of the provisions that assisted in making this plan successful. We also recognize that our efforts must remain vigilant. Through its partnership with its stakeholders, air quality planning and regulatory agencies, ADEQ will continue to support the development and application of new and innovative methods of reducing concentrations of dust.

Thank you for this opportunity to comment, and should you have any questions or concerns, please contact me at (602) 771-2288.

Sincerely,



Eric C. Massey, Director
Air Quality Division

ECM

cc: William Wiley, Maricopa County Air Quality Department
Lindy Bauer, Maricopa Association of Governments
Colleen McKaughan, United States Environmental Protection Agency

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March 6, 2014

VIA ELECTRONIC AND OVERNIGHT MAIL

Mr. Gregory Nudd (Air-2)
 U.S. Environmental Protection Agency, Region IX
 75 Hawthorne Street
 San Francisco, California 94105-3901

RE: Docket No. EPA-R09-OAR-2013-0762
Maricopa Association of Governments Comments on the Proposed Approval and Promulgation of Implementation Plans–Maricopa County PM-10 Nonattainment Area; Five Percent Plan for Attainment of the 24-Hour PM-10 Standard

Dear Mr. Nudd:

The Maricopa Association of Governments (MAG) represents 27 incorporated cities and towns within Maricopa County and the contiguous urbanized area, the Gila River Indian Community, the Salt River Pima-Maricopa Indian Community, Fort McDowell Yavapai Nation, and Maricopa and Pinal Counties. As the designated Regional Air Quality Planning Agency, the Maricopa Association of Governments Regional Council adopted the MAG 2012 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area on May 23, 2012. On February 6, 2014, the Environmental Protection Agency (EPA) published a notice proposing full approval of the plan and a determination that the PM-10 standard has been met. At this time, MAG is submitting comments to EPA in support of the proposed approval of the plan.

Collectively, the MAG 2012 Five Percent Plan for PM-10 exemplifies a tremendous collaborative effort among all levels of government and the private sector. The plan was prepared through a well-coordinated approach with the Arizona Department of Environmental Quality, Arizona Department of Transportation, Maricopa County Air Quality Department, and Maricopa Association of Governments. There was also extensive coordination with EPA Headquarters and EPA Region IX. The measures in the plan have been successfully implemented by the local governments, the State, business, and industry. As a result, EPA has determined that the region has the three years of clean data in 2010-2012 that were necessary to attain the PM-10 standard.

Specifically, the MAG 2012 Five Percent Plan for PM-10 is designed to meet the requirements of Section 189(d) of the Clean Air Act and address the technical approvability issues with the prior 2007 Five Percent Plan identified by EPA. The plan contains a wide variety of existing control measures and projects that have been implemented to reduce PM-10 and a new measure designed to reduce PM-10 during high risk conditions, including high winds. While the 2007 Five Percent Plan was withdrawn to include new information, a wide range of control measures in that plan continued to be implemented to reduce PM-10 and were resubmitted. The plan demonstrated that the measures will reduce emissions by five percent per year and demonstrated attainment of the PM-10 standard as expeditiously as practicable, which was 2012.

As required by the Clean Air Act, the MAG 2012 Five Percent Plan for PM-10 includes contingency measures, which achieve emissions reductions beyond those measures relied upon for the five percent reductions in emissions and attainment of the standard. For conformity, the plan also contains the onroad mobile source emissions budget for 2012.

A Voluntary Association of Local Governments in the Maricopa Region

Again, the Maricopa Association of Governments supports the proposed full approval of the MAG 2012 Five Percent Plan for PM-10. We have greatly appreciated the close coordination and technical assistance from the Environmental Protection Agency. We are looking forward to working cooperatively with EPA in our continuing efforts to improve air quality. If you have any questions, please do not hesitate to contact me at (602) 254-6300.

Sincerely,

A handwritten signature in purple ink that reads "Lindy Bauer". The signature is written in a cursive style with a large, stylized initial "L".

Lindy Bauer
Environmental Director

cc: Henry Darwin, Arizona Department of Environmental Quality
William Wiley, Maricopa County Air Quality Department
Colleen McKaughan, Environmental Protection Agency