

April 23, 2009

TO: Members of the MAG Air Quality Technical Advisory Committee

FROM: John Kross, Queen Creek, Chair

SUBJECT: MEETING NOTIFICATION AND TRANSMITTAL OF TENTATIVE AGENDA

Thursday, April 30, 2009 - 1:30 p.m.
MAG Office, Suite 200 - Saguaro Room
302 North 1st Avenue, Phoenix

Please park in the garage underneath the building. Bring your ticket to the meeting; parking will be validated. For those using transit, the Regional Public Transportation Authority will provide transit tickets for your trip. For those using bicycles, please lock your bicycle in the bike rack in the garage.

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Members of the MAG Air Quality Technical Advisory Committee may attend in person, via video conference or by telephone conference call. Those attending by video conference must notify the MAG site three business days prior to the meeting.

Please be advised that under procedures approved by the MAG Regional Council, all MAG committees need to have a quorum to conduct the meeting. A quorum is a simple majority of the membership. If you are unable to attend the meeting, please make arrangements for a proxy from your entity to represent you.

TENTATIVE AGENDA

COMMITTEE ACTION REQUESTED

1. Call to Order

2. Call to the Audience

An opportunity will be provided to members of the public to address the Air Quality Technical Advisory Committee on items not scheduled on the agenda that fall under the jurisdiction of MAG, or on items on the agenda for discussion but not for action. Members of the public will be requested not to exceed a three minute time period for their comments. A total of 15 minutes will be provided for the Call to the Audience agenda item, unless the Air Quality Technical Advisory Committee requests an exception to this limit. Please note that those wishing to comment on action agenda items will be given an opportunity at the time the item is heard.

3. Approval of the February 26, 2009 Meeting Minutes

4. Eight-Hour Ozone Nonattainment Area Boundary Recommended by the Governor

By March 12, 2009, the Governor was required to recommend nonattainment area boundaries to the Environmental Protection Agency (EPA) for the revised eight-hour ozone standard. The Environmental Protection Agency had strengthened the standard by lowering it from .08 parts per million to .075 parts per million on March 12, 2008. The Arizona Department of Environmental Quality (ADEQ) had proposed a Strawman Option for a Revised Eight-Hour Ozone Nonattainment Area Boundary. The ADEQ proposed to extend the boundary only where absolutely necessary, primarily to include some power plants. On February 25, 2009, the MAG

2. For information.

3. Review and approve the February 26, 2009 meeting minutes.

4. For information and discussion.

Regional Council took action to support the Strawman Option.

On March 12, 2009, the Governor recommended the Eight-Hour Ozone Nonattainment Boundary for the new .075 parts per million standard to EPA. The recommended boundary is the same as the Strawman Option. The EPA will notify states and tribal communities of any modifications to their recommendations by November 12, 2009. There will be an opportunity to submit additional information and comments. The final ozone boundary designations will be made by EPA by March 12, 2010. It is anticipated that new air quality plans would be due in 2013. Please refer to the enclosed material.

5. Maricopa County Clean Air Initiative

In 2009, Maricopa County launched the Clean Air Make More Initiative. The core of the Clean Air Make More initiative revolves around the following ideal: the Maricopa County region is in a critical state when it comes to air pollution and it will take the efforts of every individual to clean up the air. The CleanAirMakeMore.com website serves as an educational tool for residents within Maricopa County. Through the website, radio advertising, billboard announcements and news releases, Maricopa County strives to educate the public on current air quality issues and to encourage them to take action to help clean the air we breathe.

6. Court Ruling on the EPA Exceptional Events Rule and the Implications for High Wind Events, Flagging, and Concurrences

In 2005, Congress amended the Clean Air Act to require EPA to promulgate rules for air quality monitoring during exceptional events. An exceptional event is an event that affects air quality; is not reasonably controllable or

5. For information and discussion.

6. For information and discussion.

preventable; caused by human activity that is unlikely to recur at a particular location or a natural event; and is determined by the EPA Administrator to be an exceptional event. In March 2007, EPA published a final exceptional events rule. The rule was then legally challenged by the Natural Resources Defense Council.

On March 20, 2009, the U.S. Court of Appeals for the D.C. Circuit issued a ruling which generally upheld the exceptional events rule. The implications for the Maricopa region will be discussed. Please refer to the enclosed information.

7. New Draft EPA Mobile Source Emissions Model

In accordance with the Clean Air Act, EPA is required to regularly update its mobile source emissions model. EPA is continuously collecting data and conducting emission studies to make sure the Agency has the best possible basis for its assessment. In April 2009, EPA released the Draft MOVES2009 model which is designed to be a replacement for the MOBILE6.2 model. The implications for the MAG region will be discussed.

8. Possible Greenhouse Gas Requirements in CLEAN-TEA

The National Association of Regional Councils and Association of Metropolitan Planning Organizations have indicated that greenhouse gas requirements may be included in the upcoming transportation reauthorization legislation in Congress. To date, both the draft Clean Low-Emissions Affordable New Transportation Equity Act (CLEAN-TEA) and the draft American Clean Energy and Security Act of 2009 include greenhouse gas requirements for metropolitan planning organizations. An overview will be provided.

7. For information and discussion.

8. For information and discussion.

9. Call for Future Agenda Items

The next meeting of the Committee has been tentatively scheduled for Tuesday, May 26, 2009 at 1:30 p.m. The Chairman will invite the Committee members to suggest future agenda items.

9. For information and discussion.

MINUTES OF THE
MARICOPA ASSOCIATION OF GOVERNMENTS
AIR QUALITY TECHNICAL ADVISORY COMMITTEE MEETING

Thursday, February 26, 2009
MAG Office
Phoenix, Arizona

MEMBERS ATTENDING

John Kross, Town of Queen Creek, Chairman
Sue McDermott, Avondale

Elizabeth Biggins-Ramer, Buckeye

#Jim Weiss, Chandler

#Jamie McCullough, El Mirage

Kurt Sharp for Tami Ryall, Gilbert

Doug Kukino, Glendale

James Nichols, Goodyear

#Greg Edwards for Scott Bouchie, Mesa

Joe Gibbs for Gaye Knight, Phoenix

*Larry Person, Scottsdale

#Antonio DeLaCruz, Surprise

Oddvar Tveit, Tempe

*Mark Hannah, Youngtown

*Walter Bouchard, Citizen Representative

*Corey Woods, American Lung Association of Arizona

*Barbara Sprungl, Salt River Project

*Brian O'Donnell, Southwest Gas Corporation

Mark Hajduk, Arizona Public Service Company

*Gina Grey, Western States Petroleum Association

*Valley Metro/RPTA

Dave Berry, Arizona Motor Transport Association

Jeannette Fish, Maricopa County Farm Bureau

Russell Bowers, Arizona Rock Products Association

*Greater Phoenix Chamber of Commerce

Amanda McGennis, Associated General
Contractors

*Spencer Kamps, Homebuilders Association of
Central Arizona

*Mannie Carpenter, Valley Forward

Kai Umeda, University of Arizona Cooperative
Extension

Beverly Chenausky, Arizona Department of
Transportation

Diane Arnst, Arizona Department of
Environmental Quality

*Wienke Tax, Environmental Protection Agency
Jo Crumbaker, Maricopa County Air Quality
Department

Duane Yantorno, Arizona Department of Weights
and Measures

*Ed Stillings, Federal Highway Administration

*Judi Nelson, Arizona State University

#Christopher Horan, Salt River Pima-Maricopa
Indian Community

*David Rueckert, Citizen Representative

*Members neither present nor represented by proxy.

#Participated via telephone conference call.

+Participated via video conference call.

OTHERS PRESENT

Lindy Bauer, Maricopa Association of Governments

Patrisia Magallon, Maricopa Association of

Governments

Julie Hoffman, Maricopa Association of Governments

Dean Giles, Maricopa Association of Governments

Randy Sedlacek, Maricopa Association of Governments

Cathy Arthur, Maricopa Association of Governments

Taejoo Shin, Maricopa Association of Governments

Eileen Yazzie, Maricopa Association of Governments

Lawrence Odle, Maricopa County Air Quality

Department

Holly Ward, Maricopa County Air Quality
Department

Mark Young, Queen Creek

Chris Turner-Noteware, City of Phoenix

Joonwon Joo, Arizona Department of Transportation

Michelle Wilson, City of Glendale

Scott DiBiase, Pinal County

Dan Catlin, Fort McDowell Yavapai Nation

Shane Kiesow, City of Apache Junction

1. Call to Order

A meeting of the MAG Air Quality Technical Advisory Committee was conducted on February 26, 2009. John Kross, Town of Queen Creek, Chair, called the meeting to order at approximately 1:34 p.m. Jamie McCullough, City of El Mirage; Jim Weiss, City of Chandler; Greg Edwards, City of Mesa; Chris Horan, Salt River Pima-Maricopa Indian Community; and Antonio DeLaCruz, City of Surprise, attended the meeting via telephone conference call.

2. Call to the Audience

Mr. Kross stated that, according to the MAG public comment process, members of the audience who wish to speak are requested to fill out comment cards, which are available on the tables adjacent to the doorways inside the meeting room. Citizens are asked not to exceed a three minute time period for their comments. Public comment is provided at the beginning of the meeting for nonagenda items and nonaction agenda items. He noted that no public comment cards had been received.

3. Approval of the January 29, 2009 Meeting Minutes

The Committee reviewed the minutes from the January 29, 2009 meeting. Russell Bowers, Arizona Rock Products Association, moved and Doug Kukino, City of Glendale, seconded and the motion to approve the January 29, 2009 meeting minutes carried unanimously.

4. Request for Project Changes From Phoenix

Eileen Yazzie, Maricopa Association of Governments (MAG), provided an overview of the request for project changes from the City of Phoenix. She stated that she would give an explanation of the current Draft MAG Transportation Program Principles and how they relate to the requested project change. Ms. Yazzie added that Chris Turner-Noteware, Transportation Engineer for the City of Phoenix, was present to help answer any technical questions regarding the project. She mentioned that MAG staff and the transportation programming committees have been working in the past year to revise the programming principles for transportation projects. She noted that the MAG transportation programming committees include the Transportation Review Committee, Management Committee, Transportation Policy Committee, and Regional Council as well as working groups. Ms. Yazzie indicated that one of the principles discusses making an adjustment to a project that is currently programmed and federally funded. She added that if the city needs to make an adjustment to the project, the project would go back to the technical advisory committee that initially recommended the project to be programmed and subsequently, continue through the MAG Transportation Programming Committee Process. Ms. Yazzie mentioned that if a Bike/Pedestrian project with Congestion Mitigation and Air Quality Improvement (CMAQ) funding programmed needs an adjustment, it would be heard at the Bike/Pedestrian Technical Advisory Committee as well as Intelligent Transportation Systems (ITS) projects would be heard at the ITS Committee. She stated that the Transportation Review Committee relies on the technical advisory committees to help make recommendations.

Ms. Yazzie referred to the handout provided to the Committee for Agenda Item #4. She stated that the Phoenix projects were originally programmed as part of the measure, MAG Allocate Additional Five Million Dollars in FY 2007 Federal Funds for Paving Dirt Roads and Shoulders, in the MAG 2007 Five Percent Plan for PM-10. Ms. Yazzie added that the time frame for MAG to receive the project applications was extremely short. She mentioned that the City of Phoenix originally submitted the application as a package which included shoulders and roads and requested a total amount. Ms. Yazzie stated that MAG staff recommended splitting the amounts for the projects. She indicated that

the City was at a pre-design phase when the application was completed and it estimated the transportation costs. Ms. Yazzie stated that the project is currently moving forward and the cost estimates are now different. She indicated that the road portion will require more funds than the shoulder project. Ms. Yazzie mentioned that the City of Phoenix is requesting an adjustment to the CMAQ programmed dollar amounts per project. She added that the total amount would remain the same; however, Phoenix is seeking to shift funds from one project to the other. The funds are available at this time. Joe Gibbs, City of Phoenix, stated that the request is a minor adjustment.

Mr. Kross inquired about the thresholds that trigger the Committee to review a change to a particular project. Ms. Yazzie responded that the projects have to be programmed and requested by the lead agency that is sponsoring the project. She indicated that the threshold would be minor changes. Ms. Yazzie added that if there are major changes to a project, the agency may be asked to reconsider the project.

Mr. Kross called for a motion to recommend approval of the Phoenix project changes which are part of an air quality measure and forward the revised CMAQ evaluation based on the project changes to the MAG Transportation Review Committee. Dave Berry, Arizona Motor Transport Association, moved and Jim Nichols, City of Goodyear, seconded and the motion carried unanimously.

Mr. Bowers noted that according to the CMAQ Annual Report, \$25 million worth of projects have no PM-10 benefit, \$11 million resulted in only twelve kilograms of PM-10 reduction per day, and \$36 million was spent for less than twelve kilograms per day.

5. Overview of the Maricopa County Dust Control Program

Lawrence Odle, Maricopa County Air Quality Department, provided an overview of the Maricopa County Air Quality Control Program. He stated that he has been with the agency for a few months and some changes have been made in policies and directions. Mr. Odle added that the program overview would include the agency reorganization, Maricopa County Commitments in the Five Percent Plan for PM-10, plan progress and preliminary observations. Mr. Odle presented a reorganization chart for the Maricopa County Air Quality Department. He mentioned that the entire Department has been divided into six basic divisions and organized so that all functional parts of the program are in the same division. Mr. Odle stated that Dennis Dickerson has been hired as the new ombudsman, and Kathleen Sommer was transferred to assist Mr. Dickerson. Mr. Odle added that this new area will be assisting the stakeholders in complying with the regulations.

Mr. Odle mentioned that some of the commitments that the Maricopa County Air Quality Department has made in the Five Percent Plan include expanding outreach and public education. Mr. Odle added that the commitments also include training on basic and comprehensive dust control as well as dust control training videos for the cities. He indicated that the Department also agreed to a subcontractor registration program. Mr. Odle stated that there have also been revisions to Rules 300, 310, 310.01, 314 and Rule 316. He commented on ordinances for off-highway vehicles, leaf blowers, and vehicle use on vacant lots. He also mentioned revisions to the residential wood burning ordinance.

Mr. Odle stated that the Maricopa County Commitments in the Five Percent Plan include development of an after hour inspection and surveillance program and vacant lot procedures for implementation of on-call stabilization services. Mr. Odle indicated that there will also be mobile monitoring to measure PM-10. In addition, the County will also create a fund for paving/stabilizing in high pollution areas, enhance enforcement of trespass ordinances/codes, and model cumulative impacts.

Mr. Odle discussed the progress the Maricopa County Air Quality Department has made toward its commitments in the Five Percent Plan. He stated that the County has initiated a major comprehensive outreach campaign. He added that the previous slogan "Running out of Air" has been changed to "Clean Air Make More." Mr. Odle noted that the focus is on positive conduct that can be directed toward good change. He stated that the County has increased advertising in television, radio, billboards and the website. He mentioned the PSAs and indicated that the Maricopa County Air Quality Department is expanding the city-town council outreach program. Mr. Odle commented on the Clean Air Commitment Program and stated that Maricopa County currently has over 4,000 sign-ups in the program. He stated that the County has an advanced newsletter program and recently conducted a collaborative workshop forum. Mr. Odle added that the workshop was held in order to ask the cities and towns how the County could assist them with the programs. He indicated that 55 people were present at the workshop representing over 25 entities and agencies. Mr. Odle noted that approximately 75 ideas and recommendations were received at the workshop. He mentioned that these workshops will be successful in helping the County provide funds and assistance to the cities and towns.

Mr. Odle discussed the Maricopa County Air Quality Department staffing commitments. He stated that the staffing commitments were to hire 51 inspectors and seven supervisors. Mr. Odle added that the County hired 50 inspectors and seven supervisors by July 1, 2008. He mentioned that the Department currently has 52 inspectors and six supervisors and issued 4,204 dust control permits in 2008. Mr. Odle indicated that the Department has hired over 91 different staff in less than one year; however, there was recently a reduction in force where 52 positions were lost. He added that he does not believe the staffing loss will inhibit the County's ability to be successful as it moves forward in the future.

Mr. Odle discussed the progress made to Rules 310, 310.01, and 316, based on limited data. He indicated that for Rule 310, permitted dust generating operations, the number of inspections has increased and the compliance rate has improved from 60 to 87 percent between 2007 and 2008. Mr. Odle stated that for Rule 310.01, non-permitted and non-traditional dust generating operations, the compliance rate has improved from 90 to 93 percent. He noted that the County is also increasing the number of inspections on the sources.

Mr. Odle mentioned that based on a limited database, Rule 316 for nonmetallic mineral processing activities has seen a decrease in the compliance rate from approximately 44 to 17 percent. He added that there has been an increase in the number of inspections for Rule 316. Mr. Odle commented on the policy issues for Rule 316. He stated that the numbers are accurate; however, it may not be the complete story since there may be sources that are included in the data that may not be subject to Rule 316. Mr. Odle noted that this issue is currently under review by the Maricopa County Air Quality Department and is expected to be fixed within the next two to six months.

Mr. Odle discussed the increase in training. He stated that as of February 13, 2009, the Maricopa County Air Quality Department had 5,115 subcontractors registered. Mr. Odle indicated that the County also began Train the Trainer classes. He mentioned that previously, the County had agreed not to provide training to the cities since the policy was to allow training to occur through the industry trainers; however, some of the cities and towns could not afford it. Therefore, it was decided unanimously at the workshop that the County would provide training free to the cities and towns. Mr. Odle commented that rule revisions have been completed for Rules 310, 310.01, 314, and Rule 316. He added that the Maricopa County Air Quality Department anticipates additional changes for some

of these rules in the future which are currently being reviewed by the County. Mr. Odle noted that the County has also adopted four ordinances.

Mr. Odle mentioned the economy and stated that there are some impacts to the program. He added that there has been a ten percent decrease in dust permits which cover 20 percent less acreage between 2007 and 2008. Mr. Odle indicated that in 2008, the County had the lowest number of dust permits issued in the last five years and there were approximately one-third less dust permits over one-half less acreage from 2007 to the present. He commented that the numbers may now be different from when the Five Percent Plan was completed. He presented a graph that showed the number of dust control permits that have been issued by the County. Mr. Odle stated that one-third of dust inspections resulted in violations. He added that over one-fourth of Non Title V sources inspected exhibited some type of violation. Mr. Odle indicated that 70 percent of the Title V sources inspected resulted in some type of violation. He mentioned that the County only inspected the Title V sources once every two years. Mr. Odle noted that the County can improve compliance rates as well as its relationship with the stakeholders that the County is permitting.

Mr. Odle discussed the issue of backlogs. He stated that the County has a backlog of 1,500 enforcement cases. Mr. Odle indicated that it is a top priority to eliminate this backlog. He added that there is also a backlog of 350 permit applications which is up to four years. Mr. Odle stated that he expects half of these applications to be completed by June 30, 2009. He indicated that there is also a backlog of 4,873 dust inspections and 5,529 vacant lot inspections. Mr. Odle mentioned that the County believes it can still meet the Five Percent Plan commitments between now and June 30, 2009. He presented the twelve PM-10 exceedances that occurred in 2008. Mr. Odle added that the Arizona Department of Environmental Quality (ADEQ) is in the process of preparing and submitting its exceptional events policy to the Environmental Protection Agency (EPA) and many of these exceedances may be exceptional events. He indicated that the County has established a task force to perform comprehensive coordinated inspections and enforcement in specified areas within a one-half and one mile radius of each air monitoring site with PM exceedances in the past three years. Mr. Odle stated that the Maricopa County Air Quality Department is focusing on thorough and detailed inspections around those areas in order to see what can be controlled. He added that the County believes that a portion of the particulates are localized in terms of impacting the stations.

Mr. Odle stated that the County is initiating a preventative triage approach. He added that the Maricopa County Air Quality Department will be watching the particulate levels in areas as they increase on a real time basis. Mr. Odle indicated that if the particulate levels reach a certain point, the County will send inspectors to the sources that are causing the levels to increase and cease those operations immediately. He presented an aerial photograph that showed plumes from two different sources that were directly up wind from an air monitoring station. He added that the monitoring station was being bombarded by the sources on a continuous basis. Mr. Odle stated that the County needs to be able to identify that kind of activity and stop it.

Mr. Odle mentioned that the Maricopa County Air Quality Department is developing an active training program for interested cities. He indicated that the County is looking to expand intergovernmental agreements with interested cities to assist in dust related inspections. He commented on the successful program with the City of Scottsdale. Mr. Odle stated that the County is also developing an Assistant Inspector Program. He indicated that County staff in the field will be trained to perform visual inspections that can be counted toward the inspection program and improve the efficiency of staff coverage. Mr. Odle also mentioned that mobile monitoring will be performed in the near future. He

indicated that the County has taken ownership of the air monitoring vehicle and will have an open house in the near future. Mr. Odle added that the mobile monitoring will focus on ambient monitoring activities and training activities in the first year.

Mr. Odle stated that the County is in the process of establishing a SEP fund for stabilizing high pollution areas around the air monitoring sites that have demonstrated exceedances. He added that the penalty funds will be utilized. He mentioned prioritizing based on the monitoring sites and city needs. Mr. Odle indicated that No Burn Days have also been established on High Pollution Advisory days which is a new policy for the County. Mr. Odle stated that the Maricopa County Air Quality Department will be utilizing an aerial inspection program on High Pollution Advisory days. He added that the County is using this program to recognize the sources when there is a violation of the National Ambient Air Quality Standards (NAAQS) on the High Pollution Advisory days. Mr. Odle stated that he has two goals: 1) to improve customer service; and 2) reduce the number of days that the region exceeds the standards. He added that everything the Maricopa County Air Quality Department does will be focused around these two goals.

Mr. Odle stated that the County also implemented an expansion program at interested agencies and selected stationary sources to create awareness and alert of daily air quality conditions. Mr. Odle indicated that this program is an asthma coalition flag program which was started at some schools. He commented that one of the problems found at the stationary sources was that many of the violations were coming from employees and subcontractors being careless, not necessarily due to conscious activities. Mr. Odle mentioned that the County is asking for participation in the FLAG program which will coordinate with the Air Quality Index. He stated that a red flag indicates that the region is exceeding the standard; therefore, everyone will need to be cautious on that day. Mr. Odle added that several sources have indicated their willingness to participate in this program since it will alert the employees that the County will be out enforcing on that day and to be extra careful.

Mr. Odle commented that the County instituted a policy where a maximum penalty will be given to sources that are caught with an emissions exceedance on a day when the region is violating the health based standard, which jeopardizes transportation funds. He indicated that the County will be conducting vacant lot inspection sweeps multiple times during the remainder of the fiscal year. Mr. Odle also mentioned the We Care Program. He stated that the program has two forms; one form will provide commendations about the performance and the other will provide comments on suggested program changes and complaints. Mr. Odle noted that the forms have been provided to the Committee and will be distributed at the time of a violation.

Mr. Odle presented a picture of the downtown Phoenix area in January 2009. Mr. Odle mentioned that the photo was taken on a day when the monitors did not exhibit a problem in the region. He indicated that the County is focusing on reducing the number of days that exceed the standard. He discussed the importance of clean air to the region and encouraged everyone to be cognizant of all the issues that need to be addressed. Mr. Odle stated that the County will be conducting a rule effectiveness study with a larger database this summer. He added that the Maricopa County Air Quality Department welcomes any new recommendations, ideas or concerns about the program. Mr. Odle indicated that the County is expecting to have an advisory committee in place before the end of the year to serve as a forum to review rules, regulations and policy issues before the items are brought to the public.

Mr. Bowers inquired about the January 2009 picture. Mr. Odle responded that the picture is showing particulates. He added that he wanted an aerial tour of the entire County to get an idea about what is being asked of the inspectors and determine the activities that are an issue. Mr. Odle mentioned that

some of the stories that he heard were opposite to what he observed in the air. Mr. Odle stated that a problem he did notice was storage piles. He added that the picture was taken on a light wind day. Mr. Odle commented on the particulates in the picture to some extent coming from the roadway, cars driving early in the morning along the roads pulling up the dirt. Mr. Bowers commented on the direction of the picture and stated that particulates can be liquid. Mr. Odle responded that the picture is not showing fog.

Mark Hajduk, Arizona Public Service Company, inquired if aerial inspections will be used for compliance or just as a tool to identify possible violators which would be followed by an inspection. Mr. Odle responded the program would be used as a tool to identify possible violators. He added that aerial inspections will not be conducted on a daily basis. Mr. Odle indicated that the region does have days that are highly suspected to exceed the standard. He stated that if there is a problem with a source, the County will be able to call an enforcement officer to go out to the source and take care of the issue. Mr. Odle commented that the process requires that the County go through a lot of procedures in order to inspect a source and that will not change.

Mr. Gibbs commended the County on its radio advertisements. Mr. Odle stated that Holly Ward, Maricopa County Air Quality Department, was responsible for the change in the campaign. He commented on the Running Out of Air Campaign being negative and stated that the County wanted to turn the campaign around to be a positive statement and encourage positive conduct. Mr. Bowers commented that the triage approach around the monitors is a positive step and will be very helpful.

Mr. Kross commented on reductions in force. He inquired if those positions were inspectors. Mr. Odle replied no and stated that the County lost four dust supervisors. He added that the County reduced the ratio of supervisors to subordinate staff. Mr. Odle commented on the ratio and mentioned that the Maricopa County Air Quality Department did not need to have that ratio of supervisor activity. He stated that even though the County lost staff, the coverage will remain the same. Mr. Odle mentioned that he has spoken with EPA on the issue and the feeling is that the County's commitment to hire 51 people was met with the exception of one less inspector. He indicated that it is his belief that the County efforts will be successful due to the policy directions.

Mr. Kross inquired if the County is anticipating any further reductions for the next fiscal year. Mr. Odle responded that on his second day on the job, he was given a \$5.5 million budget deficit for the remainder of this year and as a consequence, a hiring freeze was implemented. He added that the hiring freeze allowed the County to only refill ten filled positions. Mr. Odle mentioned that during that time period, the County was able to look at the policies and the organizational activities and put together a plan that brought them into a balanced budget for the remainder of this year and next year. He commented that if the staff does what is expected of them between now and the end of next year, another refill will not be necessary. Mr. Odle indicated that the County has a very good and precise plan in place. He stated that all staff vacation, flex-time schedules and ability to work from home has been suspended for the next six weeks. Mr. Odle added that all staff is on eight hour shifts. He mentioned that data is being gathered during these six weeks in order to determine whether the County needs to move forward in another direction. Mr. Odle commented that his expectation is that at the end of this period, the data will keep them "in the black" through next year.

Amanda McGennis, Associated General Contractors, commended the County on its efforts. She suggested that the County consider a way to delineate violations such as trackout versus administrative violations. Ms. McGennis added that people are pleased that their sites are clean; however, they are still receiving record violations. She indicated that distinguishing the difference between the two types

of violations would show an improvement when it comes to the actual emission reductions. Mr. Odle thanked Ms. McGennis for her suggestion and stated that he will have the County look into the issue further. Mr. Kross thanked Mr. Odle for the presentation. He referred to a speech given by Dr. Michael Crow regarding the top issues affecting the region. Mr. Kross indicated that air quality was high on the list. He also thanked Mr. Odle for the training and outreach programs for the cities and towns.

6. Proposed Strawman Option for a Revised Eight-Hour Ozone Nonattainment Area Boundary

Lindy Bauer, MAG, provided an overview of the Proposed Strawman Option for a Revised Eight-Hour Ozone Nonattainment Area Boundary. She stated that ADEQ began a stakeholder process in February 2009 in order to determine where the boundaries should be set for the new eight-hour ozone standard. Ms. Bauer added that the eight-hour ozone standard was strengthened by EPA in March 2008. She indicated that the Governor is required to make a recommendation on the boundary by March 12, 2009. Ms. Bauer mentioned that ADEQ conducted stakeholder meetings where it presented a Strawman Option for everyone to review and submit comments. She noted that the Strawman Option along with a memorandum describing the process was sent to the Committee in the agenda packet. The ADEQ has indicated that very little has changed since the boundary was last established in 2004.

Ms. Bauer stated that ADEQ is proposing to expand the eight-hour ozone nonattainment boundary minimally. She mentioned that the Strawman Option expands the current boundary to include the new Harquahala Power Generating Station to the west. She noted that generating stations are generally major sources and the nonattainment boundary is supposed to include major sources and monitors that have violations. Ms. Bauer indicated that the Strawman Option would also expand the boundary to include the Gila River Power Station near the Town of Gila Bend as well as the Salt River Project (SRP) planned Abel Facility to the southeast. She mentioned that the SRP Abel Facility is not built; however, it is a planned facility. Ms. Bauer added that the Strawman Option would also include the Queen Valley monitor. She stated that this monitor was placed by ADEQ to measure transport and is in rugged terrain where biogenic activity is also likely contributing to the exceedances of the standard at this monitor.

Ms. Bauer stated that ADEQ also looked at the Tonto National Monument monitor just east of the current boundary. She added that the monitor is located in the Tonto National Forest and is exceeding the standard at .078 parts per million. Ms. Bauer mentioned that ADEQ did not include this monitor in the Strawman Option since there is nothing in the area to control that would stop the exceedances. Ms. Bauer stated that if the sources within the Strawman Option are controlled, then the region could move toward attainment status. She added that currently eight of the 20 monitors are meeting the .075 parts per million ozone standard, which means twelve of the monitors are in violation. The region is therefore not meeting the new standard. Ms. Bauer indicated that she appreciates ADEQ conducting the stakeholder meetings. She mentioned that this information was presented to the MAG Management Committee on February 11, 2009. Ms. Bauer stated that the Strawman Option was also presented to the MAG Regional Council on February 25, 2009 where it took action to support the addition of the mentioned areas to the boundary. She indicated that the MAG Air Quality Technical Advisory Committee had its last meeting on January 29, 2009. Ms. Bauer stated that ADEQ conducted the stakeholder meetings in February and she was encouraged to see that many of the Committee members were present at the meetings. She added that the deadline for submitting

comments to ADEQ was today, February 26, 2009. Ms. Bauer noted that MAG took the information from ADEQ and has provided it to the member agencies.

Mr. Bowers inquired about who would enforce the regulations at Four Peaks, Sunflower, Cottonwood Wash and Sycamore Creek where people go to hunt and recreate. He mentioned that the areas are remote. Mr. Bowers asked who would go out to these areas and issue a Notice of Violation to someone with a campfire. Jo Crumbaker, Maricopa County Air Quality Department, responded that the County rules already apply to any area inside the Maricopa County boundary. She stated that the Strawman Option does not represent a change from the existing policy for those activities. Ms. Crumbaker added that the enforcement program also has not changed. Mr. Bowers inquired about the policy for somebody with a campfire. Diane Arnst, ADEQ, responded that the state law has exceptions for different types of activities such as ceremonial fires and certain barbecues. Ms. Crumbaker stated that there may be Forest Service regulations during the fire season that may prevent campfires. She added that Rule 314 has exemptions for recreational burning. Ms. Crumbaker commented that Maricopa County has not identified the areas mentioned as a problem but should the County become aware of something that would trigger its interest, the County would then proceed.

Ms. Arnst reminded the Committee that the boundary is the Governor's recommendation. She added that ADEQ will send a technical support document to the Governor consolidating the input from the comments. Ms. Arnst indicated that ADEQ has received one comment to her knowledge.

7. CMAQ Annual Report

Dean Giles, MAG, provided a briefing on the 2008 Congestion Mitigation and Air Quality Improvement Annual Report. He stated that the federal CMAQ program guidance requires that the states produce an annual report that specifies how CMAQ funds have been spent and the expected air quality benefits. Mr. Giles noted that a copy of the annual report was mailed out to the members of the Committee and a copy has also been provided at each place. He added that the report was produced in cooperation with the Arizona Department of Transportation (ADOT). The data for calculating the estimated air quality benefits was originally provided by the MAG member agencies when calculating the CMAQ emission reductions for the programming process. Mr. Giles mentioned that the annual report includes the project description, the cost in terms of CMAQ funding requested, and the estimated air quality benefits per day for volatile organic compounds (VOCs), carbon monoxide (CO), nitrogen oxide (NOx) and PM-10. He indicated that for PM-10 related projects such as street sweepers and paving dirt roads, there is no benefit for CO, NOx, or VOCs. Mr. Giles stated that there are also projects in the report that do not have PM-10 benefits such as Freeway Management System projects and Intelligent Transportation System (ITS) projects. He added that the reason for this is that as speeds increase, there is no change in the PM-10 emissions. Mr. Giles indicated that the air quality benefits for PM-2.5 have not been calculated in the CMAQ Annual Report since the region is in attainment for that pollutant.

Ms. Arnst inquired if the project amount column includes the CMAQ dollars or the total amount of the project. Mr. Giles responded that the project amount column represents CMAQ dollars. Ms. Arnst noted that there are twelve projects in the CMAQ Annual Report costing \$10.8 million, each of which received only one kilogram per day of PM-10 reduction. She added that ADEQ prefers that the most cost effective PM-10 reduction projects be funded out of this pot of money at least until the region attains the standard since the region is still in the five percent per year situation. Mr. Berry commented on bike projects versus air quality projects and stated that we need to think more carefully about our priorities. He added that the problem is that there is nothing that states CMAQ funds must be spent

on air quality projects. Mr. Berry indicated that he thinks the Committee members believe that air quality and public health should be the top priority. He mentioned that the Committee should continue to send a strong message that it does not make sense to complete some of these other projects as long as there are air quality issues. Ms. Bauer stated that the Regional Transportation Plan has an allocation for paving unpaved roads which is a PM-10 measure. She added that the PM-10 street sweepers are also funded with CMAQ funds. Ms. Bauer indicated that both of these measures are direct PM-10 measures that are in the plans and funded with CMAQ funds. She mentioned that the Congestion Mitigation and Air Quality Improvement funds are intended to be for transportation control measures that have air quality benefits. Ms. Bauer commented that the funds have to be spent on projects with air quality benefits and congestion benefits in order to be eligible for the funding. Ms. Bauer stated that the measures with the biggest impact on the PM-10 problem are the unpaved road projects and street sweepers.

Mr. Berry inquired why traffic flow improvement projects do not have any PM-10 benefit. Mr. Giles indicated the methodology for calculating the traffic flow improvement projects results in no PM-10 emissions benefit. He added that there are usually VOC benefits as speed is increased; however, with regard to CO and NOx, there may be some disbenefit associated with the project. Mr. Berry inquired about tailpipe emissions for PM-10. Mr. Giles replied that a very small amount of PM-10 benefit is associated with tailpipe emissions. Ms. Bauer added that tailpipe emissions for PM-10 are approximately one percent and this is the reason why the numbers are not shown.

Mr. Gibbs commented that at the Maricopa County forum, the possibility of CMAQ dollars for water trucks was mentioned. He stated that this would be a good idea and inquired if there are any obstacles to using CMAQ funds for purchasing water trucks. Mr. Giles responded that MAG will research the question and check with the Federal Highway Administration.

Jeannette Fish, Maricopa County Farm Bureau, commented on the negative figures shown on pages four, five and six of the annual report. She inquired if the figures indicate that the amount of carbon monoxide increases. Mr. Giles responded that is correct. He added that the CO and NOx portions begin increasing as speed increases with the ITS projects.

Mr. Berry inquired if there is a report indicating that everything committed to was built. Mr. Giles responded that the Committee typically reviews projects proposed for funding. He added that in some cases projects drop out after they have been proposed and added to the Transportation Improvement Program. He mentioned that the projects that get dropped go back to the Transportation Review Committee. Mr. Berry asked who would verify that a project has been completed. Mr. Giles responded that MAG receives reports from ADOT on how funds have been expended. Beverly Chenausky, ADOT, responded that the agencies will not get funding if they do not have receipts or proof that they have spent that money. She noted that it is a reimbursement program. Ms. Chenausky added that ADOT has recourse to get its money back if the agency requesting the funds does not build the project with the funds.

8. Call for Future Agenda Items

Mr. Bowers proposed that there be a regular update on successful completion and results of the projects. Ms. Chenausky stated that some of the projects that have negative benefits were allowed funding through the Federal Highway Administration since the CMAQ program is federally funded. She added that projects such as safety improvements, which really have no air quality benefits, may be eligible for congestion and other purposes. Ms. Chenausky indicated that the issue may be better

addressed to the Federal Highway Administration as it implements its new Federal Highway Transportation Funding Bill. She commented that by adding so many categories that are eligible for CMAQ funding, it waters down the actual benefit for air quality. She mentioned that it would be useful to collaborate with the federal partners and develop an approach that will direct money toward PM-2.5 and PM-10, which is not within the program, and to quit making minute projects eligible for this funding.

Mr. Berry stated that the Air Quality Technical Advisory Committee has had a great deal of influence and input on prioritizing the project list and the recommendations have had a lot of weight as the projects move forward. He added that there should be another filter in the process. Mr. Berry mentioned that the modal committees have constituency groups that develop the projects that are ultimately presented to the Committee for consideration. Mr. Berry inquired whether there should be an air quality constituency group that would be able to put air quality projects into the process. He added that this may help make sure that the air quality projects rise to the top.

Mr. Kross referred to the comments made by Ms. Chenausky and indicated that MAG has an active legislative affairs division. He also mentioned the Congressional Delegation. Ms. Chenausky stated that the American Association of State Highway and Transportation Officials (AASHTO) group is also recommending to add climate change projects to this pot of money. She indicated that all these needs will make it more difficult to see the NAAQS benefit. Mr. Berry commented on contacting the mayors and city councils in terms of what projects are being brought forward by the cities.

Ms. Bauer stated that MAG tried to get PM-10 into the CMAQ formula during the last reauthorization; however, it was not included. She added that ADOT and ADEQ also helped on the issue. Ms. Bauer indicated that the formula is still based on carbon monoxide and ozone; however, the funds can be used for PM-10 projects. Ms. McGennis inquired if a position paper can be developed by the Committee stating that it recommends PM-10 be in the formula. She noted that Chairman Oberstar will be in town. Mr. Kross commented on the process and stated that MAG staff can look into it for future consideration. Ms. Bauer added that the MAG Regional Council is the MAG decision making body. Ms. McGennis inquired if Committee members can make a recommendation to Chairman Oberstar as individuals. Mr. Kross responded yes.

Ms. Arnst commented on the CMAQ methodology workshop. She reminded everyone that the reporting for measures implemented in 2008 are due in March or April. Ms. Arnst added that the forms have been provided electronically. She reminded the Committee to fill out the forms. Ms. Arnst mentioned that ADEQ is reporting the number of website hits on pages such as leaf blower information and off-highway vehicles. She indicated that this is another way to show that the message is getting out. Ms. Arnst noted that other agencies might want to consider this information when reporting in the comments. Ms. Bauer commented that the forms were sent out in advance to give the MAG member agencies and the State an opportunity to start collecting the information that will be requested. She asked that everyone wait to complete the forms until they are officially sent out by MAG. Ms. Bauer noted that there have been a couple of changes. She added that the forms will be sent out in March. Ms. Bauer indicated that a workshop will be held for the implementers to talk about the forms and ask questions. She mentioned that MAG will be requesting the forms back in April and a report will then be compiled.

Mr. Kross announced that the next meeting of the Committee has been tentatively scheduled for March 26, 2009 at 1:30 p.m. With no further comments, the meeting was adjourned at 2:49 p.m.



STATE OF ARIZONA

JANICE K. BREWER
GOVERNOR

EXECUTIVE OFFICE

March 12, 2009

Ms. Laura Yoshii
Acting Regional Administrator
US EPA Region IX
Mail Code: ORA-1
75 Hawthorne Street
San Francisco, CA 94105-3901

Re: Arizona's 8-Hour Ozone Area Designation Recommendations

Dear Ms. Yoshii:

Pursuant to Section 107(d)(1) of the Clean Air Act, Arizona hereby submits the following 8-hour area designation recommendation for all areas of the State outside of Indian Country (term as defined in federal law, 18 USC 1151).

Arizona recommends that all parts of the State (except for Indian Country) be designated attainment/unclassifiable, except for portions of Maricopa County and portions of Pinal County as defined in the Enclosure. Arizona's supporting analysis for this recommendation is also enclosed (Technical Support Document).

I look forward to working with you to finalize the designation by March 12, 2010. If you have any questions, please contact Mr. Patrick Cunningham, Acting Director of the Arizona Department of Environmental Quality, at (602) 771-2204 or Nancy C. Wrona, Director, Air Quality Division, at (602) 771-2308.

Sincerely,

A handwritten signature in cursive script that reads "Janice K. Brewer".
Janice K. Brewer
Governor

JB:ma:njw

Enclosures

Cc: Sheryl Billbrey, Chief of Staff to the Regional Administrator
Deborah Jordan, Director, Air Division, USEPA Region 9
Colleen McKaughan, Associate Director, Air Division, USEPA Region 9

Recommended Attainment/Unclassifiable and Nonattainment Areas for Arizona

Arizona-Ozone (2008 8-Hour Standard)

Designated Area	Designation Type	Classification Type
<p>Phoenix Area: Maricopa County (part).....</p> <p>T1N, R1E (except that portion in Indian Country) T1N, R2E T1N, R3E T1N, R4E (except that portion in Indian Country) T1N, R5E (except that portion in Indian Country) T1N, R6E T1N, R7E T1N, R1W T1N, R2W T1N, R3W T1N, R4W T1N, R5W T1N, R6W T1N, R7W T1N, R8W</p> <p>T2N, R1E T2N, R2E T2N, R3E T2N, R4E T2N, R6E (except that portion in Indian Country) T2N, R7E (except that portion in Indian Country) T2N, R8E T2N, R9E T2N, R10E T2N, R11E T2N, R12E (except that portion in Gila County) T2N, R13E (except that portion in Gila County) T2N, R1W T2N, R2W T2N, R3W T2N, R4W T2N, R5W T2N, R6W T2N, R7W T2N, R8W</p> <p>T3N, R1E T3N, R2E</p>	<p>Nonattainment</p>	

Designated Area	Designation Type	Classification Type
<p>T3N, R3E T3N, R4E T3N, R5E (except that portion in Indian Country) T3N, R6E (except that portion in Indian Country) T3N, R7E (except that portion in Indian Country) T3N, R8E T3N, R9E T3N, R10E (except that portion in Gila County) T3N, R11E (except that portion in Gila County) T3N, R12E (except that portion in Gila County) T3N, R1W T3N, R2W T3N, R3W T3N, R4W T3N, R5W T3N, R6W</p> <p>T4N, R1E T4N, R2E T4N, R3E T4N, R4E T4N, R5E T4N, R6E (except that portion in Indian Country) T4N, R7E (except that portion in Indian Country) T4N, R8E T4N, R9E T4N, R10E (except that portion in Gila County) T4N, R11E (except that portion in Gila County) T4N, R12E (except that portion in Gila County) T4N, R1W T4N, R2W T4N, R3W T4N, R4W T4N, R5W T4N, R6W</p> <p>T5N, R1E T5N, R2E T5N, R3E T5N, R4E T5N, R5E T5N, R6E T5N, R7E T5N, R8E T5N, R9E (except that portion in Gila County) T5N, R10E (except that portion in Gila County) T5N, R1W</p>		

Designated Area	Designation Type	Classification Type
<p>T5N, R2W T5N, R3W T5N, R4W T5N, R5W</p> <p>T6N, R1E (except that portion in Yavapai County) T6N, R2E T6N, R3E T6N, R4E T6N, R5E T6N, R6E T6N, R7E T6N, R8E T6N, R9E (except that portion in Gila County) T6N, R10E (except that portion in Gila County) T6N, R1W (except that portion in Yavapai County) T6N, R2W T6N, R3W T6N, R4W T6N, R5W</p> <p>T7N, R1E (except that portion in Yavapai County) T7N, R2E (except that portion in Yavapai County) T7N, R3E T7N, R4E T7N, R5E T7N, R6E T7N, R7E T7N, R8E T7N, R9E (except that portion in Gila County) T7N, R1W (except that portion in Yavapai County) T7N, R2W (except that portion in Yavapai County)</p> <p>T8N, R2E (except that portion in Yavapai County) T8N, R3E (except that portion in Yavapai County) T8N, R4E (except that portion in Yavapai County) T8N, R5E (except that portion in Yavapai County) T8N, R6E (except that portion in Yavapai County) T8N, R7E (except that portion in Yavapai County) T8N, R8E (except that portion in Yavapai and Gila Counties) T8N, R9E (except that portion in Yavapai and Gila Counties)</p> <p>T1S, R1E (except that portion in Indian Country) T1S, R2E (except that portion in Pinal County and in Indian Country)</p>		

Designated Area	Designation Type	Classification Type
<p>T1S, R3E T1S, R4E T1S, R5E T1S, R6E T1S, R7E T1S, R1W T1S, R2W T1S, R3W T1S, R4W T1S, R5W T1S, R6W</p> <p>T2S, R1E (except that portion in Indian Country) T2S, R5E T2S, R6E T2S, R7E T2S, R1W T2S, R2W T2S, R3W T2S, R4W T2S, R5W</p> <p>T3S, R1E T3S, R1W T3S, R2W T3S, R3W T3S, R4W T3S, R5W</p> <p>T4S, R1E T4S, R1W T4S, R2W T4S, R3W T4S, R4W T4S, R5W</p> <p>T5S, R4W (Sections 1 through 22 and 27 through 34)</p> <p>Pinal County (part)</p> <p>T1N, R8E T1N, R9E T1N, R10E</p> <p>T1S, R8E T1S, R9E T1S, R10E</p>	<p>Nonattainment</p>	

Designated Area	Designation Type	Classification Type
<p>T2S, R8E T2S, R9E T2S, R10E (Sections 1 through 12)</p> <p>T3S, R7E T3S, R8E T3S, R9E</p> <p>Rest of State (except those portions in Indian Country)</p> <p>Apache County Cochise County Coconino County Gila County Graham County Greenlee County La Paz County Maricopa County (part) Remainder of County Mohave County Navajo County Pima County Pinal County (part) Remainder of County Santa Cruz County Yavapai County Yuma County</p>	<p>Attainment/ Unclassifiable</p>	

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 8, 2008

Decided March 20, 2009

No. 07-1151

NATURAL RESOURCES DEFENSE COUNCIL,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

AMERICAN FARM BUREAU FEDERATION, ET AL.,
INTERVENORS

Consolidated with 08-1057

On Petitions for Review of Final Actions
of the Environmental Protection Agency

Colin C. O'Brien argued the cause for petitioner. With him on the briefs was *John Walke*.

Joshua M. Levin, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief was *John C. Cruden*, Deputy Assistant Attorney General.

Peter S. Glaser argued the cause for intervenor. With him

on the brief were *Norman W. Fichthorn, Julie Anna Potts, and Harold P. Quinn Jr. Richard E. Schwartz* entered an appearance.

Before: HENDERSON, RANDOLPH and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge RANDOLPH*.

Opinion concurring in part and dissenting in part filed by *Circuit Judge ROGERS*.

RANDOLPH, *Circuit Judge*: State authorities submit air pollution emissions data to the Environmental Protection Agency. EPA monitors the data in order to evaluate regional compliance with national air pollution standards. In 2007, EPA promulgated a regulation governing the exclusion of emissions data during “exceptional events” such as natural disasters. The Natural Resources Defense Council (NRDC) brought petitions for review, seeking to set aside the rule’s definition of “natural events” and to vacate several statements in the preamble to the rule concerning types of events that may qualify as “exceptional.”

I.

The Clean Air Act commands EPA to promulgate national air quality standards for certain air pollutants. States develop and implement plans to comply with EPA’s air quality standards. 42 U.S.C. §§ 7408–7410. The states have established a network of air quality monitoring stations to measure regional compliance with EPA’s national standards. Based on this data, EPA designates areas as being in either “attainment” or “nonattainment” and imposes more rigorous

pollution control measures in “nonattainment” areas. *See* 42 U.S.C. §§ 7407(d), 7502.

In 2005, Congress amended the Clean Air Act to require EPA to promulgate regulations governing air quality monitoring during “exceptional events.” *See* 42 U.S.C. § 7619(b). The amended statute defined “exceptional event” as 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 . . . to be an exceptional event.” *Id.* § 7619(b)(1)(A). EPA published a final exceptional events rule, accompanied by a lengthy preamble, in March 2007. Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13,560 (Mar. 22, 2007) (codified at 40 C.F.R. §§ 50.1, 50.14, 51.930). The final rule’s definition of “exceptional events,” codified at 40 C.F.R. § 50.1(j), repeated the statutory language. In the next subsection, the rule defined “natural event” – as used in 42 U.S.C. § 7619(b)(1)(A)(iii) – as “an event in which human activity plays little or no direct causal role.” 40 C.F.R. § 50.1(k). The rule also provided that states may “flag” anomalous data caused by exceptional events, and that EPA will then review the flagged data and determine whether to exclude it from the set of data used in reviewing compliance with its air quality standards. 40 C.F.R. § 50.14.

NRDC argues against EPA’s definition of “natural event,” against its description in the rule’s preamble of a “final rule concerning high wind events,” and against its list, again in the preamble, of examples of potentially exceptional events.

II.

NRDC’s complaint is that EPA should not have defined “natural event” in 40 C.F.R. § 50.1(k) to include events in which

human activities play “little” causal role. As NRDC sees it, a “natural event” within the meaning of § 7619 is something that occurs without the slightest human influence. EPA says this objection was never raised during the rulemaking and is therefore barred.

Section 307 of the Clean Air Act states: “Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” 42 U.S.C. § 7607(d)(7)(B). Similar provisions are common with respect to other agencies. *See Wash. Ass’n for Television & Children v. FCC*, 712 F.2d 677, 682 n.6 (D.C. Cir. 1983). Their purpose is to ensure that the agency and other interested persons have been alerted to the commenter’s objection to the proposed rule. The agency then may correct or modify the rule it proposed or explain why it disagrees with the objection. *See Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998). Other parties also may contribute to the agency’s deliberations by endorsing or opposing the objection and by providing information and arguments in support of their position.

NRDC thinks the following portion of its nine-page, single spaced letter to EPA constituted an objection to EPA’s proposed definition of “natural event”:

Under no circumstance can the clean-up associated with a natural disaster itself be considered a “natural event.” EPA’s suggestion to the contrary flies in the face of the plain statutory language. The statute clearly and explicitly distinguishes between “natural event[s]” (events that do not have a human origin) and “events caused by human activity.” A natural event is one that is not the result of human activity . . . While the

level of human activity that discharges pollutants may increase in the wake of a natural disaster, emissions from clean-up activities (such as debris burning, operation of diesel equipment, and demolition activities) are clearly events caused by human activity, and may not be classified as “exceptional events” unless they meet each of the requirements of section 319 for qualifying anthropogenic events.

In short, the activities themselves that are responsible for the emissions (and possible violations of the NAAQS) are of human origin, and by definition *not* natural events. The fact that a natural event precipitates the need for human activity cannot and does not transform the human activity itself into a natural event. Thus, the Act clearly precludes EPA from identifying emissions from clean-up activities as “natural events” that qualify as exceptional events.

NRDC Comments, at 4–5.

Given the context, no EPA official would have guessed that NRDC was complaining about the agency’s proposed definition of “natural event.” Those familiar with the proceedings would have taken NRDC’s remarks as a criticism of the one sentence in the notice of proposed rulemaking dealing with clean-up activities after a natural disaster (such as the eruption of Mt. St. Helens in 1980 or Hurricane Katrina in 2005). The sentence read: “For the purpose of flagging, major natural disasters, such as hurricanes and tornadoes for which State, local, or Federal relief has been granted, and clean-up activities associated with these events may be considered exceptional events.” Treatment of Data Influenced by Exceptional Events, 71 Fed. Reg. 12,592, 12,596 (Mar. 10, 2006). It is not apparent that EPA even rested its view about clean-up activities on the proposed definition of

“natural event” in 40 C.F.R. § 50.1(k) rather than on the clause in another proposed subsection defining “exceptional events” to include human activities “unlikely to recur at a particular location,” *id.* § 50.1(j).

There are additional reasons why NRDC’s critique, quoted above, would not have alerted the careful reader to the complaint it now makes about § 50.1(k). NRDC’s comments said that a natural event could not have a “human origin” and could not be “the result of human activity.” These comments are not necessarily inconsistent with § 50.1(k)’s definition of natural events as ones in which human activity plays “little or no direct causal role.” No one would say that the “origin” of the tornado was human activity because the storm spread man-made air pollutants throughout the countryside. The definition of “natural event” in proposed § 50.1(k) was only a few words long, yet NRDC did not quote the portion it now finds objectionable. NRDC never even identified the rule by section number or placement in the notice of proposed rulemaking. We have held that Section 307 of the Clean Air Act bars litigants from arguing against a particular section of a rule on judicial review if they failed to identify the particular section in their comments during the rulemaking. *See Mossville Envtl. Action Now v. EPA*, 370 F.3d 1232, 1240 (D.C. Cir. 2004); *Motor & Equip. Mfrs.*, 142 F.3d at 462. A citation to the section of the rule or a description of it may be all that is needed. If a comment lacking even that low level of specificity sufficed, the agency would be subjected to verbal traps. Whenever the agency failed to detect an obscure criticism of one aspect of its proposal, the petitioner could claim not only that it had complied with Section 307 but also that the agency acted arbitrarily because it never responded to the comment. Rulemaking proceedings and the legal doctrines that have grown up around them are intricate and cumbersome enough. Agency officials should not have to wade through reams of documents searching

for “‘implied’ challenges.” *Mossville*, 370 F.3d at 1239. It is not too much to expect interested persons to point to the particular portion of the proposed rule they are arguing against.

It is worth adding that after EPA promulgated the final rule containing § 50.1(k) and its definition of “natural event,” NRDC filed a petition for reconsideration. In its petition NRDC spelled out for the first time its complaint about not excluding from “natural event” those events in which human activity had only a “little” causal effect. NRDC also explained that the grounds for its objection to § 50.1(k) “arose after the period for public comment and are of central relevance to the rule.” Petition for Reconsideration, In the Matter of the Final Rule: Treatment of Data Influence by Exceptional Events, No. 2060-AN40 (E.P.A. May 21, 2007). This representation cuts against NRDC’s current position that it objected to § 50.1(k) during the comment period and is a further indication that NRDC failed to satisfy Section 307’s requirement.

III.

The balance of NRDC’s case deals not with the rules EPA promulgated but with its statements in the preamble to the rules. We have jurisdiction to review these statements only if they constitute final agency action. 42 U.S.C. § 7607(b)(1). A final agency action is one that marks the consummation of the agency’s decisionmaking process and that establishes rights and obligations or creates binding legal consequences. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). While preamble statements may in some unique cases constitute binding, final agency action susceptible to judicial review, *Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1222–23 (D.C. Cir. 1996), this is not the norm. Agency statements “having general applicability and legal effect” are to be published in the Code of Federal Regulations. Federal Register Act, 44 U.S.C.

§ 1510(a)–(b); 1 C.F.R. § 8.1; *see Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986).

In one section of the preamble, EPA refers to its “final rule concerning high wind events,” which “states that ambient particulate matter concentrations due to dust being raised by unusually high winds will be treated as due to uncontrollable natural events” when certain conditions apply. 72 Fed. Reg. 13,560, 13,576. There is no such final rule. The final rule does not mention high wind events or anything about “ambient particulate matter concentrations.” EPA calls this a drafting error. In light of the error, the high wind events section of the preamble is a legal nullity. Agencies must publish substantive rules in the Federal Register to give them effect. 5 U.S.C. § 552(a)(1); *Morton v. Ruiz*, 415 U.S. 199, 233 & n.27 (1974). An unpublished final rule on high winds can have no legal consequences, and neither can preamble statements mentioning such a rule. *See Brock*, 796 F.2d at 539. Because there was no “nationally applicable . . . final action taken” by EPA, 42 U.S.C. § 7607(b)(1), there is nothing for this court to review.

The preamble also contains a list of “examples” of events that may be considered “exceptional” under the final rule. *See* 72 Fed. Reg. 13,560, 13,564–65. NRDC objects to these examples on the basis that they treat a variety of common events as per se exceptional in violation of 42 U.S.C. § 7619. We do not believe the statements in the preamble amounted to final agency action. EPA spoke in the conditional, suggesting that events in the various categories “may be exceptional events” or “may qualify for exclusion under this rule provided that all other requirements of the rule are met.” 72 Fed. Reg. at 13,564–65. Other statements were equivocal, such as the declaration, repeated several times in different forms, that certain events are to be evaluated “on a case-to-case basis.” *Id.* Giving “decisive weight to the agency’s choice between ‘may’ and ‘will,’” *Brock*,

796 F.2d at 538, we have held that similar statements are nonbinding and unreviewable. See *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

Even if the statements in the preamble were reviewable under the Clean Air Act, they are not ripe for review at this time. The statements about exceptional events are “hypothetical and non-specific.” *Kennecott*, 88 F.3d at 1223. NRDC has not demonstrated that any of the statements has immediate legal or practical consequences. How EPA will use or rely on or interpret what it said in the preamble is uncertain. See *Kennecott*, 88 F.3d at 1223; *Pub. Citizen, Inc. v. U.S. Nuclear Regulatory Comm'n*, 940 F.2d 679, 683 (D.C. Cir. 1991). We can see no significant hardship to the parties from waiting for a real case to emerge. As EPA points out in its brief, the Clean Air Act “provides for judicial review of any EPA decision to determine the attainment status of an area, or to designate or redesignate an area, based on EPA’s decision to exclude exceptional events data or other information.” Resp’ts Br. at 39; cf. *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998).

The petitions for review are therefore dismissed.

So ordered.

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: When an agency receives comments that object to its application of a statutory term as being contrary to the plain text of the statute, what is the agency to understand is the target of the objection? The specific application or the agency's underlying interpretation of the term or both? The court responds only the application. But the answer depends on how the comments are phrased. If, as here, the comments address a specific application by pointing out that it reflects an interpretation of a statutory term that contradicts the plain text of the statute, how can the agency respond to the comments without considering whether its definition is consistent with the statute, much less how would it not be on notice that the comments extended to the agency's interpretation of the statutory term?

The NRDC objected to EPA's interpretation of the term "natural event," 42 U.S.C. § 7619(b)(1)(A)(iii),¹ as applied to emissions arising from clean-up activities associated with natural disasters, explaining that such an interpretation was inconsistent with the statutory text and the legislative history. It offered these comments in the context of addressing EPA's list of examples of "natural events" in the preamble to the notice of proposed rulemaking, *The Treatment of Data Influenced by*

¹ The Clean Air Act defines "exceptional event" as 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).

Exceptional Events (“NPRM”), 71 Fed. Reg. 12,592, 12,596 (Mar. 10, 2006). NRDC Comments, at 4-5. Given the stated reason for the objection to the application and the context, it is unclear what rule follows from the court’s approach for there is no heightened comment requirement under the Administrative Procedure Act, the Clean Air Act, or our precedent.

Although section 307’s exhaustion requirement is “strictly” enforced, *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998), our precedent explains that “commenters must be given some leeway in developing their argument before this court, so long as the comments to the agency were adequate notification of the general substance of the complaint.” *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006). Likewise, our precedent rejects the idea that the exhaustion requirement calls for hair-splitting. *E.g.*, *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817 (D.C. Cir. 1998). For example, in *National Petrochemical & Refiners Association v. EPA*, 287 F.3d 1130 (D.C. Cir. 2002), the court concluded that although the comments did not specifically mention the cold-start portion of the Federal Test Procedure, they did “raise the underlying issue of poor performance at certain temperatures,” *id.* at 1139, and consequently the comments were “close enough to have put the EPA on notice that it had to defend the performance of the NO_x adsorbbers at all relevant temperatures and conditions,” *id.* at 1139-40. So too here, where the comments and the structure of the NPRM both indicate that EPA was put on notice of NRDC’s underlying objection to the definition of “natural event.”

The comments at issue stated:

[1] Under no circumstances can the clean-up associated with a natural disaster itself be considered a “natural event.” [2] EPA’s suggestion to the contrary

flies in the face of the plain statutory language. [3] The statute clearly and explicitly distinguishes between “natural event[s]” (events that do have a human origin) and “events caused by human activity.” [4] A natural event is one that is not the result of human activity. [5] For example, the Legislative History identifies *only* forest fires and volcanic eruptions as examples of natural events. [6] While the level of human activity that discharges pollutants may increase in the wake of a natural disaster, emissions from clean-up activities (such as debris burning, operation of diesel equipment, and demolition activities) are clearly events caused by human activity, and may not be classified as “exceptional events” unless they meet each of the requirements of section 319 for qualifying anthropogenic events.

[7] In short, the activities themselves that are responsible for the emissions (and possible violations of NAAQS) are of human origin, and by definition *not* natural events. [8] The fact that a natural event precipitates the need for human activity cannot and does not transform the human activity itself into a natural event. [9] Thus, the Act clearly precludes EPA from identifying emissions from clean-up activities as “natural events” that qualify as exceptional events.

NRDC Comments, at 4-5 (internal citation omitted) (alteration other than numbering in NRDC comments).

It is readily apparent these comments put EPA on notice that the NRDC was objecting to its broad interpretation of the statutory term “natural event.” Although the comments do not expressly refer to 40 C.F.R. § 50.1(k), which codifies EPA’s definition of “natural event,” the introductory phrase — “[u]nder

no circumstances” — signals an underlying concern with EPA’s interpretation of what can qualify as a “natural event.” So introduced, the second sentence makes clear that the preceding reference to a particular application is grounded in an objection to the agency’s interpretation of what is a “natural event” as too broad and contrary to the plain statutory text. The third sentence explains why, pointing to the distinction in the statute between natural events and those caused by human activity. *See* 42 U.S.C. § 7619(b)(1)(A)(iii). The fourth sentence states the conclusion that follows in the commenter’s view. Support for that view is offered in the fifth sentence’s reference to an illustrative example in the legislative history. The sixth sentence identifies the confusion that the agency’s broad interpretation reflects, given the statutory distinction and inclusion of specific exceptions. The second paragraph makes the same point: the statute bars EPA from including such an application in its listing of examples of a “natural event” because clean-up activities and other events resulting from human activity are inherently (as opposed to impliedly) human activities and thus not a “natural event.”

Even if the entirety of the above-quoted comments did not put EPA on notice that the NRDC was objecting to its interpretation of “natural event,” the fourth sentence did. Following a sentence noting the statutory distinction, the fourth sentence states: “A natural event is one that is not the result of human activity.” [3-5] This alone was fair warning that, according to the NRDC, the statute precludes treating any human-caused activity as a “natural event.” As the fourth sentence was made in the context of addressing EPA’s application of its definition, the comments were “close enough,” *Nat’l Petrochem. & Refiners Ass’n*, 135 F.3d at 817, to have put EPA on notice that the commenter was challenging the agency’s definition of a statutory term. Either way EPA could not avoid being aware that the NRDC’s comments objected to the

underlying broad interpretation of “natural event” and so met the Clean Air Act’s “reasonable specificity” requirement, 42 U.S.C. § 7607(d)(7)(B).

This is not an instance in which the agency would be unclear as to what the comments addressed or have to “wade through reams of documents searching for ‘implied challenges,’” Op. at 6-7 (quoting *Mossville Env’tl. Action Now v. EPA*, 370 F.3d 1232, 1240 (D.C. Cir. 2004)). The comments state on the first page that they are addressing “elements of EPA’s March 10 proposal,” i.e., the NPRM, and explain why, as demonstrated by one example in the preamble’s listing of examples, EPA’s interpretation of “natural event” could not be consistent with the plain meaning of the statute, *see* Op. at 6, pointing to the statutory text and the legislative history, [3]-[5]. Even speculating — contrary to EPA’s proposal, *see* NPRM, 71 Fed. Reg. at 12,596 — that EPA’s view of clean-up activities was based on the definition of “exceptional events” as including human activities “unlikely to recur at a particular location,” *see* Op. at 5-6, the comments would alert EPA to the objection that the statute does not permit an activity with any human cause to be an “exceptional event” unless the statutory criteria for an “event caused by human activity” were satisfied, [6]. In fact, by using separate sections and headings in the comments to address each possibility, NRDC’s comments object to the proposed rule’s treatment of clean-up activities as “exceptional events” either as natural events or events caused by human activity.

The specified context of the comments, especially the placement of the clean-up-activities example in that part of the NPRM where EPA was giving examples of how its definition of “natural event” would be applied also shows that EPA was on notice of the objection to its interpretation of “natural event.” The comments address a sentence in the NPRM involving clean-up activities after a natural disaster, *see* Op. at 5, that

appears in the section of the preamble to the proposed rule giving examples of “natural events.” NPRM, 71 Fed. Reg. at 12,596 (“5. Natural Events”). The comments thereby direct the reader to the underlying concept that is at issue: a broad interpretation of “natural event” that includes activities with some human contribution. Together, the text and structure of the comments and placement of the clean-up activities example in the NPRM’s listing sufficed to put EPA on notice that the NRDC was objecting to EPA’s definition of “natural event.” Nothing in the NRDC’s petition for reconsideration suggests its earlier comments had not raised an objection to the agency’s interpretation of “natural event.” *See Op.* at 7. In the petition the NRDC complains only that earlier comments could not have objected to justifications for the definition that appeared for the first time in the preamble to the final rule, namely certain legislative history, a previous rulemaking proposal, and new illustrative examples. In any event, the rehearing objection to EPA’s definition of “natural event” tracks the NRDC’s earlier comments.²

Nonetheless, although EPA was on notice that the NRDC

² In seeking reconsideration of the final rule, NRDC stated:

The Final Rule’s interpretation of the statutory term “natural event” is an unlawful departure from the clear language of the statute. The statute identifies a dichotomy whereby events are either “natural” or “caused by human activity”. 42 U.S.C. § 7619(1)(A). Since the statute (and logic) does not permit an event to be both natural and caused by human activity, a ‘natural event’ has no human activity.

Petition for Reconsideration of the Natural Resources Defense Council, In the Matter of the Final Rule: Treatment of Data Influenced by Exceptional Events, No. 2060-AN40, at 5-6 (E.P.A. May 21, 2007).

was objecting to its broad interpretation of “natural event” in a manner that would include human activities, the NRDC’s objection fails on the merits. The Clean Air Act does not define “natural event” or specify how to categorize events with predominantly natural causes but some human contribution. Because the statute leaves a gap to be filled by EPA, the statutory term is ambiguous. EPA’s definition, in turn, is permissible. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). As EPA offers, “human activities sometimes contribute to otherwise spontaneous events,” Respondent’s Br. at 33; *see also* Treatment of Data Influenced by Exceptional Events (“Final Rule”), 72 Fed. Reg. 13,560, 13,563 (Mar. 22, 2007), such as a planned forest fire that gets out of control because of unforeseen circumstances. Still, the question whether EPA’s application of the term “natural event” to particular circumstances will, in fact, be permissible is for another day, as EPA’s listing of examples is neither exhaustive, *see* Final Rule, 72 Fed. Reg. at 13,564, nor binding on it, *see* Op. at 8-9; *cf. Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 226-28 (D.C. Cir. 2007); *Interstate Natural Gas Ass’n of America v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002).

Accordingly, I respectfully dissent from Part II of the opinion and otherwise concur.