

June 14, 2010

TO: Members of the MAG Regional Council Executive Committee

FROM: Councilwoman Peggy Neely, City of Phoenix, Chair

SUBJECT: MEETING NOTIFICATION AND TRANSMITTAL OF TENTATIVE AGENDA  
FOR THE MAG REGIONAL COUNCIL EXECUTIVE COMMITTEE AND A POSSIBLE  
EXECUTIVE SESSION

Monday, June 21, 2010 - 12:00 Noon  
MAG Office, Suite 200 - Cholla Room  
302 North 1<sup>st</sup> Avenue, Phoenix

A meeting of MAG Regional Council Executive Committee has been scheduled for the time and place noted above. Members of the Committee may attend the meeting either in person, by telephone conference, or by video conference.

Please park in the garage under 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.

Pursuant to Title II of the Americans with Disabilities Act (ADA), MAG does not discriminate on the basis of disability in admissions to or participation in its public meetings. Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting Denise McClafferty at the MAG office. Requests should be made as early as possible to allow time to arrange the accommodation.

If you have any questions regarding the Executive Committee agenda items, please contact me at (602) 262-7445. For MAG staff, please contact Dennis Smith, MAG Executive Director, at (602) 254-6300.

**MAG EXECUTIVE COMMITTEE  
TENTATIVE AGENDA  
June 21, 2010**

COMMITTEE ACTION REQUESTED

1. Call to Order

The meeting of the Executive Committee will be called to order.

2. Call to the Audience

An opportunity will be provided to members of the public to address the Executive 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 Executive 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 Executive Committee Consent Agenda

Prior to action on the consent agenda, members of the audience will be provided an opportunity to comment on consent items that are being presented for action. Following the comment period, Committee members may request that an item be removed from the consent agenda. Consent items are marked with an asterisk (\*).

2. Information and discussion.

3. Approval of Executive Committee Consent Agenda.

**ITEMS PROPOSED FOR CONSENT \*  
BY THE EXECUTIVE COMMITTEE**

\*3A. Approval of the May 17, 2010, Executive Committee Meeting Minutes

\*3B. Amendment to the FY 2010 MAG Unified Planning Work Program and Annual Budget to Accept Funding from the City of Phoenix for Human Services Transportation Coordination Planning

3A. Review and approval of the May 17, 2010 Executive Committee meeting minutes.

3B. Approval of the budget amendment to the FY 2010 MAG Unified Planning Work Program and Annual Budget (UPWP) to add a new Intergovernmental Agreement that increases the FY 2010 MAG UPWP by \$192,385.

The FY 2010 MAG Unified Planning Work Program and Annual Budget (UPWP) was approved on May 27, 2009. A new intergovernmental agreement for Human Services that was not included in the FY 2010 MAG UPWP was awarded to MAG recently. This item is to recommend approval of an amendment to the MAG 2010 UPWP increasing the budget in Human Services for a new intergovernmental agreement received from the City of Phoenix to conduct human services transportation coordination planning. This planning is required by SAFETEA-LU and affects any applicants for Section 5310, Elderly Persons and Persons with Disabilities; Section 5316, Job Access and Reverse Commute; and Section 5317, New Freedom. The intergovernmental agreement increases the FY 2010 MAG UPWP by \$192,385. Please refer to the enclosed material.

**ITEMS PROPOSED TO BE HEARD  
BY THE EXECUTIVE COMMITTEE**

4. Update on Exceptional Events and MAG Five Percent Plan for PM-10

On May 25, 2010, the Environmental Protection Agency (EPA) announced that it would not concur with the Arizona Department of Environmental Quality (ADEQ) documentation regarding four exceptional events at the West 43<sup>rd</sup> Avenue monitor in 2008. The region will not have its first year of clean data and will not be in attainment by 2010. EPA has decided to disapprove the MAG Five Percent Plan for PM-10 for reducing dust pollution in the Valley. The decision, if made final, will have significant implications for our region, including a potential conformity freeze on our \$7 billion Transportation Improvement Program and the loss of federal highway funding.

Compelling information was found that the conditions in the riverbed and high winds were major contributors to the exceptional events. MAG and ADEQ staff worked vigorously to provide information and documentation to the EPA supporting the exceedances and exceptional

4. Information, discussion and possible action to recess the meeting to conduct an executive session with MAG's attorney for legal advice regarding the EPA nonconcurrency on the four exceptional events at the West 43<sup>rd</sup> Avenue monitor in 2008 and the EPA's intent to disapprove the MAG Five Percent Plan for PM-10 for reducing dust pollution in the Valley; and reconvene the meeting to consider possible action to obtain specialized legal counsel regarding the EPA nonconcurrency on the four exceptional events at the West 43<sup>rd</sup> Avenue monitor in 2008 and the EPA's intent to disapprove the MAG Five Percent Plan for PM-10 for reducing dust pollution in the Valley.

events. In addition, at the May 25<sup>th</sup> meeting the EPA Region 9 Administrator acknowledged that the EPA Exceptional Events Rule was flawed. Instead of accepting the ADEQ exceptional events documentation and MAG's technical analysis that the monitor readings were caused by high wind exceptional events, the EPA Region 9 Administrator noted that he had to enforce the flawed rule.

At the EPA meeting, MAG was prepared to discuss a project involving Phoenix, Maricopa County and the US Army Corps of Engineers to restore the riverbed near the West 43<sup>rd</sup> Avenue monitor to its native habitat. This project is viewed as a permanent, long-term solution to stabilize the riverbed. No opportunity was given to discuss this option. The EPA issued its decision with no warning and no opportunity for our experts to review and provide comment on the final technical support document from EPA.

On May 26, 2010, the MAG Regional Council directed staff to bring recommendations to the Executive Committee on obtaining legal advice and suggested that staff work with the Governor and the Arizona Congressional Delegation to stay the action of EPA until EPA corrects its flawed policy.

The Executive Committee may vote to recess the meeting and go into executive session with MAG's attorney for legal advice regarding the EPA nonconcurrence on the four exceptional events at the West 43<sup>rd</sup> Avenue monitor in 2008 and the EPA's intent to disapprove the MAG Five Percent Plan for PM-10 for reducing dust pollution in the Valley. The authority for such an executive session is A.R.S. § 38-431.03(A)(3).

The Executive Committee may reconvene the meeting to consider obtaining specialized legal counsel regarding the EPA nonconcurrence on the four exceptional events at the West 43<sup>rd</sup> Avenue monitor in 2008 and the EPA's intent to disapprove the MAG Five Percent Plan for PM-10 for reducing dust pollution in the Valley.

5. Sustainable Communities Program Grant

At the May 26, 2010 MAG Regional Council meeting, there was discussion pertaining to possible approaches for the Sustainable Communities Planning Grant Program. In preparation for the imminent release of the Notice of Funding Availability by the U.S. Department of Housing and Urban Development, staff was directed to survey the MAG member agencies to determine the role of MAG in the application process. A report will be offered on the results of the survey distributed on May 27, 2010.

The advance notice issued by HUD in March did not define eligible applicant or region. It is hoped that the Notice of Funding Availability will offer more clarity. The advance notice did emphasize the need for strong partnerships and taking a regional approach. Funding levels were identified in the advance notice as providing up to \$5 million for large metropolitan areas and up to \$2 million for small metropolitan or rural areas. Of the \$100 million available nationally, approximately \$25 million has been set aside for small metropolitan or rural areas. The process is expected to be very competitive.

The NOFA will provide an opportunity for regions to apply for grant funding to support the development of regional plans for sustainable development. Acquiring funds now may position the region to receive additional funding in the future if such plans become a requirement with the reauthorization of federal transportation funding. The purpose of the program is to support multi-jurisdictional regional planning efforts that integrate housing, economic development, and transportation decision-making in a manner that empowers jurisdictions to consider the interdependent challenges of economic growth, social equity and environmental impact simultaneously. Please refer to the enclosed material.

5. Information, discussion and further direction on MAG's involvement and role in developing an application for the HUD Sustainable Communities Program grant.

6. Transit Planning Responsibilities

At the April 28, 2010 Regional Council meeting, the City of Surprise requested that a future agenda item be considered by the Regional Council regarding transit planning responsibilities. Staff was directed to further clarify this request for consideration by the Executive Committee. At the May 17, 2010 Executive Committee meeting, MAG noted that Surprise was interested in the relationship of the recently approved transit planning agreement by the Regional Council and the new law approved by the Governor, SB 1063, and how these actions may change transit planning responsibilities. Staff presented a revised transit planning roles and responsibilities chart and the transit planning responsibilities were discussed. Members of the Executive Committee stated they would like the opportunity to review the chart, the transit planning agreement and the new law with their staff and have further discussion at the June Executive Committee meeting. Please refer to the enclosed material.

7. MAG Committee Chair and Vice Chair Appointments ending June 30, 2010

On July 22, 2009, the MAG Regional Council approved the MAG Committee Operating Policies and Procedures. Officer appointments for technical and other policy committees, with exception of the MAG Regional Council, Transportation Policy Committee, and Management Committee, will be made by the MAG Executive Committee and are eligible for one-year terms, with possible reappointment to serve up to one additional term by consent of the respective committee. These appointments will be staggered to assist continuity, appointing approximately half of the committee officers in June each year and the remainder in January, unless a vacancy occurs.

A memorandum was sent to the technical and policy committee members whose chairs and vice chair expire in June explaining that the members had two options: 1) recommend reappointment of

6. Information, discussion, and possible action.

7. Approval of appointments of the technical and policy committee chairs and vice chairs ending June 30, 2010.

the current chair and vice chair to serve a second one-year term, or 2) have the vice chair ascend to the chair position and have a new vice chair appointed by the Regional Council Executive Committee. An update on the committees' recommendations will be provided. Please refer to the enclosed material.

8. 2010 Desert Peaks Awards Update

The Maricopa Association of Governments biennially hosts the Desert Peaks Awards program to recognize regional excellence. The prestigious awards are presented to those agencies and individuals who have demonstrated a commitment to promoting, recognizing, and attaining the ideals of regionalism. The judging panel met April 23, 2010, and selected the 2010 Desert Peaks Awards recipients. All nominees have been notified of the judges' selections. Invitations were mailed May 19, 2010, and RSVPs are being accepted (deadline June 18, 2010). The awards ceremony will be held directly following the MAG annual meeting on June 30, 2010, at the Sheraton Phoenix Downtown Hotel, 340 North 3rd Street, Phoenix.

9. Request for Future Agenda Items

Topics or issues of interest that the Executive Committee would like to have considered for discussion at a future meeting will be requested.

10. Comments from the Committee

An opportunity will be provided for the Executive Committee members to present a brief summary of current events. The Executive Committee is not allowed to propose, discuss, deliberate or take action at the meeting on any matter in the summary, unless the specific matter is properly noticed for legal action.

Adjournment

8. Information and discussion.

9. Information and discussion.

10. Information

MINUTES OF THE  
MARICOPA ASSOCIATION OF GOVERNMENTS  
MAG REGIONAL COUNCIL EXECUTIVE COMMITTEE  
May 17, 2010  
MAG Offices, Cholla Room  
302 N. 1<sup>st</sup> Avenue, Phoenix, Arizona

MEMBERS ATTENDING

- |   |   |
|---|---|
| * Councilwoman Peggy Neely, Chair<br>Mayor Thomas L. Schoaf, Litchfield Park,<br>Vice Chair | Mayor Marie Lopez Rogers, Avondale<br># Mayor James M. Cavanaugh, Goodyear<br>Mayor Scott Smith, Mesa |
| # Mayor Hugh Hallman, Tempe, Treasurer  | Mayor Jim Lane, Scottsdale  |

\* Not present

# Participated by video or telephone conference call

1. Call to Order

The Executive Committee meeting was called to order by Vice Chair Schoaf at 12:07 p.m. He noted that an addendum, agenda item #11, and a map of the Wellton Branch were at their place. Vice Chair Schoaf stated that public comment cards were available for those members of the public who wish to comment. Transit tickets were available from Valley Metro for those using transit to come to the meeting. Parking validation was available from MAG staff for those who parked in the parking garage.

2. Call to the Audience

Vice Chair Schoaf noted that, according to the MAG public comment process, members of the audience who wish to speak are requested to fill out the public comment cards. He stated that there is a three-minute time limit. Public comment is provided at the beginning of the meeting for items that are not on the agenda that are within the jurisdiction of MAG, or non-action agenda items that are on the agenda for discussion or information only. Vice Chair Schoaf noted that no public comment cards had been received.

3. Consent Agenda

Vice Chair Schoaf noted that prior to action on the consent agenda, members of the audience are provided an opportunity to comment on consent items that are being presented for action. Following the comment period, Committee members may request that an item be removed from the consent agenda. Vice Chair Schoaf noted that no public comment cards had been received.

Vice Chair Schoaf requested a motion to approve the consent agenda. Mayor Hallman commented on consent agenda item 3B. He stated that he is grateful that these resources are going into this project. He asked for clarification from staff that this effort is focused on the fact that Interstate 10 is being built out and little if any effort was put into looking at alternatives to the I-10 corridor. Mayor Hallman stated that he understands that this is to supplement what is going forward so that

MAG has a better understanding of the possibility of using rail, particularly commuter rail, from Maricopa up through the same corridor to address not just post construction, but also the provision of transportation options during construction as a mitigation measure. Mr. Smith stated that was correct and is the purpose.

Mayor Hallman then moved to approve items #3A and #3B. Mayor Cavanaugh seconded the motion and the motion carried unanimously.

3A. Approval of the April 19, 2010, Executive Committee Meeting Minutes

The Regional Council Executive Committee, by consent, approved the April 19, 2010, Executive Committee meeting minutes.

3B. Consultant Selection for the Southeast Corridor Major Investment Study

The Regional Council Executive Committee, by consent, approved the selection of HDR, Inc. to conduct the Southeast Corridor Major Investment Study for an amount not to exceed \$300,000. The fiscal year (FY) 2010 MAG Unified Planning Work Program and Annual Budget, approved by the MAG Regional Council in May 2009, was amended in March 2010 to include \$300,000 to conduct the Southeast Corridor Major Investment Study. The Arizona Department of Transportation (ADOT) is in the process of completing an Environmental Impact Statement (EIS) for the widening of Interstate 10, the Maricopa Freeway, between the SR-51/SR-202L/Red Mountain "Mini-Stack" and SR-202L/Santan-South Mountain "Pecos Stack" traffic interchanges. During the course of the EIS, questions have been raised by MAG member agencies about the investment being made in this corridor and the need for alternative transportation options, in addition to widening Interstate 10 and improving the system traffic interchanges, to accommodate the growing travel demand between the East Valley and Central Phoenix. MAG proposes conducting the Southeast Corridor Major Investment Study for these purposes. A request for proposals was advertised on March 22, 2010 and four proposals were received. A multi-agency proposal evaluation team reviewed the proposal documents and, on April 28, 2010, the proposal evaluation team recommended to MAG the selection of HDR, Inc. to conduct the project in an amount not to exceed \$300,000.

4. Approval of the Draft FY 2011 MAG Unified Planning Work Program and Annual Budget and the Member Dues and Assessments

Becky Kimbrough stated that the draft MAG Unified Planning Work Program and Annual Budget is on the agenda for recommendation of approval. She noted the draft Work Program is presented incrementally beginning in January with proposed dues and assessments. This year MAG is proposing to keep a 50 percent overall reduction of member dues in place in the FY 2011 budget due to the economic conditions. Ms. Kimbrough stated that in February MAG presented proposed projects for the Work Program and began work on the initial draft for mail out to our committee members in March. She explained that this incremental presentation allows time for questions, input, and a more thorough review of the proposed budgetary items. Ms. Kimbrough stated that we also covered positions and the proposed additional floor and renovations at the April meeting. She explained that the final draft budget reflects this information and the overall increase is almost solely due to the reported changes.

Ms. Kimbrough stated that the Intermodal Planning Group meeting was held on Friday, April 29, 2010. Representatives from Federal Highway, the Federal Transit Administration, the Arizona Department of Transportation, the Environmental Protection Agency (via telephone), the City of Phoenix Public Transit, Valley Metro, Valley Metro Rail and the Arizona Department of Environmental Quality were in attendance. She noted that there were great presentations and a lot of discussion, and no new recommendations for budget revisions were made. Ms. Kimbrough stated that MAG submits its Work Program each year to the Government Finance Officer's Association for review and application for the Distinguished Budget Presentation Award. She noted that MAG received this award for the current Work Program, and the approved budget for FY 2011 will be submitted for the 11<sup>th</sup> consecutive year. Ms. Kimbrough thanked the Executive Committee and asked if there were any questions.

Vice Chair Schoaf stated that in the explanation of the budget, it notes that there is a 5 percent change in salaries. He noted that on page 61 of the budget under expenditures and personnel costs, it has a percentage change of 7.44 percent. He also noted that in the narrative it indicates that there are 8 percent more people. Vice Chair Schoaf asked staff to explain how all these numbers come together. Ms. Kimbrough explained the net change of 7.44 percent. She noted that six positions were added to the budget, as well as a five percent increase for some of the staff positions that were not part of the compensation study and received no increase. She also noted an increase in the Arizona State Retirement System (ASRS) contribution, which is also part of the personnel costs. Vice Chair Schoaf asked how you can have an eight percent increase in people and any increase at all in compensation and only have a net increase of 7.44 percent. Ms. Kimbrough explained that the salaries for the different positions vary and all positions were not budgeted to receive an increase.

Mayor Hallman moved to recommend approval of the resolution adopting the Draft FY 2011 MAG Unified Planning Work Program and Annual Budget and the member dues and assessments. Mayor Smith seconded the motions and the motion was carried unanimously.

5. Sustainable Communities Planning Grant Program Update

Amy St. Peter thanked the Executive Committee for the opportunity to present information regarding the Sustainable Communities Planning Grant Program. She stated that since the April Executive Committee meeting, staff has undertaken a number of efforts to gather more information about the Sustainable Communities Program per the Executive Committee's request. Ms. St. Peter explained that this included meetings with the officers of the MAG technical Committees, community partners, and other councils of governments. She stated that the highlights from these meetings will be shared and guidance will be sought regarding future potential activity in response to the upcoming grant competition.

Ms. St. Peter stated that the grant competition will be offered through the U.S. Department of Housing and Urban Development (HUD) in partnership with the U.S. Department of Transportation (DOT) and the Environmental Protection Agency (EPA). She explained that the funding supports the development of regional plans for sustainable development and that MAG may be eligible to apply for funding. Ms. St. Peter stated that applying for this funding source may position MAG well in the future if such plans become a requirement with the re-authorization of federal transportation funding. She stated that approximately \$100 million is available nationally with up to \$5 million potentially available for large metropolitan areas. A 20 percent match is required. She noted that it

is anticipated that this grant process will be very competitive and oversubscribed. In a recent address, HUD Secretary Sean Donovan indicated that they expect to make 40 awards nationwide, and the time frame to apply for the grant will likely be as short as 60 days.

Ms. St. Peter stated that the advance notice published by HUD in March did not define an eligible applicant or region, but it is hoped that the Notice of Funding Availability (NOFA) due by mid-June will clarify who can apply for this funding. She noted that such clarification will help determine if MAG is the most appropriate applicant for the region. She also noted that many other agencies in this region have expressed interest in applying or partnering for the grant. Ms. St. Peter stated that feedback received so far indicates support for a regional application through MAG. Some cities are also weighing the benefits of applying on their own or through a regional effort, and other councils of governments are considering their options. She noted that the Joint Planning Advisory Council, at its April 2010 meeting, discussed the possibility of a consolidated application.

Ms. St. Peter stated that if MAG does submit an application on behalf of the region or on behalf of the Sun Corridor, there are some potential opportunities for action. A regional plan for sustainable development could include a focus on developing green housing and jobs along high capacity transit lines such as commuter rail, light rail, and the proposed intercity rail from Phoenix to Tucson. She noted that the officers of the technical Committees expressed support for this focus. She stated that they also indicated it was important to focus on the entire region, to consider infill development, to specifically identify the impact desired by the plan, and to leverage existing efforts proposed in the MAG FY 2011 Unified Planning Work Program. Ms. St. Peter stated that potential community partners, such as Urban Land Institute, ASU, LISC, Sonoran Institute and others expressed support for transit oriented development, connecting the paths along the canals, working with the tribal communities to connect them with additional transit services, and developing model codes to promote transit oriented development and fiscal effectiveness. She noted that feedback received from HUD indicates support for a consolidated application on behalf of the Sun Corridor, specific criteria to measure the impact of the planning process, and strong partners committed to a unifying purpose. Sustainability has been a common theme among other federal agencies such as the Federal Transit Administration and is expected to be an ongoing priority. Ms. St. Peter thanked the Executive Committee for their time and asked if there were any questions or suggestions.

Mayor Lane asked whether there has been sacrifice of local control on any of the issues. Ms. St. Peter stated that one of the items that has been looked at is leveraging existing efforts. That will help to focus the effort on what is underway and what we currently have support to do. Ms. St. Peter stated that the NOFA is expected to be out mid June 2010 and we hope it will help to clarify some questions. She noted that the positive side is that this gives applicants more time to organize. Ms. St. Peter stated that staff will be paying careful and close attention to the NOFA, when it does come out, to determine if there is anything staff needs to discuss with the Executive Committee. Mr. Smith stated that as a result of the stakeholders meeting, staff heard interest in modeling this after California's efforts where regions are setting targets and really becoming more involved in comprehensive land use planning. He noted that staff indicated MAG elected officials were not there at this point. The local head of HUD office said focus on things that are totally supported throughout the region. Mr. Smith stated that the support is with commuter and light rail lines, as well as transit oriented development around these rail lines and canals. Mr. Smith suggested coming up with "guiding principles" that are adopted by the Regional Council. He noted that we would then send those principles out to the cities and the city would send back a commitment that is

comfortable. MAG would take that commitment and model those efforts and put them together in a plan. He noted that the cities would still keep local control.

Mayor Lane confirmed that the NOFA will help clarify some of the questions. Ms. St. Peter confirmed that staff hopes the NOFA will clarify some things. Vice Mayor Schoaf thanked Ms. St. Peter for her report.

6. Regional Council Request for Future Agenda Items – Clarification and Guidance Regarding Transit Planning Responsibilities

Dennis Smith stated that on July 22, 2009, the MAG Regional Council adopted the MAG Committee Operating Policies and Procedures. He noted that under *Section 1.08 - Agenda Development* item number 4, it states the “Requests for future agenda items” will be placed on all Regional Council agendas. Items requested as future agenda items at Regional Council will be considered by the Executive Committee for further direction. Mr. Smith stated that at the April 28, 2010 MAG Regional Council meeting, the member from the City of Surprise requested that a future agenda item be considered by the Regional Council regarding transit planning responsibilities. Staff was directed to further clarify this request. Mr. Smith noted that the City of Surprise is seeking clarification and guidance regarding MAG’s regional transit planning responsibilities in relation to the Regional Public Transportation Authority (RPTA) since the approval of the Transit Planning Agreement by the Regional Council on March 31, 2010 and the changes in state law (SB 1063), regarding transit responsibilities, signed by the Governor on April 28, 2010. He noted that the effective date for SB 1063 is July 29, 2010. Mr. Smith explained that the provision in SB 1063, ARS §5106, states that the RPTA Board adopts a budget process in conjunction with MAG and that changes to the budget that materially impact the performance of the Regional Transportation Plan or that add or delete current or planned regional service in a corridor, shall be approved by MAG. Mr. Smith stated that MAG staff received a request on Friday for an update of the Transit Related Roles and Responsibilities chart. He noted that this was prepared and is in draft form at your place. Mr. Smith concluded by stating that the City of Surprise has requested that the clarification of transit planning roles and responsibilities be placed on the Regional Council agenda. He stated the staff is requesting direction from the Executive Committee on this agenda item.

Mayor Hallman asked what is it that the City of Surprise is asking for clarification. Mr. Smith replied that in his discussions with the City of Surprise, they are asking that if there are major changes to the Transit Life Cycle Program (TLCP), who has the primary responsibility. Is it the RPTA Board or it is the MAG Regional Council. Mayor Hallman proposed that we discuss this at the next Executive Committee meeting so that we can review the materials. Vice Chair Schoaf stated that this issue needs to be looked at carefully. Mayor Smith asked what the outcome would be of further discussion. He noted that we have an MOU and we have a law that is in place. Mayor Hallman stated that it is his understanding that we reviewed and agreed on what the MOU and law stated. Vice Chair Schoaf asked if staff or the attorney would clarify Section 3 of 485121 E in SB1063 which states that “the Board may recommend modifications to the public transportation element of the Regional Transportation Plan (RTP).” He stated that his question is whether that means changes to the Transit Life Cycle Plan are recommendations to the extent that they effect any change in the RTP. Mr. Smith confirmed that is correct. He explained that when you make changes to the TLCP, those changes need to be in the TIP and the RTP. Vice Mayor Schoaf stated that he interprets this section as all changes, not just material changes. Mr. Smith noted that the intent was

material changes. Vice Mayor Schoaf stated that he believes that is one of the questions that the City of Surprise would like answered. How those two sections interplay. Fredda Bisman asked for the opportunity to review the documents and report back at the next Executive Committee meeting. Mayor Smith suggested that staff gather together any other specific questions regarding transit planning responsibilities. Vice Chair Schoaf commented that some cities are concerned about the difficulty that the RPTA Board is having in producing any compromise to deal with budget issues and the conflicts that could have an effect on other regional transportation efforts. Mayor Smith asked if this clarification will assist in addressing the issue. Vice Chair Schoaf stated that the Executive Committee has been very clear to MAG staff that all four step in the table are suppose to be implemented. He added that one of the questions we have not asked staff is can we finish those steps without other changes in state law, and if we do, will that allow mitigation of the issues at RPTA.

Mr. Smith stated that the four options were addressed on the prior chart. He noted that the Executive Committee directed staff to move quickly and come back in 60 days. He stated that there were a series of negotiations with our planning partners and MAG staff came back to the Executive Committee with a compromise. The compromise was reflected in the memorandum and aligning the state law with the federal law. Mr. Smith explained that if the desire was to have total control of all operations in the MAG arena, it would require changing state statute. Mr. Smith stated that there was never total support for this idea (column four). Vice Chair Schoaf stated that he did not take away that the process was finished and that should also be part of the conversation. He noted that there still is the problem of multiple boards with multiple memberships that represent the same entities that have an inability to have consistent resolution of planning issues. Mr. Smith commented that the City of Surprise stated their question was that if there are major changes to the TLCP that impact the RTP, who should take the lead. He noted that first question is what is a material change and should there be some type of threshold.

Mayor Hallman stated that he needed to leave the meeting. He suggested that we discuss the issue at the next meeting. He also noted that he is very concerned about local control. Mayor Hallman stated that his suggestion would be to take this one step at a time. For example if the planning responsibilities work well, then we could look at merging the operations of bus and rail, if possible. He noted that he supports following the steps. Vice Chair Schoaf stated that this item will be on the next Executive Committee agenda. Mr. Smith stated that staff will look into the questions and be prepared to give a report at the next meeting.

7. MAG Committee Operating Policies and Procedures - Clarification on Chair and Vice Chair of Technical Committees

Denise McClafferty stated that in July of last year, the Regional Council approved the MAG Committee Operating Policies and Procedures. She noted that it states that "Officer appointments for technical and other policy committees, will be made by the MAG Executive Committee and are eligible for one-year terms, with possible reappointment to serve up to one additional term by consent of the respective committee." It also states that "In the event of a vacancy in the Chair position, the Vice Chair becomes Chair for the unexpired term of the previous Chair and a Vice Chair is elected to complete the remainder of the Vice Chair's term." Ms. McClafferty noted that in other MAG committees, such as the Transportation Policy Committee, it is noted in the Policies and Procedures that the Chair needs to be a MAG member agency. The Technical and Policy

Committees section does not specifically state this. She stated that currently, the Chairs of the technical committees are from MAG member agencies, but the Vice Chairs, in some cases, are from out side agencies, such as a community council. Ms. McClafferty explained that the question is what happens when the second one-year term of the Chair expires and the Vice Chair ascends to the Chair position. She noted that staff is requesting guidance on whether the Chair and Vice Chair of the Technical and Policy Committees should be from a MAG member agency.

Mayor Lopez Rogers stated that this goes back to local control and supports that the chair and vice chair should be from a member agency. Mayor Smith asked if the intent was for the vice chair to ascend to the chair. Mr. Smith stated that the understanding was that the vice chair would ascend to chair. Mayor Smith asked if there was any other compelling agreements why we would not want to have a non MAG member agency as vice chair. Ms. McClafferty stated that in the past there have been issues of non MAG member agencies not completely understanding the MAG process. Mr. Smith added that on the positive side of having a non member agency serve as vice chair is that they can bring new ideas to the table. He stated, however, that it comes back to local control. Mayor Lopez Rogers moved to approve that both chair and vice chair of MAG Technical and Policy Committees need to be from a MAG member agency. Mayor Smith seconded the motion and the motion carried unanimously.

11. Amendment of the MAG FY 2010 Unified Planning Work Program and Annual Budget to Provide Matching Funds to ADOT for a Federal Railroad Administration Grant to Study the Union Pacific Railroad Wellton Branch for Possible Future Amtrak Service to the Phoenix Metropolitan Area

This agenda item was taken out of order. Dennis Smith stated MAG received a call from the state of Arizona and they indicated that they would be applying for funding in the High Speed Rail category and would have to submit their grant with no matching funds because they were unable to provide the match. The State indicated the match would be \$60,000. Mr. Smith noted that they are applying for \$300,000 total and the application is due by May 19, 2010. Mr. Smith stated that he indicated to the State that he would bring the request for MAG to provide the \$60,000 match to the Executive Committee for approval. Mr. Smith then introduced Mark Pearsall, who does the MAG rail planning, to discuss the Wellton Branch rail line.

Mr. Pearsall stated that before the Committee is a slide of the former Southern Pacific Wellton Branch. He noted that Union Pacific currently owns this branch line. Mr. Pearsall pointed out the current Amtrak Sunset Limited Texas Eagle routing through the southern part of the State of Arizona serving the communities of Tucson, Maricopa and Yuma. He noted that the main line, also known as the Gila line, has seen Amtrak service for the last 14 years. He also pointed out the former Amtrak and Intercity Passenger Rail routes through Phoenix, which was in service from 1927 to 1996. These routes were taken out of service when the western portion of this service was down graded to storage. Phoenix then became the 5<sup>th</sup> largest city in the United States without intercity passenger rail service. Mr. Pearsall stated that the city of Maricopa is the closest city with Amtrak service, and the only way to get to this station is by private vehicle or taxi. The shuttle bus service was discontinued a few years ago. Mr. Pearsall stated that this grant would be used to study the re-implementation of Amtrak service through the Valley by looking at the cost of reopening the line through the west valley.

Mr. Pearsall gave an overview of historic Phoenix Union Station, which was built in 1923. It

received its first through passenger rail service in 1927. Between 1950 and 1960, Southern Pacific and Santa Fe Railway were featuring approximately 12 intercity passenger trains a day, which was a substantial amount for a city the size of Phoenix at that time. He noted that 10 of those train were transcontinental trains from Tucson through Phoenix to Yuma. One train came from Chicago through Flagstaff and Williams and terminating here in Phoenix. Mr. Pearsall showed a slide of a demonstration train that many MAG committee members were lucky enough to ride. He noted that in May 2000, Phoenix borrowed the Amtrak Talgo train from Washington State for a weekend to test the viability and interest of passenger rail between Phoenix and Tucson. Mr. Pearsall presented a slide of Phoenix Union Station today. He noted that Sprint and Qwest currently own the property and it has been restored. Mr. Pearsall then showed an aerial view of Union Station in the 1940's and today. He noted the vacant and industrial areas to the southwest of Union Station today. He also noted that there are ways to connect Union Station again should passenger rail service frequent this facility, with possible extension of the Dash shuttle service. Mr. Pearsall showed the Committee what a future station might look like by putting together a track platform scenario. He noted that with the MAG Commuter Rail Studies, this area was surveyed and looked at for its capability of being an urban rail hub again. This scenario shows the ability to service eight trains a day.

Mayor Hallman stated that he had the pleasure of taking Amtrak from Maricopa to Houston and Boston to New Orleans in 2005. He indicated his concerns of what this region will have to deal with if Amtrak returns. He noted that we need to recognize that freight, which he is in support of through our Sun Corridor efforts, will be in direct conflict with Amtrak. He stated that freight definitely has priority. Mayor Hallman stated that he learned that the Amtrak time schedule is subjective noting that his experience left him 15 to 20 hours late. He stated that he supports moving forward with the grant, but stated that we need to recognize these challenges. Mr. Pearsall stated that Mayor Hallman's points were very relevant. He noted that the things that may be game changers for the region are that Amtrak has proposed remedies to those points. He explained that Amtrak is running a three day a week train in each direction and has been doing this for 40 years with poor results averaging only 78,000 riders a year when most of their other daily services, specifically through Flagstaff, are carrying in the hundreds of thousands. Mr. Pearsall stated that some of the remedies that Amtrak put forward for October is daily service in both directions, thus allowing people to rely on that train; working with Union Pacific to tighten up their scheduled window so that UP can schedule their freight in tandem with their passenger service; focusing everything out of their San Antonio station so that passenger can travel from Chicago to San Antonio to Tucson, Maricopa and Los Angeles; and resurrecting a bus connection between Phoenix and Maricopa. He noted that UP has spent \$20 million in the past five months on improving infrastructure in the Valley, which is something that this region would not have to financially absorb. Mr. Pearsall stated that UP also stated that getting the Amtrak Sunset Limited off the congested southern Gila line and perhaps rerouting through the Valley, would benefit their freight.

Mayor Hallman stated that getting service down onto that Sunset Limited line that goes through Tucson would require reactivating a line that was abandoned, the Valley to Maricopa Line, which is missing a segment. He noted that the massive amount of freight that is currently on the line will take precedence.

Vice Chair Schoaf asked if there were any other comments or questions. There being none he called for a motion.

Mayor Smith moved to approve amending the MAG FY 2010 Unified Planning Work Program and Annual Budget to provide \$60,000 to ADOT as matching funds for a Federal Railroad Administration grant to study the Union Pacific Railroad Wellton Branch for possible future Amtrak service to the Phoenix metropolitan area. Mayor Lopez Rogers seconded the motion and the motion passed unanimously.

8. Request for Future Agenda Items

Vice Chair Schoaf asked if there were any requests for future agenda items. Mayor Hallman confirmed that staff will bring back agenda item number six after further clarification on specific questions or concerns from member agencies. Executive Committee agreed.

9. Comments from the Committee

Vice Chair Schoaf asked if there were any comments for the committee members. Mayor Lane commented on the Wellton Branch item to Mayor Hallman's comment regarding point-to-point service. He noted that he is interested in if this is a controlling study focusing specifically on Amtrak. He asked if there were any other alternative studies regarding rail outside of Amtrak. Mr. Smith stated that the Western High Speed Rail Alliance (WHSRA) is also putting in an application for the connectivity between Phoenix and Las Vegas and Phoenix and Los Angeles. He noted the difference is that the WHSRA is also looking at freight

10. Adjournment

Mayor Lane moved to adjourn the Executive Committee meeting. Mayor Hallman seconded the motion and it carried unanimously. There being no further business, the Executive Committee adjourned at 1:08 p.m.

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Chair

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Secretary



302 North 1st Avenue, Suite 300 ▲ Phoenix, Arizona 85003  
Phone (602) 254-6300 ▲ FAX (602) 254-6490

June 14, 2010

TO: Members of the MAG Regional Council Executive Committee

FROM: Amy St. Peter, Human Services Manager

SUBJECT: AMENDMENT TO THE FY 2010 MAG UNIFIED PLANNING WORK PROGRAM AND ANNUAL BUDGET TO ACCEPT FUNDING FROM THE CITY OF PHOENIX FOR HUMAN SERVICES TRANSPORTATION COORDINATION PLANNING

The FY 2010 MAG Unified Planning Work Program and Annual Budget (UPWP) was approved on May 27, 2009. A new intergovernmental agreement for Human Services that was not included in the FY 2010 MAG UPWP was awarded to MAG recently. This item is to recommend approval of an amendment to the MAG 2010 Unified Planning Work Program and Annual Budget (UPWP) increasing the budget in Human Services for the new intergovernmental agreement received from the City of Phoenix to conduct human services transportation coordination planning. This planning is required by SAFETEA-LU and affects any applicants for Section 5310, Elderly Persons and Persons with Disabilities; Section 5316, Job Access and Reverse Commute; and Section 5317, New Freedom. The intergovernmental agreement increases the FY 2010 MAG UPWP by \$192,385.

The coordinated human services transportation planning activities conducted by MAG results in the development of an inventory of human services transportation services, an assessment of the gaps in service, and prioritized strategies to coordinate human services transportation services. It is expected that the plan will be updated on an annual basis to allow new agencies and projects to receive funding. The MAG coordinated human services transportation planning activities fulfill the need for the region to have a plan in place in order to secure federal funding.

If you have any questions regarding this amendment, please contact me at the MAG office at (602) 254-6300.

WESTERN STATES AIR RESOURCES COUNCIL



September 11, 2009

Gina McCarthy, Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue  
Washington, D.C. 20004

**Subject: Recommendations to improve implementation of the Exceptional Events Rule**

Dear Ms. McCarthy:

The Western States Air Resources (WESTAR) Council, an association of fifteen western state air quality management agencies, offers the enclosed recommendations related to the implementation of rules governing the treatment of data influenced by exceptional events – 40 CFR Parts 50 and 51, typically referred to as the Exceptional Events Rule. This rule is especially important in western states where we face significant air quality challenges brought on by chronic wildfires and dust storms. Improvements in the implementation of this important rule would benefit EPA, state and local agencies, and the public by focusing scarce air quality management resources on problems we can solve instead of problems over which we have little or no control.

Many of the problems that have been encountered could be resolved through simple rule revisions while others could be addressed through procedures that would differentiate those cases where expeditious concurrence is warranted from those cases where more rigorous justification is needed. In those cases where additional justification is needed, it is critical that EPA provide early feedback on the elements of an exceptional events request that are either misunderstood or that need further explanation.

Finally, states will always be limited to available data to justify their exceptional events requests. It is unlikely that the available data will be as complete and comprehensive as

would be needed to provide indisputable evidence in support of an exceptional events request. Nevertheless, decisions must be made and it is in all of our interests that those decisions are made on a timely basis.

Thank you in advance for your consideration of these recommendations. If you have any questions or comments, please contact Dan Johnson, WESTAR Executive Director, at 206-254-9145 (djohnson@westar.org).

Sincerely,



Martin Bauer, President  
Western States Air Resources Council

Cc: WESTAR Council Air Directors  
Bill Harnett, EPA-OAQPS  
Steve Page, EPA-OAQPS  
EPA Regional Administrators, Regions 6, 8, 9, 10  
Bill Becker, NACAA

## ATTACHMENT

### Recommended Actions to Improve Implementation of 40 CFR Parts 50 and 51 Related to Treatment of Data Influenced by Exceptional Events

The Exceptional Events Rule, which became effective on May 21, 2007, provides state and local agencies with a mechanism to exclude air monitoring values associated with exceptional events from datasets used to make important regulatory determinations, including the determination of attainment and redesignation from nonattainment to attainment. The preamble to the rule characterizes exceptional events as "events for which normal planning and regulatory processes established by the [Clean Air Act] are not appropriate." State and local air quality management agencies and EPA Regional Offices have encountered problems implementing the rule. Delays in processing and approving exceptional event demonstrations add workload both for EPA as well as state and local agencies while the backlog of pending actions by EPA grows and retrieval of older documentation becomes increasingly problematic. State and local agencies are often faced with strict deadlines to make regulatory decisions (e.g., attainment/nonattainment determinations), decisions that could hinge on whether or not data affected by exceptional events are included or excluded. Accordingly, WESTAR believes that EPA should establish a goal to respond to requests within 60 days, and in no case should EPA need more than 18 months to make a final concurrence decision.

Many of the problems can be traced to the lack of clarity surrounding EPA's expectations about what a state<sup>1</sup> should include in its demonstration package, as well as lack of consistency between the preamble and the rule itself. States are left to guess what EPA will ultimately require. While written guidance could address this issue, strict guidelines and thresholds would ignore the reality that each exceptional event is different in its own way. *A state should always be afforded the opportunity to demonstrate that monitored data has been affected by an exceptional event and exclude the data even when the circumstances surrounding the event are unusual and do not conform to a "one size fits all" model.*

States, EPA, and ultimately the public will benefit if we can solve these implementation issues. States should not be required to solve problems over which they have little or no control. It is essential that we focus our air quality management resources on problems we can solve, especially in these times of tight budgets and limited resources.

WESTAR believes the following recommendations address many of the problems states and EPA have encountered over the past two years. EPA's expectations with regard to the scope and content of a state's exceptional events demonstration package need to be more clearly articulated. Once EPA's expectations are clear, states should be able to prepare packages

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<sup>1</sup>All subsequent references to the state are meant to include state and local agencies responsible for submitting air quality data to the AQS.

that address those expectations or explain why an alternative analysis or explanation is appropriate.

Our recommendations address each of the showings a state is required to make, as spelled out in the Exceptional Events Rule. According to the rule, the state must show that:

1. An exceptional event occurred, as defined in the rule;
2. There is a clear causal relationship between the monitored value and the event;
3. There would have been no exceedance but for the event;
4. The event caused a measured concentration in excess of normal historical fluctuations;
5. The state has followed a public comment process; and
6. Reasonable actions are being taken to protect public health.

In general, we recommend that EPA use a screening process that differentiates exceptional event demonstrations that can and should be expedited from those that, absent significant justification, are unlikely to receive EPA concurrence. In the case of the former, neither EPA nor the state should devote additional resources to embellishing an otherwise approvable package. In the latter case, the state should know the hurdles it is likely to face in preparing an approvable demonstration so that informed decisions can be made about committing resources to the task.

The majority of the cases will fall somewhere between these two extremes – simple in many respects but more complicated in others. In these cases, it is important that EPA and the state are clear on both the showings that need more work as well as those showings that are sufficient and approvable. In short, both EPA and the state should be clear on expectations.

#### Recommendations

1. Show that an exceptional event occurred, as defined in the rule.

In the preamble to the Exceptional Events Rule, EPA describes exceptional events as “events for which the normal planning and regulatory process established by the CAA is not appropriate.” This characterization addresses the fundamental issue that the Exceptional Events Rule is meant to address - that regulatory decisions under the CAA should not be biased by monitored air quality data over which the state has little or no control.

The rule provides a broad definition of an exceptional event as an event that affects air quality, is not reasonably controllable or preventable, and is either a natural event or an event that is unlikely to recur [50.1(j)]. The rule later restricts an exceptional event to exceedances or violations of a NAAQS [50.14(a)(1)] and further requires the state to justify its request for exclusion of data by showing that the exceedance would not have occurred but for the event [50.14(c)(3)(iii)(D)].

Unfortunately, these restrictions could result in inflated design values, driving Clean Air Act planning and regulatory processes that are not appropriate. For example, inflated design values could impact nonattainment area classifications, control program target reductions in attainment SIPs, monitoring network design obligations, and eligibility for the limited maintenance plan option.

WESTAR recommends either of two paths for EPA to address this issue. The preferred alternative would be for EPA to revise the Exceptional Events Rule to allow its use any time monitored values are affected by an exceptional event that is not reasonably controllable or preventable. If EPA chooses not to revise the rule, WESTAR recommends that EPA allow for data that does not otherwise meet the definition of an exceptional event to be excluded under the Part 50 NAAQS rule appendices that govern data handling and allow the Regional Administrator to exclude data on a case-by-case basis.

2. Show that there is a clear causal relationship between the monitored value and the event.

The relationship between the event and the impacted monitoring site should be clearly established by the state in its exceptional event demonstration package. Once that relationship has been clearly established, no further work to address this part of the Exceptional Events Rule should be required. In some cases, the circumstances of the event will be such that the demonstration by the state is simple, while in other cases more detailed analysis will be needed. Our recommendation centers on how EPA could differentiate between the simple and the more difficult demonstrations so that, in the simple case, expeditious concurrence can be expected, and in the more difficult case, EPA can quickly alert the state as to the specific information needed for approval.

The clear causal relationship should be established through a description of four critical elements: meteorology, area impacted by the event, contributing emission sources, and air quality impacts.

- a. **Narrative:** Describe the event in narrative terms, including the chronology, and summarize how the following elements interacted to impact the monitoring site. The narrative and the associated analyses below should establish that: 1) there was an event, 2) the meteorological conditions were sufficient to provide for transport of the emissions generated by the event to the monitor, and 3) the chronology of concentrations (either daily or hourly) at the affected monitors are consistent with the expected arrival of the emissions.
- b. **Meteorology:**
  - i. Expedited review for *dust* if:

1. 20 mph or greater wind speed for minimum of 2 hours or wind speed above an established dust suspension threshold for the region, and;
  2. Synoptic scale meteorology which could be coupled with back trajectories as appropriate showing source-receptor relationship.
- ii. Expedited review for *fire impact on PM or ozone* if:
1. Synoptic scale meteorology which could be coupled with back trajectories as appropriate showing source-receptor relationship, or;
  2. Satellite and/or photographic evidence showing plume impact coupled with vertical dispersion evidence showing ground level impact.
- c. Area impacted by the event: Expedited review if all of the monitors expected to be impacted by the event were impacted.
- d. Contributing emission sources: Expedited review if the state shows emissions in the area were consistent before, during, and after the event, aside from emissions from the event itself.
- e. Air Quality Impacts: Expedited review if there is physical evidence of a plume impacting the monitor. For PM, this might include photographs or smoke markers on filter. For ozone, this might include a showing that the diurnal pattern differs significantly from the typical diurnal pattern for that monitoring site with respect to either the timing of peaks and valleys in the diurnal profile, or the rapidity of the buildup of concentrations.
3. Show that there would have been no exceedance but for the event

This is a special case of the clear causal discussion above, requiring a state to show not only that there was an impact from an event on a monitored value, but that the impact was significant enough to have caused the exceedance.

This demonstration requires a state to calculate the incremental impact caused by an event at a monitoring site over the relevant averaging time. In the preamble to the Exceptional Events Rule, however, EPA acknowledges that there are no precise and universally applicable techniques for calculating incremental impacts. Despite this acknowledgement, the state must do such a calculation to make the showing that there would have been no exceedance but for the event.

In large part, this dilemma is an outgrowth of EPA's choice to limit the definition of an exceptional event to an event that caused an exceedance of a NAAQS. EPA established a bright line test while acknowledging the absence of acceptable methods to meet the test.

Reiterating our comments above regarding EPA's choice to limit exceptional events to those that caused an exceedance, WESTAR believes that EPA should either revise the Rule to allow its use any time monitored values are affected by an exceptional event that is not reasonably controllable or preventable, or allow for data that does not otherwise meet the definition of an exceptional event to be excluded under the Part 50 NAAQS rule appendices that govern data handling and allow the Regional Administrator to exclude data on a case-by-case basis. If EPA chooses not to address this issue through either path, we offer the following recommendations on the requirement to show that there would not have been an exceedance but for the event.

WESTAR recommends expedited review when the incremental increase attributed to an exceptional event, as calculated using the methods described below, was sufficient to cause an exceedance of the relevant NAAQS:

- a. Estimating event impacts on 24 hour PM: Calculate the difference between the monitored value and the average PM concentration based on all of the hourly measurements at the site excluding the hours during which the event impacted the site. The difference is assumed to be the impact from the event. Hourly PM data must be available using this approach, or;
- b. Calculate the 98<sup>th</sup> percentile average daily PM value for similar time periods (typically seasonal but more precise, area specific metrics could be used). The incremental impact from the event is assumed to be the difference between the actual value for that day and the 98<sup>th</sup> percentile expected value for similar days.
- c. Estimating fire impact on ozone:
  - i. In areas that use predictive modeling to estimate ozone values for AQI purposes, the increase in monitored ozone resulting from the event is assumed to be the difference between the monitored value and a predicted value, or;
  - ii. The incremental impact from the event is assumed to be the difference between the actual value for that day and the 98<sup>th</sup> percentile expected value for similar days, calculated by determining the 98<sup>th</sup> percentile average 8-hour ozone value for similar time periods (typically seasonal but more precise, area specific metrics could be used).

4. Show that the event caused a measured concentration in excess of normal historical fluctuations

WESTAR stands by its May 25, 2006 comments to the Exceptional Events Rule docket as follows:

“WESTAR’s view is that statistical analysis may be used to qualify an event as an exceptional event, but statistical analysis should not be used to exclude an event from qualification as an exceptional event. Accordingly, WESTAR recommends that the rule allow States to seek a flag for any and all data impacted by an exceptional event. Concentrations above the 75<sup>th</sup> percentile of typical concentrations qualify as exceptional events and require only basic documentation. States may justify concentrations below the 75<sup>th</sup> percentile level on a case-by-case basis.”

Notwithstanding WESTAR’s comments, EPA chose in the final rule to require a state to show that the event resulted in a monitored value in excess of normal historical fluctuations. By limiting exceptional events in this manner, EPA has effectively excluded chronic dust and wildfire events that are common in the western states. That is, as chronic events, they are a part of our historical record against which we are required to show that a particular event caused an abnormal concentration. In short, during these chronic events, abnormal is normal, and under these circumstances it would be senseless to try to show that the event is abnormal.

WESTAR recommends that EPA either revise the rule to exclude this provision, or issue guidance consistent with our May 25, 2006 comments quoted above. The suggested 75<sup>th</sup> percentile should be considered sufficient for expedited review.

5. Show that the state has followed a public comment process

This provision of the Exceptional Events Rule has not proven to be a problem, and we therefore offer no recommendations for improvement.

6. Show that reasonable actions are being taken to protect public health.

While an exceptional event is defined as an event that is not reasonably controllable or preventable, reasonable steps can and should be taken to mitigate the impacts of an event on public health. This is consistent with the guiding principle in the preamble to the Exceptional Events Rule that protection of public health is the highest priority.

WESTAR recommends that states that have developed Natural Events Action Plans under the Natural Events Policy (superseded by the Exceptional Events Rule) continue to use these or

similar plans to guide the steps to be taken to alert and inform the public and to address actions the state may take to reduce emissions, especially from temporary and intermittent sources. States that have not developed such plans may consider doing so, or document other ongoing public education and alert programs if there is a likelihood of dust or fire events in the future.

As part of this showing, EPA must also determine whether the state is implementing an emission control program that, in effect, represents "reasonable actions" to protect public health. Section 110 of the Clean Air Act requires just this sort of showing in each state's SIP, a plan that provides for implementation, maintenance, and enforcement of primary and secondary air quality standards. The SIP must contain, among other things, enforceable emission limitations and other control measures, means, or techniques as may be necessary or appropriate to prohibit any source from contributing significantly to nonattainment or interfere with maintenance of national ambient air quality standards.

WESTAR believes that, with regard to exceptional events, EPA's assessment of whether a state is taking reasonable actions to protect public health should merely be an assessment of whether the state has met its obligations under Section 110 of the Clean Air Act. This would include emission control programs and regulations that are being implemented by the state, that have been submitted to EPA for inclusion in their SIP, but that have not yet been acted upon by EPA.

If the 110 SIP is deficient, EPA should call for a SIP revision as set forth in the Act. Under these circumstances the state would need to show that the deficiency had little impact on the monitored value for which the state has requested exclusion under the Exceptional Events Rule. Otherwise, WESTAR believes that the absence of a SIP call represents *de facto* evidence that the state is taking reasonable steps to protect public health.

In either case, EPA's review should focus on whether, in fact, the applicable provisions of the SIP were being implemented when the event occurred, including intermittent control measures—for example, suspending burn permits.

## 7. Additional recommendations

In addition to the recommendations above related to specific showings a state must make in support of an exceptional events request, WESTAR has several suggestions regarding basic program administration that, if implemented, will ensure that the state and EPA are clear on all issues related to the approvability of exceptional events requests. The common theme is: keep in touch and keep informed.

- a. Learn from previous successes (and failures). The content and format of an approvable exceptional event demonstration will become clear over time as EPA responds to more and more demonstrations. A successful demonstration

should guide future demonstrations, including, for example, consistent definition of key terms and consistent application of analytical methods.

- b. EPA should provide periodic reports on the status of their review of exceptional event demonstrations.
- c. When an exceptional event demonstration, for one reason or another, does not qualify for expedited review, the state should be informed within 60 days of their submittal and given the opportunity to consult with EPA on the specific areas that are deficient. This is especially important when, in EPA's view, one or more of the areas represent a fatal flaw to approval.

In closing, streamlining the implementation of the exceptional events rule would benefit EPA, the states, and ultimately the public. Simple, yet critical, changes to the rule would resolve many issues, while other issues could be addressed by implementing procedures that differentiate exceptional events based on the complexity of the circumstances surrounding the event. States will always be limited to the data they have on hand to document an event. Knowing what data are most important and how those data are best used to document an exceptional event will contribute significantly to improving the implementation of the exceptional events rule.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 08 2010

OFFICE OF  
AIR AND RADIATION

Mr. Martin Bauer  
President  
Western States Air Resources Council (WESTAR)  
1218 3<sup>rd</sup> Avenue  
Seattle, Washington 98101

Dear Mr. Bauer:

Thank you for your letter of September 11, 2009, providing recommendations of the Western States Air Resources Council (WESTAR) related to the implementation of rules governing the treatment of data influenced by exceptional events—40 CFR Parts 50 and 51, typically referred to as the "Exceptional Events Rule."

In your letter, you discuss how important the Exceptional Events Rule is to western states in light of the air quality challenges brought on by the frequent occurrence of chronic wildfires and dust storms in your area. Additionally, you have provided suggested recommendations for improvements in the implementation of this important rule, recognizing the budget pressures that we are all experiencing at this time for air quality management resources.

I appreciate the time and effort WESTAR and your member states put into these recommendations, the discussions we have had with WESTAR representatives previously, and the work of your WESTAR Exceptional Events Workgroup.

We are exploring how implementation of the exceptional events rule can be improved to provide clarity and efficiency within the Agency and for all of our stakeholders. This includes consideration of chronic natural events in the exceptional events context, and other events for which developing technical demonstrations proves to be difficult. I have asked my staff to identify areas where guidance or other rule considerations would be appropriate to achieve this goal and to work over the next six months to develop solutions that will improve rule implementation. During this process, we want to continue our dialog with WESTAR on implementation issues, and the U.S. Environmental Protection Agency (EPA) Regional staff will continue to work with you to develop technical demonstrations to support consideration of exceptional events.

As you mention in your letter, the effectiveness of this rule is important for the state and local agencies, and the general public, and we must all do our best to make sure that we spend our resources wisely to protect public health.

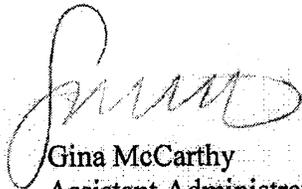
1. 20 mph or greater wind speed for minimum of 2 hours or wind speed above an established dust suspension threshold for the region, and;
  2. Synoptic scale meteorology which could be coupled with back trajectories as appropriate showing source-receptor relationship.
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1. Synoptic scale meteorology which could be coupled with back trajectories as appropriate showing source-receptor relationship, or;
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This demonstration requires a state to calculate the incremental impact caused by an event at a monitoring site over the relevant averaging time. In the preamble to the Exceptional Events Rule, however, EPA acknowledges that there are no precise and universally applicable techniques for calculating incremental impacts. Despite this acknowledgement, the state must do such a calculation to make the showing that there would have been no exceedance but for the event.

Again, thank you for your letter. I look forward to further discussions with you on ways to implement clean air programs in the western U.S.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gina McCarthy".

Gina McCarthy  
Assistant Administrator

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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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

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Consolidated with 08-1057

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

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*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),<sup>1</sup> 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*

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<sup>1</sup> 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<sub>x</sub> adsorbers 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.<sup>2</sup>

Nonetheless, although EPA was on notice that the NRDC

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<sup>2</sup> 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.

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## Clean Air Report - 06/10/2010

# EPA Veto Of Arizona 'Exceptional' Event Claim Bolsters Call For Guidance

EPA has rejected Arizona's bid to rely on an EPA "exceptional" events rule to exempt dust storms that contributed to air pollution spikes from counting towards its attainment of air standards, highlighting problems states face in using the rule to win the exemptions, and bolstering calls for EPA guidance to ease the rule's implementation, sources say.

The agency is working on guidance designed to address some of the states' concerns, which include criticisms that the rule sets unclear definitions for what events qualify as those that are in excess of "historical" concentrations. But some states are calling for formal notice-and-comment rule revisions, which they say are long overdue in order to address a backlog of states' exceptional events claims said to be pending at EPA.

Among the changes states are advocating are guidance on prioritizing EPA processing of more-complicated exceptional events, and rule changes to amend the agency's definition of "exceptional" events.

California Air Resources Board (CARB) head Mary Nichols is crafting a "stern" letter to EPA urging it to quickly issue guidance to make the rule easier to implement and apply in a nationally consistent manner, according to a California air official who also describes the denial of Arizona's claim as "troubling."

EPA appears to be sticking with plans to develop guidance and not pursue formal changes to its rule. The agency's exceptional events rule, issued during the Bush administration, allows states to claim that exceptional events – those defined by EPA as natural events, or events unlikely to recur that are not reasonably controllable or preventable – caused pollution to increase in excess of normal historical concentrations.

If EPA approves a state's claim then the pollution associated with an exceptional event does not count towards the state's attainment with an agency national ambient air quality standard (NAAQS).

State officials say the backlog of exceptional events claims at EPA will only grow with the stricter ozone NAAQS EPA is expected to finalize in August. The new standard, in the range of 0.060 to 0.070 parts per million, will push many areas out of attainment for the first time. Many states, particularly in the West, will need to use the exceptional events rule to exclude pollution spikes in order to meet the NAAQS, sources say.

However, state and local air officials claim that EPA has a backlog of exceptional events claims and that it is difficult for states to prove such claims, because the agency does not apply the rule on a consistent basis and it is unclear what metric EPA uses to determine historical concentrations under the rule.

EPA's decision to reject Arizona's claim of an exceptional event that should be exempted from counting towards NAAQS attainment highlights the difficulties states face in using the rule, sources say.

EPA Region IX Administrator Jared Blumenfeld in a May 25 statement said he was rejecting Arizona's claim of an exceptional event because, "After thoroughly reviewing the State's data, EPA air-quality scientists determined that a legally significant number of pollution spikes were not the result of regional dust storms." According to Blumenfeld's statement, the exceptional events claimed by Arizona "were not supported by the science."

Arizona had claimed that 10 out of 11 exceedances of EPA's coarse particulate matter (PM10) NAAQS were caused by naturally occurring dust storms, which are common across the arid West. But EPA's decision means that the agency could now disapprove Arizona's PM10 state implementation plan (SIP) – an air quality blueprint for attaining the standard – which in turn could result in the loss of federal highway funds.

Ben Grumbles, former Bush EPA water chief and now director of Arizona's environment department, said he is "disappointed" with the decision but will work with "local and regional agency partners to improve air quality."

The California air official says that the Arizona decision is "troubling" and highlights the problems that states face in collecting adequate data to make the case for an exceptional events exemption under EPA's rule.

The source says that a separate dispute with EPA over an exceptional events claim in California's Imperial County remains unresolved. EPA in December rejected the county's exceptional events claim for high-wind events that the county says caused PM10 NAAQS exceedances in the area in 2006 and 2007 -- a decision California opposes.

The source says that no progress has been made in talks with EPA over the decision, and that the CARB has not made any decision yet to approve the county's PM10 SIP, as the exceptional events determination forms an important part of that document. However, CARB's Nichols will soon send a letter to EPA, asking for changes to the implementation of the exceptional events rule to ease its use by states across the country, the source says.

Nichols will ask EPA to provide guidance that will enable state air districts and EPA regional offices to implement the rule in a uniform fashion, which they are presently unable to do, the source says.

**EPA air chief Regina McCarthy told state air officials at a May meeting in Sacramento, CA,** that EPA is aware of states' concerns with the rule, the California source says. McCarthy vowed that EPA would issue guidance this year, in line with an earlier promise to take steps to ease the rule's implementation, the source adds.

The Western States Air Resources Council (WESTAR), representing state and local air officials in the region, has previously argued that the definition of "exceptional event" needs to be clarified through a formal notice-and-comment rule revision to ease a state's demonstration that their NAAQS exceedances stem from such events.

EPA has said it will complete its consideration of possible changes to ease implementation by September, but has not so far indicated a willingness to actually revise the rule itself. However, states say that revisions may be necessary given the importance the rule will play in helping states meet stricter NAAQS.

Possible improvements EPA could make to the rule in its upcoming guidance include prioritizing EPA processing of difficult exceptional events requests from states, WESTAR has suggested. Another option is to establish standardized metrics to determine data requirements (*Clean Air Report*, March 4).

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June 14, 2010

TO: Members of MAG Regional Council Executive Committee

FROM: Amy St. Peter, Human Services Manager

SUBJECT: SUSTAINABLE COMMUNITIES PROGRAM GRANT

This memorandum is provided as an update to discussions at the May MAG Regional Council meeting about possible approaches for the Sustainable Communities Planning Grant Program. The U.S. Department of Housing and Urban Development is expected to release the Notice of Funding Availability for this program in June. In preparation for the grant's imminent release, staff was directed to survey the MAG member agencies to determine the role of MAG in the application process. A report will be offered on the results of the survey at the June MAG Executive Committee meeting. Guidance will be solicited to put the region in the best position to compete for federal funding.

The Sustainable Communities Planning Grant Program is expected to be very competitive. The advance notice issued by HUD in March emphasized the need for strong partnerships and taking a regional approach. Other items in the advance notice were not as clear. For example, the advance notice did not define eligible applicant or region. It is hoped that the Notice of Funding Availability, due in June, will offer more clarity. The advance notice did indicate up to \$5 million for large metropolitan areas and up to \$2 million for small metropolitan or rural areas would be available. Of the \$100 million available nationally, approximately \$25 million has been set aside for small metropolitan or rural areas.

These funds support the creation of regional plans for sustainable development. Acquiring funds now may position the region to receive additional funding in the future if such plans become a requirement with the reauthorization of federal transportation funding. Recent discussions have identified opportunities to support federal sustainability goals with local initiatives. The officers of the MAG technical committees and community partners have indicated support focusing on the development of green housing and jobs along light rail, commuter rail, the intercity rail between Phoenix and Tucson. Completing the path along the canal system has also been discussed.

The viability of a consolidated application on behalf of the Sun Corridor is being explored. HUD has expressed support for this approach. The Central Arizona Association of Governments has voted to participate in a consolidated application and the Pima Association of Governments has indicated their participation as well. More than 20 community partners have also expressed interest in supporting an application. Any consolidated effort would maintain the flexibility needed to address local issues within each county. This would ensure that the entire region would be included in the planning effort. Clarity on the scope of work and the roles of MAG, the MAG member agencies, and community partners will facilitate the development of a competitive application.

If you have any questions regarding this item, please contact me at the MAG office at (602) 254-6300.

AGREEMENT BETWEEN AND AMONG THE MARICOPA ASSOCIATION OF GOVERNMENTS, THE REGIONAL PUBLIC TRANSPORTATION AUTHORITY, VALLEY METRO RAIL, THE CITY OF PHOENIX AND THE TRANSIT OPERATORS IN THE MAG REGION REPRESENTED ON THE REGIONAL COUNCIL REGARDING TRANSIT PLANNING, PROGRAMMING AND FUND ALLOCATION.

Regarding the coordination of ongoing transit planning for programming federal funds that support the ongoing and future deployment of transit services affecting the Phoenix-Mesa Urbanized Area and the Avondale Urbanized Area, hereinafter referred to as the Urbanized Area (UZA).

This AGREEMENT is between and among the MARICOPA ASSOCIATION OF GOVERNMENTS (MAG), THE REGIONAL PUBLIC TRANSPORTATION AUTHORITY (RPTA), VALLEY METRO RAIL (METRO), the CITY OF PHOENIX, and other transit operators that are represented on the MAG Regional Council.

This AGREEMENT replaces the Resolution on Metropolitan Transportation Planning and Programming approved by the MAG Regional Council on May, 23, 2007.

*WITNESS THAT:*

*WHEREAS*, the RPTA, METRO, the CITY OF PHOENIX, transit operators, and other local government agencies in the MAG region are eligible to apply for and receive Federal Transit Administration (FTA) and/or Federal Highway Administration (FHWA) transit funding for capital, operating, and planning assistance for the delivery of public transportation; and

*WHEREAS*, MAG is the Metropolitan Planning Organization (MPO) for the UZA, directed by a duly comprised Regional Council of elected officials with a committee structure that represents all of the transit operators in the region to advise the MAG Regional Council on transportation planning and policy questions; and

*WHEREAS*, this AGREEMENT describes the planning and programming relationship among those agencies; and

*WHEREAS*, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires MPOs to work cooperatively with public transit operators to develop Regional Transportation Plans (RTPs) and Transportation Improvement Programs (TIPs) for urbanized areas, which are intended to further the national interest to encourage and promote the safe and efficient management, operation, and development of surface transportation systems to serve the mobility of people and freight and foster economic growth and development within and through urbanized areas, while minimizing transportation-related fuel consumption and air pollution; and

*WHEREAS*, MAG, the RPTA, METRO, the CITY OF PHOENIX and other participating local government agencies rely upon a cooperative relationship to foster regional transit planning which feeds directly into state and national planning;

*NOW, THEREFORE*, in consideration of the mutual benefits to the transit operators and jurisdictions hereto, and in consideration of the covenants and conditions herein contained, the transit operators and jurisdictions agree as follows:

Purpose. The purpose of this AGREEMENT is to set forth the basic structure for cooperative planning and decision making regarding transit planning and programming between MAG, RPTA, METRO, the CITY OF PHOENIX and other participating local government agencies.

Representation on MAG Transit Committee. All MAG member agencies are invited to serve as voting members of the MAG Transit Committee. The Arizona Department of Transportation (ADOT), RPTA and METRO are also invited to serve as voting members of the MAG Transit Committee. The MAG Transit Committee serves as the primary MAG committee to coordinate regional transit planning and programming of federal transit related funds.

Regional Transit Coordination. MAG, RPTA, METRO and the CITY OF PHOENIX agree to work cooperatively with each other and with the other transit operators and local government agencies in ensuring the provision of coordinated, regionwide transit services. Items to be considered should include fares, transfer and pass policies, transit information, marketing, schedules, service coordination, data needed to meet periodic reporting requirements, and other activities as required.

Regional Transportation Plan. MAG agrees to prepare, adopt and maintain, as required, a Regional Transportation Plan (RTP). MAG, RPTA, METRO and the CITY OF PHOENIX agree to work cooperatively with each other and with the other transit operators and local government agencies in the refinement of the RTP through the conduct of and participation in multimodal transportation studies.

Transportation Improvement Program (TIP) Development Process. The MAG TIP development process shall serve as the focal point for making an annual determination regarding the distribution of federal funds available for allocation by MAG within the UZA. The transit operators and local government agencies agree that it is desirable to ensure that a stable funding stream is available for all operators that allows the operators to carry out coordinated services throughout the UZA.

MAG develops its annual program of projects in consultation with interested transit operators and local government agencies. Following direct consultation among the transit operators and jurisdictions to this AGREEMENT, MAG distributes notices of intent to develop or amend the TIP, publishes the proposed program of projects to be adopted, and carries out a public involvement and review process for TIP adoption or amendment, in compliance with 23 CFR Sections 450.312 and 450.324. The same notices of intent, publication of proposed projects, and public involvement and review also shall be used to fulfill the public hearing requirements of 49 U.S.C. Section 5307, covering review and approval of FTA grant applications for TIP projects. RPTA, METRO, other transit operators, and MAG member agencies seeking TIP programming and subsequent grant approvals, will provide MAG with sufficient project detail to convey understanding of the projects by all interested agencies and persons, meet FTA grant application requirements, and provide a clear linkage to TIP project descriptions. MAG will advertise the proposed public hearing(s), projects to be programmed, and fund amounts to be programmed through their existing public participation process.

The CITY OF PHOENIX, as the Designated Recipient, implements the Annual Grant for the FTA. As part of this process, the CITY OF PHOENIX balances the FTA portion of the transportation annual appropriations and provides, to MAG, revisions to the TIP to reconcile the grant and the first year of the TIP. Following reconciliation, MAG works cooperatively with the CITY of PHOENIX to determine if the TIP is in agreement with the Annual Grant. If agreement is reached, MAG concurs with the reconciliation and informs the FTA of its determination.

The MAG Transit Committee meets to draft a program of projects for the TIP. This program of projects is forwarded to the MAG Transportation Review Committee, Management Committee, Transportation Policy Committee and the Regional Council to be considered for inclusion into the MAG TIP. Following the enactment of an annual federal budget and publication of funding apportionments and discretionary awards in the Federal Register, the CITY OF PHOENIX informs MAG of the amounts of the formula and other designated federal funds coming to the UZA. MAG then consults with the transit operators and local government agencies working through the MAG Transit Committee to finalize the recommended programming of those funds into the TIP, making adjustments as necessary to the draft program of projects completed earlier.

As part of the TIP process, projects are programmed in the TIP on behalf of all transit providers receiving federal funds. MAG, working through the MAG Transit Committee, will develop a recommended prioritized list of projects for the allocation of federal funds, which would include all FTA 5307 funds apportioned to the UZA plus additional federal funds that may be available for distribution from FTA and FHWA. The MAG Transit Committee will identify priority projects and endeavor to program the use of said funds based on factors that are cooperatively developed by the MAG Transit Committee with final approval by the MAG Regional Council.

**Grant Application for Transit Funding.** The CITY OF PHOENIX is the Designated Recipient for federal formula funds allocated under the Federal Transit Act, as amended, in the UZA. The MAG Transit Committee will develop projects to be submitted to the CITY OF PHOENIX. The CITY OF PHOENIX will prepare applications to the FTA and FHWA for federal transit funding. Draft applications will be submitted to MAG using an agreed upon method, in advance of the FTA or FHWA submittal to confirm accuracy and consistency with TIP programming requirements and with the MAG RTP, as required by federal guidelines. All transit operators and jurisdictions agree to work in good faith to develop consistent programming, documentation, and funding requests in a manner consistent with FTA or FHWA requirements.

**Progress Reporting.** MAG is responsible for tracking the overall progress of all projects in the TIP, is required to produce an annual list of projects for which federal funds have been obligated in the preceding year, and ensures that it is made available for public review.

Transit operators and local government agencies receiving federal transit funding will assist MAG's and the CITY OF PHOENIX's efforts to track the overall progress of transit projects in the TIP. At a minimum, milestone/progress reports submitted to FTA and reviewed by MAG shall contain all of the information required in FTA Circular 5010, as amended from time to time, for grant administration of procedures. If project specific questions are raised by FTA or MAG that cannot be answered through review of the Transportation Electronic Award and Management (TEAM) documentation, the affected transit operator

or jurisdiction will, upon request, provide MAG or the CITY OF PHOENIX, as applicable, additional information. Examples of information that may be periodically requested include the following:

1. A classification of the projects by the individual categories, as identified in the TIP.
2. A documentation of the stage of project implementation.
3. An explanation for any project delays if the project is behind schedule.
4. The reasons for any cost overruns if the project is over budget.
5. A status on the amount of federal funding obligated, received, and used to support projects.
6. Any identified needs for a TIP amendment.
7. Project savings to be reverted, if any, at project completion.

TIP Amendments. Each transit operator and local government agency receiving transit funding is responsible for notifying MAG if there is the need to amend the TIP. Amendments may require three to four months to process for approval. MAG typically processes TIP amendments on a quarterly basis. A formal request for changes in project cost, scope, or schedule must be made to be incorporated in an amendment. Certain minor adjustments and administrative and project budget modifications can be made outside the formal amendment process, but must be requested in writing.

As part of the quarterly progress report, or more frequent reporting if required, each transit operator or local government agency receiving transit funding will notify MAG regarding the reasons an amendment to the TIP is needed. TIP amendments may be needed to address issues such as funding shortfalls, delays in project implementation and/or new projects that need to be included in the TIP. Subrecipients of FTA funding shall regularly update the CITY of PHOENIX on project status, and the CITY of PHOENIX shall periodically provide a grant status review to the MAG Transit Committee.

Public Comment. The federal regulations for metropolitan planning under SAFETEA-LU are incorporated within the MAG adopted public involvement process. Federal law requires that the MPO work cooperatively with the state department of transportation and the regional transit operators to provide citizens, affected public agencies, representatives of transportation agencies, freight shippers, private providers of transportation, representative users of public transit, and other interested transit operators and jurisdictions a reasonable opportunity to comment on proposed transportation plans and programs. All MAG public involvement efforts are consistent with Title VI of the Civil Rights Act and the Executive Order on Environmental Justice.

Public Involvement Process. MAG's adopted public involvement process is divided into four phases:

1. Early phase
2. Mid phase
3. Final phase
4. Continuous Involvement

During each of these phases, MAG will work closely with ADOT, RPTA, METRO, and the CITY OF PHOENIX. Responses to public comment in the Mid Phase and Final Phase Public Input Opportunity Reports are coordinated with the above listed agencies. The public hearing for the TIP and RTP includes

representation from the above listed agencies. These groups may also co-host public involvement events, including public hearings and meetings and information booths at special events throughout the region.

Air Quality. In nonattainment areas for air quality standards, the MPO is responsible for determining conformity of the TIP and RTP with the State Implementation Plan to achieve air quality standards. The goal is to ensure that transportation plans, programs, and projects do not cause or contribute to violations of the air quality standards.

Conformity consultation in the MAG region is to be done in accordance with 40 CFR 93.105 and Arizona Administrative Code R18-2-1405. Under these requirements, MAG consults with local governments and appropriate State and federal agencies on the TIP, the RTP, conformity analysis, and the MAG Unified Planning Work Program and Annual Budget. For local government consultation, the MAG Management Committee is the primary contact. This includes RPTA, the CITY OF PHOENIX and other local government agencies that provide transit service.

Human Services Coordination Plan. The MAG Unified Planning Work Program and Annual Budget includes the Human Services Coordination Transportation Plan as required by SAFETEA-LU regulations. This plan is drafted cooperatively by MAG with the CITY OF PHOENIX and other stakeholders. This activity results in the identification of coordination strategies to make human services transportation more efficient and seamless, particularly as it pertains to the FTA Job Access Reverse Commute (JARC, section 5316), New Freedom (section 5317), and Elderly and Persons with Disabilities (section 5310) projects. The CITY OF PHOENIX develops and facilitates the application process for JARC and New Freedom funding. This process requires that applicants demonstrate they are utilizing the coordination strategies identified in the Human Services Coordination Transportation Plan. The plan is updated by MAG in partnership with the CITY OF PHOENIX and other stakeholders as needed.

MAG Unified Planning Work Program and Annual Budget. The MAG Unified Planning Work Program (UPWP) and Annual Budget is developed in a collaborative process with federal, state and local agencies and input is sought from the public on key issues facing the MAG region. Planning for the UPWP is a continuous process. In developing the UPWP, MAG meets with RPTA, METRO, the CITY OF PHOENIX and ADOT to ensure coordination of projects. Portions of the UPWP are brought incrementally to the MAG Regional Council Executive Committee, serving as the MAG Finance Committee, and to the MAG Management Committee and MAG Regional Council. Budget presentations are made from January through May each year.

In the spring of each year, the draft budget is provided to local, state and federal agencies for review in anticipation of the Intermodal Planning Group (IPG) meeting where questions and comments are heard and, if necessary, adjustments are made regarding state and federal agency comments. At the IPG meeting, MAG, RPTA, METRO, the CITY OF PHOENIX and ADOT participate in the presentations and the meeting. The final budget is presented to the MAG Regional Council in the month of May and, upon approval, is sent in the month of June to ADOT and the FHWA.

Review and Refinement of Transit Planning and Programming Roles and Responsibilities. During FY 2010, a staff Working Group with representatives from MAG, the CITY OF PHOENIX, RPTA, and

METRO undertook an examination of the regional transit programming and planning roles performed by the four agencies. This examination was undertaken to achieve the following objectives:

1. Provide better integration of all modes of travel in the Regional Transportation Plan (RTP).
2. Continue development of a transit program that reflects regional priorities identified in the RTP.
3. Ensure that MAG is meeting its responsibilities under federal and state law to develop an integrated long range transportation plan; develop and administer the Transportation Improvement Program; develop and execute the annual Unified Planning Work Program; and provide administrative oversight of the utilization of Proposition 400 funds.
4. Clarify roles and responsibilities among the four agencies to reduce duplication and to ensure a more efficient and integrated planning process.

The Working Group reached consensus on several issues. Four of the Working Group recommendations further clarify the coordination of ongoing transit planning, as outlined below:

1. MAG is responsible for transit system planning activities for the region, including the transit component of the Regional Transportation Plan, transit corridor studies (prior to the identification of project funding), transit system studies and subregional studies. In some instances, MAG may determine to have a transit operator conduct a specific subregional or corridor study.
2. For projects that require a federal Alternatives Analysis (AA) process, MAG, in cooperation with the affected agencies/jurisdiction(s), shall determine the appropriate agency to conduct and manage the AA. The Locally Preferred Alternative (LPA) resulting from the AA will be reviewed and approved through the MAG committee process. The process for review and approval of an LPA includes the following steps: 1) review and adoption by the affected jurisdiction(s); 2) informational review and acceptance by the METRO and/or RPTA Boards, as appropriate; and 3) review through the MAG committee process, with final approval of the LPA by the MAG Regional Council for inclusion in and conformity with the Regional Transportation Plan. To ensure continuity in the planning process, RPTA and METRO will provide periodic updates to the MAG Transit Committee on federal Alternatives Analysis projects.

Draft Design Concept Reports (DCR) and other major project scoping documents will be reviewed and approved for concurrence through the MAG committee process, in addition to any other agency approvals. MAG will join the operating agency and affected jurisdictions as a member of the Project Management Team for project planning studies, and MAG will provide oversight and quality control over the use of the MAG Travel Demand Model.

3. Regional sustainability issues should be coordinated at MAG, and project/facility specific sustainability initiatives, in connection with the federal application process, should be coordinated by METRO and RPTA in conjunction with the local jurisdiction(s).
4. Regional Transit Oriented Development planning issues should be coordinated at MAG, and project/facility specific Transit Oriented Development initiatives, in connection with the federal application process, should be coordinated by METRO and RPTA in conjunction with the local jurisdiction(s).

Amendments to the Agreement. This AGREEMENT may be amended at any time by the mutual agreement of the parties hereto.

Agreement Termination. Participation in the AGREEMENT may be terminated by any of the parties hereto provided that the terminating party provides notice to each of the other parties at least ninety (90) days prior to the date of termination. Termination by any one party does not relieve any other party to this AGREEMENT of its responsibilities under this AGREEMENT.

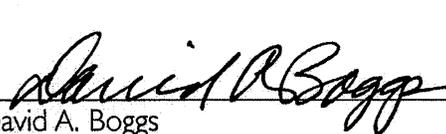
Agreement Authorization.

MARICOPA ASSOCIATION OF  
GOVERNMENTS

  
\_\_\_\_\_  
Dennis Smith  
Executive Director

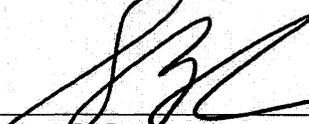
4/06/10  
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Date

REGIONAL PUBLIC TRANSPORTATION  
AUTHORITY

  
\_\_\_\_\_  
David A. Boggs  
Executive Director

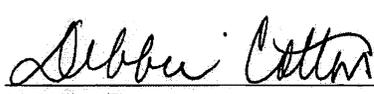
3/31/10  
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Date

VALLEY METRO RAIL

  
\_\_\_\_\_  
Stephen R. Banta  
Chief Executive Officer

3/31/10  
\_\_\_\_\_  
Date

CITY OF PHOENIX

  
\_\_\_\_\_  
Debbie Cotton  
Public Transit Director

3.31.10  
\_\_\_\_\_  
Date

House Engrossed Senate Bill

**FILED**  
**KEN BENNETT**  
**SECRETARY OF STATE**

State of Arizona  
Senate  
Forty-ninth Legislature  
Second Regular Session  
2010

CHAPTER 201

## **SENATE BILL 1063**

AN ACT

AMENDING SECTIONS 48-5103, 48-5106, 48-5121, 48-5122 AND 48-5141, ARIZONA  
REVISED STATUTES; RELATING TO PUBLIC TRANSPORTATION.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 48-5103, Arizona Revised Statutes, is amended to  
3 read:

4 48-5103. Public transportation fund

5 A. A public transportation fund is established for the authority. The  
6 fund consists of:

7 1. Monies appropriated by each municipality that is a member of the  
8 authority or the county, if it elected to enter into the authority. Each  
9 member municipality and member county shall appropriate monies to the public  
10 transportation fund in an amount determined by the board.

11 2. Monies appropriated by a county that has not elected to enter into  
12 the authority in an amount determined by the county board of supervisors.

13 3. Transportation excise tax revenues that are allocated to the fund  
14 pursuant to section 42-6104 or 42-6105. The board shall separately account  
15 for monies from transportation excise tax revenues allocated pursuant to  
16 section 42-6105, subsection E, paragraph 3 for:

17 (a) A light rail public transit system.

18 (b) Capital costs for other public transportation.

19 (c) Operation and maintenance costs for other public transportation.

20 4. Monies distributed under title 28, chapter 17, article 1.

21 5. Grants, gifts or donations from public or private sources.

22 6. Monies granted by the federal government or appropriated by the  
23 legislature.

24 7. Fares or other revenues collected in operating a public  
25 transportation system.

26 8. Local transportation assistance monies that are distributed to each  
27 member under section 28-8102 and as provided in section 48-5104.

28 9. Local transportation assistance monies that are distributed to a  
29 member pursuant to section 28-8102 and that must be used for public  
30 transportation.

31 10. Local transportation assistance monies that are distributed  
32 pursuant to section 28-8103, subsection A, paragraph 1.

33 B. On behalf of the authority, the fiscal agent shall administer  
34 monies paid into the public transportation fund. Monies in the fund may be  
35 spent pursuant to or to implement the PUBLIC TRANSPORTATION ELEMENT OF THE  
36 regional ~~public~~ transportation ~~system~~ plan DEVELOPED AND APPROVED BY THE  
37 REGIONAL PLANNING AGENCY, including reimbursement for utility relocation  
38 costs as prescribed in section 48-5107, adopted pursuant to section 48-5121  
39 and for projects identified in the regional transportation plan adopted by  
40 the regional planning agency pursuant to section 28-6308.

41 C. Monies in the fund shall not be spent to promote or advocate a  
42 position, alternative or outcome of an election, to influence public opinion  
43 or to pay or contract for consultants or advisors to influence public opinion  
44 with respect to an election regarding taxes or other sources of revenue for  
45 the fund or regarding the regional ~~public~~ transportation ~~system~~ plan.



1 prescribed in subsection B of this section, the following items presented on  
2 an individual fiscal year basis:

3 1. The capital and operating costs of the planned regional public  
4 transportation system.

5 2. The revenue needed by source, according to section 48-5103, to fund  
6 the TRANSPORTATION ELEMENT OF THE regional public transportation system plan.

7 D. If the plan includes a rail component and if the board RAIL  
8 OPERATOR adopts estimates of capital and maintenance and operation costs of  
9 the rail system, each member municipality in which the rail system is  
10 constructed shall pay to the public transportation fund amounts by which the  
11 actual capital, maintenance and operation costs exceed the estimated costs by  
12 more than fifteen per cent, computed in constant dollars. The excess costs  
13 shall be allocated among the affected member municipalities according to the  
14 proportion of the rail system facilities that are located in each  
15 municipality. The affected member municipalities shall:

16 1. Pay the monies from their respective general funds to the public  
17 transportation fund in the fiscal year following the fiscal year in which the  
18 excess costs were incurred.

19 2. Not pay to the public transportation fund under this subsection  
20 monies that it received from any source pursuant to title 28.

21 3. Not reduce its support of transportation projects funded by any  
22 source pursuant to title 28 in order to make payments under this subsection.

23 E. The board may modify RECOMMEND MODIFICATIONS TO the regional public  
24 transportation system ELEMENT OF THE REGIONAL TRANSPORTATION plan to reflect  
25 changes in population density or technological advances in the approved  
26 public transportation modes. A majority of the members of the board voting  
27 at a public hearing called for that purpose must approve a modification to  
28 the plan THE RECOMMENDED MODIFICATIONS.

29 Sec. 4. Section 48-5122, Arizona Revised Statutes, is amended to read:  
30 48-5122. Board powers and duties

31 The board shall:

32 1. IMPLEMENT THE REGIONAL PUBLIC TRANSPORTATION ELEMENT OF THE  
33 TRANSPORTATION PLAN FUNDED BY THE PUBLIC TRANSPORTATION FUND.

34 ~~2. Determine the exclusive public transportation systems to be~~  
35 ~~acquired and constructed, the means to finance the systems and whether to~~  
36 ~~operate the PUBLIC TRANSPORTATION systems or to let contracts for their~~  
37 ~~operation.~~

38 ~~3. Adopt an annual budget and fix the compensation of its~~  
39 ~~employees.~~

40 ~~4. Adopt an administrative code by ordinance that:~~

41 (a) Prescribes the powers and duties of the employees of the authority  
42 that are not inconsistent with this chapter.

43 (b) Prescribes the method of appointing board employees.

44 (c) Prescribes methods, procedures and systems of operating and  
45 managing the board.

1 (d) May provide for, among other things, appointing a general manager  
2 and organizing the employees of the board into units for administration,  
3 design and construction, planning and operation, property acquisition and  
4 community relations and other units as the board deems necessary.

5 ~~4.~~ 5. Cause a postaudit of the financial transactions and records of  
6 the board to be made at least annually by a certified public accountant.

7 ~~5.~~ 6. Adopt all ordinances and make all rules proper or necessary to:  
8 (a) Regulate the use, operation and maintenance of its property and  
9 facilities, including its public transportation systems and related  
10 transportation facilities and services operating in its area of jurisdiction.

11 (b) Carry into effect the powers granted to the board.

12 ~~6.~~ 7. Appoint advisory commissions as it deems necessary.

13 ~~7.~~ 8. Do all things necessary to carry out the purposes of this  
14 chapter.

15 Sec. 5. Section 48-5141, Arizona Revised Statutes, is amended to read:  
16 48-5141. Regional bus system

17 ~~A. The board shall establish and operate a regional bus system. The~~  
18 ~~monies distributed under section 28-6305, subsection B shall be spent for~~  
19 ~~incremental increases in a regional bus system and for community funded~~  
20 ~~transportation services including dial a ride programs and special needs~~  
21 ~~transportation services and shall not be used to supplant any existing~~  
22 ~~sources of monies currently being used in operating an existing bus system.~~  
23 ~~The monies shall only be spent for community funded transportation services~~  
24 ~~including dial a ride programs and special needs transportation services and~~  
25 ~~to establish and operate a regional bus system, including extending existing~~  
26 ~~bus routes into regional routes, adding new regional routes, increasing the~~  
27 ~~service on existing regional routes and capital expenditures.~~

28 ~~B. The board may contract with a public agency or with a person on the~~  
29 ~~terms and conditions the board finds in its best interest to operate a~~  
30 ~~regional bus system.~~

APPROVED BY THE GOVERNOR APRIL 28, 2010.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 28, 2010.

Transit Related Planning Roles and Responsibilities

		PTD	RPTA	METRO	MAG	MOU (effective March 31, 2010)	SB 1063 (effective July 29, 2010)
Programming	Transit Lifecycle Program (TLCP) / Public Transportation Fund		Transit Element	High Capacity Transit (HCT) element	Review and concurrence		48-5103
	TLCP Budget Process						48-5106
	TLCP Material Changes				Review and approval		48-5106
	Transportation Improvement Program (TIP)					Pages 2 and 4	
	Annual Formula Grant Process	Program of Projects			Review/approval/possible ranking	Page 3	
	Annual Discretionary Grant Process				Review/approval/possible ranking	Page 3	
System Planning	Transit Element of the Regional Transportation Plan (RTP)					Page 2	48-5121
	Transit Corridor Studies (prior to identification of project funding)					Page 6	
	Transit System Plans and Subregional Studies					Page 6	
Project Planning	RTP Project Planning (no AA required)				Review and concurrence	Page 6	
	RTP Project Planning (AA required)				Lead agency definition, review and concurrence	Page 6	
	Major Project Scoping Documents				Review and concurrence	Page 6	
	Environmental Planning						
	Project Planning During Engineering						
Support Planning	Bus-Rail Interface and Service Coordination Planning					Page 2	
	Short Range Transit Plan					Page 2	
	Transit Capital Facility Planning					Page 2	
	Transit System Configuration Studies					Page 2	
	Transit GIS Implementation and Use					Page 2	
	Regional Sustainability Issues					Page 6	
	Project/Facility Specific Sustainability Issues					Page 6	
	Regional Transit Oriented Development (TOD) Issues					Page 6	
	Project/Facility TOD Initiatives					Page 6	
	Peer City Research						
	FTA Policy Input						
	Seeking Transit Funding Sources						
	Transit System Performance Monitoring					Page 2	
	Transit Travel Demand Forecasting					Page 2	
	Rideshare, Carpool, and Vanpool Programs		Regional rideshare, carpool, vanpool, telework programs		Rideshare funding and regional air quality planning		
	Bicycle Planning and Safety Education		Bicycle safety education		Regional bicycle planning and design assistance		
Other Issues	MAG Transit Committee					Page 2	
	Regional Transit Coordination					Page 2	
	Progress Reporting					Page 3	
	RTP/TIP Public Involvement Process					Page 4	
	Air Quality					Page 5	
	Human Services Coordination Plan	Program Funding				Page 5	
	MAG Work Program					Page 5	

Primary Responsibility  
 Support Role

**MAG Technical and Policy Committee Chairs and Vice Chairs  
June/July Recommended Reappointments Appointments**

MAG Committee	Chair	Term	Vice Chair	Term
9-1-1 Oversight Team	Asst. Executive Chief Steve Kreis, Phoenix Fire	2 <sup>nd</sup>	Chief Larry Rodriguez, Tolleson Police	2 <sup>nd</sup>
Air Quality Technical Advisory Committee	Doug Kukino, Glendale	2 <sup>nd</sup>	Gaye Knight, Phoenix	2 <sup>nd</sup>
Building Codes Committee	Steve Hether, Mesa	2 <sup>nd</sup>	Ken Sowers, Avondale	2 <sup>nd</sup>
Continuum of Care Regional Committee on Homelessness	Shana Ellis, Tempe	2 <sup>nd</sup>	Joanne Osborne, Goodyear	2 <sup>nd</sup>
Elderly & Persons with Disabilities Transportation Committee	John Fischbach, Goodyear	2 <sup>nd</sup>	Julie Howard, Mesa	2 <sup>nd</sup>
Human Services Coordinating Committee	Trinity Donovan, Chandler	2 <sup>nd</sup>	Michael Nowakowski, Phoenix	2 <sup>nd</sup>
Human Services Technical Committee	Sylvia Sheffield, Avondale	2 <sup>nd</sup>	Paul Ludwick, Scottsdale	1 <sup>st</sup>
Intelligent Transportation Systems (ITS) Committee	Nicolaas Swart, Maricopa County	2 <sup>nd</sup>	Debbie Albert, Glendale	2 <sup>nd</sup>
Bicycle & Pedestrian Committee	Brandon Forrey, Peoria	2 <sup>nd</sup>	Reed Kempton, Scottsdale	2 <sup>nd</sup>