

2011 Exceedances of the 24-Hour PM-10 Standard by Date
(Preliminary Data Through September 11, 2011)

Date	Monitor	24-Hour Avg. PM-10 Concentration in ug/m ³	Additional Information
February 19, 2011	West Chandler	167.9	Frontal system winds from the south. Five continuous Pinal County PM-10 monitors recorded exceedances on February 19, 2011.
March 12, 2011	South Phoenix	168.5	
July 3, 2011	Buckeye	385.6	Regional dust storm
	Central Phoenix	279.8	
	Durango	278.1	
	Dysart	240.0	
	Glendale	242.8	
	Greenwood	254.6	
	Higley	196.8	
	South Phoenix	280.7	
	Supersite	229.0	
	West Chandler	199.2	
	West 43rd Ave.	250.7	
	West Phoenix	244.2	
	Zuni Hills	260.8	
July 4, 2011	Higley	198.5	Localized thunderstorm outflow winds from the south. Five continuous Pinal County PM-10 monitors recorded exceedances on July 4, 2011.
July 5, 2011	Buckeye	164.2	Regional dust storm
	Central Phoenix	277.5	
	Durango	156.9	
	Dysart	220.0	
	Glendale	168.3	
	Greenwood	156.0	
	Higley	375.7	
	South Phoenix	207.4	
	Supersite	331.8	
	West Chandler	360.6	
	West Phoenix	267.0	
July 7, 2011	Higley	266.9	Localized thunderstorm outflow winds late in the evening along with residual dust from the July 5, 2011 regional dust storm. Five continuous Pinal County PM-10 monitors recorded exceedances on July 7, 2011.
	West Chandler	205.8	
July 8, 2011	Apache Junction	194.2	Localized thunderstorm outflow winds
July 18, 2011	Buckeye	196.7	Regional dust storm
	Central Phoenix	211.2	
	Durango	268.2	
	Dysart	163.9	
	Greenwood	209.3	
	South Phoenix	303.7	
	West 43rd Ave.	245.3	
	West Phoenix	159.7	
August 3, 2011	West Chandler	249.3	Localized thunderstorm outflow winds early in the morning. Four continuous Pinal County PM-10 monitors recorded exceedances on August 3, 2011.

Date	Monitor	24-Hour Avg. PM-10 Concentration in ug/m ³	Additional Information
August 5, 2011	Buckeye	158.7	Residual dust from August 4 evening thunderstorms-under investigation
August 18, 2011	Buckeye	296.8	Regional dust storm
	Central Phoenix	232.2	
	South Phoenix	179.0	
	West Chandler	186.1	
August 25, 2011	Buckeye	235.9	Regional dust storm
	Central Phoenix	308.7	
	Durango	437.5	
	Dysart	273.7	
	Glendale	241.2	
	Greenwood	388.6	
	South Phoenix	421.5	
	Supersite	242.2	
	West Chandler	278.6	
	West 43rd Ave.	370.3	
	West Phoenix	212.6	
Zuni Hills	212.8		
August 26, 2011	Apache Junction	169.0	Localized thunderstorm outflow winds. Four other continuous Pinal County PM-10 monitors recorded exceedances on August 26, 2011.
August 27, 2011	Buckeye	226.3	Regional dust storm
	Central Phoenix	234.0	
	Durango	261.4	
	Glendale	220.4	
	Greenwood	208.2	
	South Phoenix	301.5	
	West Chandler	229.3	
	West 43rd Ave.	292.6	
West Phoenix	164.6		
August 28, 2011	Apache Junction	282.7	Carryover from August 27, 2011 regional dust storm. Four other continuous Pinal County PM-10 monitors recorded exceedances on August 28, 2011.
	Higley	175.8	
September 2, 2011	Apache Junction	217.4	Regional dust storm
	Buckeye	169.8	
	Central Phoenix	308.0	
	Durango	255.4	
	Greenwood	198.1	
	Higley	213.5	
	South Phoenix	339.3	
	Supersite	208.9	
	West Chandler	387.5	
September 6, 2011	Apache Junction	172.6	Localized thunderstorm outflow-under investigation
September 11, 2011	North Phoenix	184.1	Regional dust storm
	Supersite	178.7	
	West Phoenix	168.8	

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	August 27, 2011	164.6	Regional dust storm
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Zuni Hills	July 3, 2011	260.8	Regional dust storm
	August 25, 2011	212.8	Regional dust storm

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kelly Paisley; and Sandra Bahr,
Plaintiffs,

vs.

Henry R. Darwin, in his capacity as Acting
Director of the Arizona Department of
Environmental Quality; and Doug Ducey,
in his capacity as Treasurer of the State of
Arizona,
Defendants.

No. CV-10-1253-PHX-DGC

ORDER

Plaintiffs are residents of Maricopa County seeking to enforce compliance with requirements of the Clean Air Act (“CAA”), 42 U.S.C. § 7401 et seq., and a State Implementation Plan submitted by Arizona under the CAA. The parties have filed motions for summary judgment, and the motions are fully briefed. Oral arguments were heard on September 2, 2011. For reasons stated below, Plaintiffs’ motion will be granted and Defendants’ motion denied.

I. Background.

The CAA establishes a comprehensive program for controlling and improving the Nation’s air quality through state and federal regulation. Pursuant to the CAA, the Environmental Protection Agency (“EPA”) has established national ambient air quality standards (“NAAQS”) for certain pollutants. 42 U.S.C. §§ 7408, 7409. Communities that violate the NAAQS are designated as nonattainment areas. The CAA requires each

1 state to develop a state implementation plan (“SIP”) providing for the attainment,
2 maintenance, and enforcement of the NAAQS within each area of the state. *Id.* § 7410.
3 The SIP is to be submitted to the EPA for approval. *Id.* “[O]nce the EPA approves a
4 SIP, the state is required to comply with it unless and until a replacement SIP is formally
5 approved.” *Coal. for Clean Air, Inc. v. S. Coast Air Quality Mgmt. Dist.*, No. CV97-
6 6916-HLH, 1999 WL 33842864, at *1 (C.D. Cal. Aug. 27, 1999) (citing 42 U.S.C. §
7 7410(a)(3)). Indeed, the approved SIP’s “requirements and commitments become
8 binding upon the state as a matter of federal law.” *AIR v. C&R Vanderham Dairy*, 435 F.
9 Supp. 2d 1078, 1085 (E.D. Cal. 2006).

10 Maricopa County, particularly the Phoenix metropolitan area, has been designated
11 as a nonattainment area for carbon monoxide, ozone, and particulate matter. In 1993, the
12 State of Arizona developed a proposed SIP, which later was revised and approved by the
13 EPA. The SIP included new funding sources for transit improvements which recently
14 had been adopted by the Arizona Legislature as part of House Bill 2001 (“H.B. 2001”)
15 and which were designed to reduce carbon monoxide and ozone and ensure compliance
16 with air quality standards mandated by the CAA. H.B. 2001, 41st Leg., 6th Sp. Sess.
17 (Ariz. 1993). Among the provisions of H.B. 2001 incorporated into the SIP were
18 amendments to A.R.S. § 5-522 to provide for the payment of lottery monies into the local
19 transportation assistance fund (“LTAF”). Subsection (A) of amended § 5-522 provided
20 that not less than 31.5% of revenues received from a new multistate lottery game known
21 as “Powerball,” up to a maximum of \$18 million each fiscal year, would be deposited
22 into the LTAF. A.R.S. § 5-522(A)(4) (1994). This provision applied only if \$45 million
23 would otherwise be available to the state general fund from lottery proceeds. A.R.S.
24 § 5-522(E) (1994). Under the SIP, the \$18 million would be apportioned to counties on
25 the basis of their citizens’ participation in the lottery, with an estimated \$10.8 million per
26 year going to Maricopa County. A.R.S. § 28-2602(F) (1994); Doc. 41-1 at 33.

27 In 2010 – the terms of the federally-binding SIP notwithstanding – the Arizona
28 Legislature passed House Bill 2012 (“H.B. 2012”) and repealed the provisions of § 5-522

1 that allocated lottery monies to the LTAF, as well as the statutory provisions establishing
2 the LTAF itself, A.R.S. §§ 28-8101 through 28-8104 (formerly A.R.S. §§ 28-2601 and
3 28-2602). H.B. 2012, 49th Leg., 7th Sp. Sess. (Ariz. 2010). Governor Brewer signed the
4 bill into law on March 18, 2010, and it became effective three months later. *Id.* § 50.

5 In June 2011, Plaintiffs filed suit against the State, the Governor, the Arizona
6 Department of Environmental Quality (“ADEQ”), and the ADEQ’s then-current Director,
7 Benjamin Grumbles. Doc. 1. In an order dated November 8, 2010, the Court concluded
8 that Plaintiffs have standing to sue, but dismissed the State, the Governor, and the ADEQ
9 based on Eleventh Amendment immunity. Doc. 15.

10 Plaintiffs filed an amended complaint against the new Acting Director of the
11 ADEQ, Henry Darwin, and the Treasurer for the State of Arizona, Doug Ducey. Doc. 33.
12 Because the portion of the SIP requiring that lottery funds be deposited into the LTAF is
13 enforceable as a matter of federal law, the complaint alleges, the Arizona Legislature was
14 without authority to repeal the deposit of lottery funds into the LTAF absent prior
15 approval from the EPA. *Id.* ¶ 37. Plaintiffs claim that the failure of Defendants to ensure
16 the continued deposit of lottery funds into the LTAF as provided for in the SIP
17 constitutes a violation of the CAA, 42 U.S.C. § 7604(f). *Id.* ¶ 39. Plaintiffs seek an
18 order, pursuant to 42 U.S.C. § 7604(a)(1), declaring that the Arizona Legislature’s repeal
19 of the deposit of lottery funds into the LTAF is preempted by the CAA and therefore has
20 no legal effect, declaring that the requirement to deposit lottery funds into the LTAF as
21 required by the SIP remains in full force and effect as a matter of federal law, and
22 directing Defendant Ducey to comply with the requirement to deposit lottery funds into
23 the LTAF. *Id.* at 8, ¶ 40.

24 **II. Summary Judgment Standard.**

25 A party seeking summary judgment bears the initial responsibility of informing
26 the court of the basis for its motion, and identifying those portions of the record
27 demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*,
28 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the evidence, viewed in

1 favor of the nonmoving party, shows that there is no genuine issue as to any material fact
2 and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

3 **III. Analysis.**

4 Defendants contend that the claims against them are barred by the Eleventh
5 Amendment. Doc. 38. Plaintiffs argue that H.B. 2012 is preempted by the CAA and that
6 declaratory and injunctive relief are appropriate. Doc. 40.

7 **A. Defendant Darwin.**

8 In the CAA, Congress authorizes civil suits against any person or governmental
9 instrumentality “who is alleged to have violated . . . or to be in violation of an emission
10 standard or limitation” under the CAA. 42 U.S.C. § 7604(a)(1). Congress grants this
11 authorization, however, only to “the extent permitted by the Eleventh Amendment[.]” *Id.*

12 The Eleventh Amendment generally bars suit against state officials where the state
13 is the real party in interest, that is, where “the judgment would tap the state’s treasury or
14 restrain or compel government action.” *Almond Hill Sch. v. U.S. Dep’t of Agric.*, 768
15 F.2d 1030, 1033 (9th Cir. 1985); *see Pennhurst State Sch. & Hosp. v. Halderman*, 465
16 U.S. 89, 101 (1984). Under the exception to this immunity created by the Supreme Court
17 in *Ex Parte Young*, 209 U.S. 123 (1908), however, a federal court may award prospective
18 injunctive relief “when a plaintiff brings suit against a state official alleging a violation of
19 federal law [.]” *Natural Res. Def. Council v. Cal. Dep’t of Transp.*, 96 F.3d 420, 422 (9th
20 Cir. 1996). The *Young* exception requires a “special relation” between the state officer
21 sued and the challenged statute, such that the officer has “some connection with the
22 enforcement of the act[.]” *Confederated Tribes & Bands of Yakama Indian Nation v.*
23 *Locke*, 176 F.3d 467, 469 (9th Cir. 1999).

24 Defendants contend that because Director Darwin has no responsibility over the
25 implementation of the former LTAF and former A.R.S. § 5-522, he lacks the “special
26 relation” required for the *Young* exception. Doc. 38 at 7. As the Court previously found
27 (Doc. 15 at 7), the ADEQ Director is directly responsible for enforcing the SIP and may
28 adopt revisions to the SIP only in conformity with federal regulations. A.R.S. § 49-404;

1 *see Sweat v. Hull*, 200 F. Supp. 2d 1162, 1173 (D. Ariz. 2001). In this case, Plaintiffs
2 seek to enforce the SIP – they seek a declaration that the obligation to deposit lottery
3 funds into the LTAF, as required by the SIP, remains in effect. Doc. 33 at 8. Defendant
4 Darwin, as the state official responsible for enforcing the SIP, has the requisite “special
5 relation” to the SIP for purposes of the *Young* exception.

6 Defendants note, correctly, that the sole form of injunctive relief sought in the
7 complaint is an order directing the Treasurer – not the ADEQ Director – to deposit lottery
8 funds into the LTAF. Because Director Darwin may not effectuate this injunctive relief,
9 they argue, he does not have the special relation to the claimed violation for purposes of
10 the *Young* exception and the suit against him therefore is barred by the Eleventh
11 Amendment. Doc. 38 at 7-10. The Court does not agree.

12 This Circuit has “long held that the Eleventh Amendment does not generally bar
13 declaratory judgment actions against state officers.” *Nat’l Audubon Society, Inc. v.*
14 *Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (citations omitted). “The only question is
15 whether the declaratory action is seeking prospective, rather than retrospective, relief.”
16 *Id.*; *see Ringo v. Lombardi*, No. 09-4095-CV-C-NKL, 2010 WL 3310240, at *4 (W.D.
17 Mo. Aug. 19, 2010) (under *Young* “state officials may be sued in their official capacities
18 for prospective declaratory and injunctive relief where plaintiffs allege that the officials
19 are violating federal law”). Plaintiffs seek a declaration that repeal of the allocation of
20 lottery funds to the LTAF is preempted by the CAA, and that the SIP’s requirement that
21 lottery funds be deposited into the LTAF therefore remains in effect. Doc. 33 at 8.
22 Stated differently, Plaintiffs claim that Defendants’ failure to enforce the SIP and allocate
23 lottery funds to the LTAF constitutes a continuing violation of federal law. Defendants
24 do not assert, and the Court does not otherwise find, that the declaratory relief sought by
25 Plaintiffs has “retrospective effect; rather it has purely prospective effect, either of its
26 own force or as a basis for . . . injunctive relief.” *Nat’l Audubon Society*, 307 F.3d at 848;
27 *see S & M Brands, Inc. v. Summer*, 393 F. Supp. 2d 604, 619 (M.D. Tenn. 2005)
28 (the plaintiffs “couched their claims entirely in prospective language” by seeking

1 judicial declarations that repeal of certain state statutory provisions is preempted by
2 federal law). The Court concludes that Director Darwin is the appropriate state official to
3 receive the Court's declaratory judgment that the SIP remains the controlling law and
4 must be complied with. The Eleventh Amendment does not bar suit against Director
5 Darwin, "who has direct authority over and principal responsibility for enforcing [the
6 SIP]." *Nat'l Audubon Society*, 307 F.3d at 347. Defendants' summary judgment motion
7 will be denied in this respect.

8 **B. Defendant Ducey.**

9 Defendants argue that the Arizona Legislature repealed the LTAF itself, the
10 complaint seeks no relief with respect to the repeal, and therefore there is no LTAF into
11 which the Treasurer may deposit lottery monies. As a result, Defendants contend, the
12 Court cannot provide redress. Doc. 38 at 6-7. Defendants read the complaint too
13 narrowly.

14 In the section entitled "REPEAL OF LTAF" (Doc. 33 at 7), Plaintiffs allege that
15 the Legislature "was without authority to repeal the deposit of lottery funds into the
16 LTAF" (*id.* ¶ 38). This challenge to the Legislature's authority, reasonably construed, is
17 not limited solely to the repeal of the provisions of A.R.S. § 5-522. The claim that
18 Defendants violated federal law by failing "to ensure the continued deposit of lottery
19 funds into the LTAF as provided for in the SIP" (*id.* ¶ 39) would ring hollow absent a
20 challenge to the repeal of the LTAF itself. Plaintiffs' complaint "must be construed so as
21 to do justice." Fed. R. Civ. P. 8(e). The Court finds that it can provide appropriate
22 redress and Plaintiffs therefore have standing to sue Defendant Ducey. Defendants'
23 summary judgment motion will be denied in this respect.¹

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26 ¹ Defendants argued in their motion that the 2009 version of the statute no longer
27 permitted the Treasurer to deposit funds from A.R.S. § 5-522(A) into the LTAF, and that
28 returning to that statutory scheme therefore would not permit injunctive relief against the
Treasurer. As made clear at oral argument, however, Plaintiffs seek enforcement of the
SIP, and the SIP clearly contained statutory authority for the Treasurer to deposit funds
from A.R.S. § 5-522(a) in the LTAF. *See* A.R.S. § 28-2602(F) (1994).

1 **C. The SIP Prohibits the Repeal.**

2 The Supremacy Clause of the United States Constitution provides that the
3 “Constitution, and the Laws of the United States which shall be made in Pursuance
4 thereof . . . shall be the supreme Law of the Land . . . , any Thing in the Constitution or
5 Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI cl. 2. Under
6 this clause, “Congress has the power to preempt state law.” *Crosby v. Nat’l Foreign*
7 *Trade Council*, 530 U.S. 363, 372 (2000). Indeed, as the Supreme Court recently
8 confirmed, “[t]he Supremacy Clause, on its face, makes federal law ‘the supreme Law of
9 the Land’ even absent an express statement by Congress.” *Pliva, Inc. v. Mensing*, 131
10 S. Ct. 2567, 2579 (2011).

11 This Circuit has made clear that provisions of an EPA-approved SIP are federally
12 enforceable in district court through the CAA’s citizen suit provision, 42 U.S.C.
13 § 7604(a)(1). *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738,
14 741 (9th Cir. 2008); *see also Latino Issues Forum v. EPA*, 558 F.3d 936, 938 (9th Cir.
15 2009); *Ass’n of Irrigated Residents v. U.S. E.P.A.*, 632 F.3d 584, 588 (9th Cir. 2011); *GM*
16 *Corp. v. United States*, 496 U.S. 530, 540 (1990). As amended by H.B. 2001, A.R.S.
17 § 5-522(A)(4) (1994) required that revenues from the multistate lottery game be
18 deposited into the LTAF. This requirement was made part of the EPA-approved SIP.
19 Doc. 39-1 at 7. Defendants admit that, absent prior approval from the EPA, the Arizona
20 Legislature lacked authority to repeal the portions of A.R.S. § 5-522(A) that are included
21 in the SIP, and that the Legislature’s attempt to do so therefore is null and void and the
22 lottery funding requirement included in the SIP remains in full force and effect. Doc. 36
23 ¶¶ 37-38. To the extent repeal of the statutory provisions establishing the LTAF itself
24 precludes full enforcement and implementation of the SIP, the Court finds that the
25 Legislature was without authority to repeal those provisions as well.

26 In summary, to the extent H.B. 2012 repealed portions of A.R.S. § 5-522(A) that
27 are included in the SIP and repealed the statutory provisions establishing the LTAF, *see*
28 A.R.S. § 28-8101 et seq., the bill “is ineffective and preempted by federal law.” *Sweat*,

1 200 F. Supp. 2d at 1172. Plaintiffs' motion for summary judgment will be granted in this
2 regard.

3 **D. Policy Arguments Are Inapposite.**

4 Defendants assert that this lawsuit has no significance to air quality or transit
5 services in the Phoenix area. Doc. 38 at 13-14. But the advisability of requiring lottery
6 funding for transit, or other policy considerations that went into the SIP, are not for this
7 Court to decide. "That some people honestly believe that the [LTAF] has outlived its
8 usefulness cannot mean that those of that view can take matters into their own hands."
9 *Kentucky Resources Council, Inc. v. EPA*, 304 F. Supp. 2d 920, 930 (W.D. Ky. 2004).
10 "[O]nce the EPA approves a SIP, the state is required to comply with it unless and until a
11 replacement SIP is formally approved." *Coal. for Clean Air, Inc. v. S. Coast Air Quality*
12 *Mgmt. Dist.*, No. CV97-6916-HLH, 1999 WL 33842864, at *1 (C.D. Cal. Aug. 27, 1999)
13 (citing 42 U.S.C. § 7410(a)(3)). If Defendants disagree with the SIP, they must follow
14 appropriate federal procedures to revise it. *See* 40 C.F.R. § 51.104. Compliance with the
15 CAA's procedure for revision of SIPs "is absolutely essential to maintaining national
16 standards for ambient air quality in a cooperative spirit. Without those procedural
17 controls, the [CAA] is bereft of coherence and enforcement power." *Id.*

18 **E. Conclusion.**

19 The Court concludes that Defendants Darwin and Ducey are properly named and
20 subject to suit in this case. The Court also finds that the SIP, which has the effect of
21 federal law under the CAA, precluded the Arizona Legislature from rescinding key
22 provisions of the SIP without EPA approval. As a result, the Court will grant summary
23 judgment in favor of Plaintiffs, deny Defendants' motion for summary judgment, and
24 order appropriate relief.

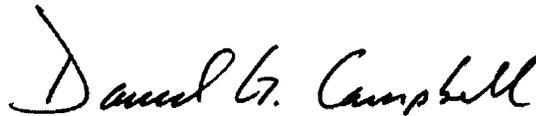
25 **IT IS ORDERED:**

- 26 1. Plaintiffs' motion for summary judgment (Doc. 40) is **granted**.
27 2. Defendants' motion for summary judgment (Doc. 38) is **denied**.
28 3. The Court enters the following declaratory relief: To the extent H.B. 2012

1 repealed portions of A.R.S. § 5-522(A) that are included in the SIP, and repealed the
2 statutory provisions establishing the LTAF, *see* A.R.S. § 28-8101 et seq., the bill is
3 ineffective and preempted by federal law. The requirement to deposit lottery funds into
4 the LTAF as set forth in the EPA-approved SIP remains in full force and effect.

5 4. The Court intends to enter an appropriate injunction against Defendant
6 Ducey to reinstate the deposit and disbursement of Arizona lottery funds into and from
7 the LTAF as required by the SIP. The parties are directed to confer and submit to the
8 Court a jointly proposed form of injunction by **September 23, 2011**. If the parties are
9 unable to agree, they shall, by **September 23, 2011**, provide the Court with memoranda
10 (not to exceed 7 pages each) setting forth their positions on an appropriate injunction.

11 Dated this 2nd day of September, 2011.

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16 David G. Campbell
17 United States District Judge
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