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January 20, 2011

TO: Members of the MAG Air Quality Technical Advisory Committee

FROM: Doug Kukino, Glendale, Chair

SUBJECT: MEETING NOTIFICATION AND TRANSMITTAL OF TENTATIVE AGENDA

Thursday, January 27, 2011 - 1:30 p.m.
MAG Office, Suite 200 - Saguaro Room
302 North 1st Avenue, Phoenix

A meeting of the MAG Air Quality Technical Advisory Committee has been scheduled for the time and place noted above. Members of the Air Quality Technical Advisory Committee may attend the meeting either in person, by videoconference or by telephone conference call. Those attending by videoconference must notify the MAG site three business days prior to the meeting. If you have any questions regarding the meeting, please contact Chair Kukino or Lindy Bauer at 602-254-6300.

Please park in the garage underneath the building, bring your ticket, and parking will be validated. For those using transit, Valley Metro/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.

In 1996, the Regional Council approved a simple majority quorum for all MAG advisory committees. If the MAG Air Quality Technical Advisory Committee does not meet the quorum requirement, members who arrived at the meeting will be instructed a legal meeting cannot occur and subsequently be dismissed. Your attendance at the meeting is strongly encouraged. If you are unable to attend the meeting, please make arrangements for a proxy from your entity to represent you.

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 Jason Stephens at the MAG office. Requests should be made as early as possible to allow time to arrange the accommodation.

A Voluntary Association of Local Governments in Maricopa County

City of Apache Junction ▲ City of Avondale ▲ Town of Buckeye ▲ Town of Carefree ▲ Town of Cave Creek ▲ City of Chandler ▲ City of El Mirage ▲ Fort McDowell Yavapai Nation ▲ Town of Fountain Hills ▲ Town of Gila Bend
Gila River Indian Community ▲ Town of Gilbert ▲ City of Glendale ▲ City of Goodyear ▲ Town of Guadalupe ▲ City of Litchfield Park ▲ Maricopa County ▲ City of Mesa ▲ Town of Paradise Valley ▲ City of Peoria ▲ City of Phoenix
Town of Queen Creek ▲ Salt River Pima-Maricopa Indian Community ▲ City of Scottsdale ▲ City of Surprise ▲ City of Tempe ▲ City of Tolleson ▲ Town of Wickenburg ▲ Town of Youngtown ▲ Arizona Department of Transportation

TENTATIVE AGENDA

COMMITTEE ACTION REQUESTED

1. Call to Order

2. Call to the Audience

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

3. Approval of the November 30, 2010 Meeting Minutes

4. Update on PM-10 Certified Street Sweeper Projects for FY 2011 CMAQ Funding

On November 30, 2010, the MAG Air Quality Technical Advisory Committee recommended a prioritized list of proposed PM-10 Certified Street Sweeper Projects for FY 2011 CMAQ funding. On January 12, 2011, the MAG Management Committee endorsed the recommendation. It is anticipated that the MAG Regional Council will take action on January 26, 2011. An update will be provided.

5. MAG Air Quality Video

In December 2010, the Maricopa Association of Governments completed a broadcast-quality video. The video helps tell the story of the air quality challenges facing the region, as

2. For information.

3. Review and approve the November 30, 2010 meeting minutes.

4. For information and discussion.

5. For information and discussion.

well as the many aggressive and progressive actions being taken to address dust pollution. The video will be shown at the meeting.

6. Update on the EPA Proposed Partial Approval and Disapproval of the MAG 2007 Five Percent Plan for PM-10

On September 9, 2010, the Environmental Protection Agency (EPA) published a notice to propose partial approval and disapproval of the MAG 2007 Five Percent Plan for PM-10 based on the timetable in the consent decree with the Arizona Center for Law in the Public Interest. If EPA finalizes the partial disapproval on January 28, 2011, a conformity freeze on the MAG Transportation Improvement Program (TIP) and Regional Transportation Plan (RTP) would occur in approximately thirty days; only projects in the first four years could proceed. If the problem is not corrected within eighteen months, tighter controls on major industries would be imposed. If the problem is still not corrected within twenty-four months of the disapproval, the loss of federal highway funds (\$1.7 billion) and a federal implementation plan would be imposed. Conformity would also lapse, which would place the \$7.4 billion TIP at risk.

EPA has continued to respond to some of the questions from MAG, ADEQ, and Maricopa County regarding a Revised Five Percent Plan for PM-10 and additional information was received on December 17, 2010. An update will be provided. Please refer to the enclosed material.

7. Proposed Revised Eight-Hour Ozone Standard

On January 6, 2010, the Environmental Protection Agency proposed to strengthen the primary eight-hour ozone standard to a level within the range of .060-.070 parts per million. In addition, EPA proposed establishing a

6. For information and discussion.

7. For information and discussion.

secondary standard within the range of 7-15 parts per million-hours. In December 2010, EPA announced that the final standards would be postponed until the end of July 2011. Please refer to the enclosed material.

8. Proposed Funding for an Air Quality Project for the MAG FY 2012 Work Program

Funding in the amount of \$280,000 is being proposed for the Air Quality Technical Assistance On Call Project for the MAG FY 2012 Unified Planning Work Program. In general, the Air Quality Technical Assistance On Call Project is for technical assistance in the preparation of an Eight-Hour Ozone Plan and and revisions to address the approvability issues for the MAG 2007 Five Percent Plan for PM-10. Technical assistance may also be needed for air quality modeling; air quality monitoring and meteorology; exceptional events; traffic surveys and emissions inventories; dirt road inventories; statistical analysis of data; collection and analysis of field data; analysis of control measures; air quality plan preparation; CMAQ evaluation methodologies; and transportation conformity.

9. Call for Future Agenda Items

The next meeting of the Committee has been tentatively scheduled for **Thursday, February 24, 2011** at 1:30 p.m. For your convenience, the Tentative Meeting Schedule for the MAG Air Quality Technical Advisory for January-November 2011 is provided. The Chairman will invite the Committee members to suggest future agenda items.

8. For information and discussion.

9. For information and discussion.

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

Tuesday, November 30, 2010
MAG Office
Phoenix, Arizona

MEMBERS ATTENDING

Doug Kukino, Glendale, Chairman
Larry Person, Scottsdale, Vice Chair
*Sue McDermott, Avondale
*Elizabeth Biggins-Ramer, Buckeye
#Jim Weiss, Chandler
#Jamie McCullough, El Mirage
Kurt Sharp, Gilbert
*Cato Esquivel, Goodyear
#Scott Bouchie, Mesa
#Janet Ramsey for William Mattingly, Peoria
Phil McNeely, Phoenix
#Antonio DeLaCruz, Surprise
Oddvar Tveit, Tempe
Grant Anderson for Mark Hannah, Youngtown
Ramona Simpson, Queen Creek
*American Lung Association of Arizona
Grant Smedley, Salt River Project
Brian O'Donnell, Southwest Gas Corporation
Mark Hajduk, Arizona Public Service Company
*Gina Grey, Western States Petroleum Association
*Valley Metro/RPTA
*Dave Berry, Arizona Motor Transport Association
Jeannette Fish, Maricopa County Farm Bureau

Steve Trussell for Russell Bowers, Arizona Rock
Products Association
Amy Bratt, Greater Phoenix Chamber of
Commerce
#Amanda McGennis, Associated General
Contractors
Spencer Kamps, Homebuilders Association of
Central Arizona
Mannie Carpenter, Valley Forward
*Erin Taylor, University of Arizona Cooperative
Extension
Beverly Chenausky, Arizona Department of
Transportation
Leonard Montenegro for Diane Arnst, Arizona
Department of Environmental Quality
*Environmental Protection Agency
Jo Crumbaker, Maricopa County Air Quality
Department
#Duane Yantorno, Arizona Department of Weights
and Measures
Ed Stillings, Federal Highway Administration
*Judi Nelson, Arizona State University
#Christopher Horan, Salt River Pima-Maricopa
Indian Community

*Members neither present nor represented by proxy.
#Participated via telephone conference call.
+Participated via video conference call.

OTHERS PRESENT

Lindy Bauer, Maricopa Association of Governments
Dean Giles, Maricopa Association of Governments
Patrisia Magallon, Maricopa Association of
Governments
Julie Hoffman, Maricopa Association of Governments
Feng Liu, Maricopa Association of Governments
Taejoo Shin, Maricopa Association of Governments
Randy Sedlacek, Maricopa Association of Governments
Matt Poppen, Maricopa Association of Governments
Ranjith Dandanayakula, Maricopa Association of
Governments
Cathy Arthur, Maricopa Association of Governments
Eileen Yazzie, Maricopa Association of Governments
Frank Schinzel, Maricopa County Air Quality

Mitch Wagner, Maricopa County Department of
Transportation
Dan Catlin, Fort McDowell
Joe Gibbs, City of Phoenix
Michelle Wilson, City of Glendale
Shane Kiesow, City of Apache Junction
Rusty Van Leuven, Arizona Department of
Agriculture
Scott DiBiase, Pinal County
Matt Tsark, Strand Associates, Inc.
Will Barnow, Maricopa County
Joonwon Joo, Arizona Department of
Transportation

1. Call to Order

A meeting of the MAG Air Quality Technical Advisory Committee was conducted on November 30, 2010. Doug Kukino, City of Glendale, Chair, called the meeting to order at approximately 1:31 p.m. Antonio DeLaCruz, City of Surprise; Jamie McCullough, City of El Mirage; Scott Bouchie, City of Mesa; Amanda McGennis, Associated General Contractors; Jim Weiss, City of Chandler; Janet Ramsey, City of Peoria; Chris Horan, Salt River Pima-Maricopa Indian Community and Duane Yantorno, Arizona Department of Weights and Measures, attended the meeting via telephone conference call.

2. Call to the Audience

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

3. Approval of the October 28, 2010 Meeting Minutes

The Committee reviewed the minutes from the October 28, 2010 meeting. Jeannette Fish, Maricopa County Farm Bureau, moved and Steve Trussell, Arizona Rock Products Association, seconded and the motion to approve the October 28, 2010 meeting minutes carried unanimously.

4. Evaluation of Proposed PM-10 Certified Street Sweeper Projects for FY 2011 CMAQ Funding

Dean Giles, MAG, presented the evaluation of proposed PM-10 Certified Street Sweeper Projects for Federal Fiscal Year 2011 Congestion Mitigation and Air Quality Improvement (CMAQ) funding. He stated that seven street sweeper projects were submitted to MAG requesting \$1.27 million in CMAQ funds and \$900,000 is available for FY 2011. Mr. Giles indicated that an additional \$367,855 in CMAQ has become available from street sweeper projects that have been requested to be deleted and from savings on street sweepers that have cost less than anticipated, for a total amount of \$1,267,855. He noted that with the additional funding, all seven proposed street sweeper projects could be funded. Mr. Giles stated that a minimum 5.7 percent cash match is required for each of the projects. He mentioned that the deadline for submission of street sweeper projects was September 16, 2010.

Mr. Giles stated that the MAG Programming Principles have established a two-tier review process for street sweeper applications. He indicated that the first stop for these applications was at the October 12, 2010 MAG Street Committee meeting. The Street Committee reviewed the street sweeper projects and their comments have been provided. Mr. Giles noted that MAG staff evaluated the proposed projects consistent with the MAG Five Percent Plan for PM-10. In addition, the emissions factors used to evaluate the projects are based on the Maricopa County 2008 PM-10 Periodic Emissions Inventory.

Mr. Giles mentioned that the evaluation indicates the estimated emission reductions in kilograms per day and the corresponding cost-effectiveness in dollars per metric ton per street sweeper project. He added that the list in the agenda packet is ranked in descending order of cost-effectiveness. Mr. Giles stated that there are additional opportunities for comment on the street sweeper projects at the MAG

Management Committee meeting tentatively scheduled for January 12, 2011 and the MAG Regional Council on January 26, 2011. The Committee is requested to recommend a Prioritized List of Proposed PM-10 Certified Street Sweeper Projects for Fiscal Year 2011 CMAQ funding to the MAG Management Committee.

Brian O'Donnell, Southwest Gas Corporation, made a motion to recommend the Prioritized List of Proposed PM-10 Certified Street Sweeper Projects for Fiscal Year 2011 CMAQ funding that was provided in the agenda packet. Phil McNeely, City of Phoenix, seconded, and the motion carried unanimously.

5. Evaluation of Proposed PM-10 Paving Unpaved Road Projects for FY 2014 CMAQ Funding

Mr. Giles presented the evaluation of proposed PM-10 Paving Unpaved Road Projects for Federal Fiscal Year 2014 CMAQ funding. He stated that the paving of streets, alleys, and shoulders support measures in the MAG Five Percent Plan for PM-10. Mr. Giles indicated that 14 projects were evaluated requesting approximately \$9.2 million in CMAQ funding in FY 2014; however, only \$4,898,000 is available in FY 2014 CMAQ funding. He noted that there is a minimum local cash match of 5.7 percent. Mr. Giles mentioned that the deadline for submission of the projects was September 16, 2010.

In accordance with the MAG Programming Principles, the projects were first reviewed by the MAG Street Committee. Mr. Giles stated that a review sheet for each of the proposed projects has been included in the agenda packet. He added that comments were made at the October 12, 2010 meeting and the request for additional information was continued over to the November 16, 2010 meeting where the information was provided. Mr. Giles indicated that MAG staff evaluated the proposed paving projects based on detailed information provided by each of the member agencies. He mentioned that in addition to the CMAQ methodologies, updated emissions factors were based on the 2008 PM-10 Periodic Emissions Inventory.

Mr. Giles stated that the evaluation provides estimated PM-10 emission reductions in kilograms per day and the corresponding cost-effectiveness in dollars per metric ton for each project. He added that Attachment A provides the ranking of proposed projects in descending order of cost-effectiveness. Attachment B provides the same projects ranked in descending order of emission reductions. He noted that the Maricopa County Department of Transportation contacted MAG about possible changes to the average week day traffic that was provided in their application, which is the first project listed in the attachments. Mr. Giles indicated that MAG has currently not confirmed the information. He added that once the information is confirmed, MAG will update the table prior to forwarding it to the MAG Transportation Review Committee scheduled to meet on December 9, 2010. The Air Quality Technical Advisory Committee is requested to recommend a ranked list of proposed PM-10 paving unpaved road projects for FY 2014 CMAQ funding and forward the list to the MAG Transportation Review Committee.

Ms. Fish commented that the projects listed are not located within ten miles of the monitors that are most likely to have PM-10 exceedances. Mr. Kukino inquired if the Committee prefers the priority list in Attachment A or Attachment B. Larry Person, City of Scottsdale, thanked MAG for providing Attachment B, which has the projects ranked by PM-10 efficiency. He added that he would prefer that the Committee use Attachment B.

Mr. O'Donnell stated that the first six projects in Attachment A subtotal \$4,564,885 out of the \$4,898,000 available. However, only the first four projects would be funded in Attachment B for a subtotal \$4,160,491. He inquired about using the remaining balance in Attachment B to fund the Fountain Hills and Peoria #2 projects. Mr. Giles responded that with the funding available, the projects in Attachment A provide more emission reductions than the ranked list in Attachment B. Mr. Giles added that in the past, the Transportation Review Committee would go back to the jurisdiction next in line and ask if they would be willing to change the scope of the project and use the remaining funds available. Therefore, the first project below the line may potentially be funded as well.

Mr. Person stated that he would prefer to use Attachment B since it focuses on air quality rather than dollars. He suggested using Attachment B to fund the four projects above the line and add the Tempe Evergreen Project, which is 1.4 miles from a monitor, the Tempe Escalante Project, which is 2.1 miles from a monitor, and then offer the remaining funds to the Peoria #2 project.

Grant Anderson, Town of Youngtown, stated that adding the Fountain Hills and Peoria #2 projects to the list in Attachment B results in funding the same projects listed in Attachment A. He inquired about the savings and requested clarification. Mr. O'Donnell agreed with Mr. Anderson about the projects and costs being the same for both attachments if his mentioned changes were made. Mr. Anderson inquired about the difference mentioned by Mr. Giles. Mr. Giles stated that there are more emission reductions from the projects currently listed in Attachment A. Mr. Anderson noted that adding the two projects to Attachment B would make the lists identical. Mr. O'Donnell added that if the Fountain Hills and Peoria #2 projects were included above the line in Attachment B, the lists would become identical and the results would be the same. He inquired if Mr. Giles agreed. Mr. Giles responded that he made his comment before it was known that the two projects would be added to Attachment B. Mr. Anderson inquired if Mr. Giles agreed with their comment. Mr. Giles responded that he would need to go back and compare tables.

Spencer Kamps, Homebuilders Association of Central Arizona, commented that the emission reductions are included in the tables. Mr. Giles responded that is correct. Mr. Kamps indicated that including the same projects in Attachment A and Attachment B results in the same emission reductions.

Mr. O'Donnell commented about the two monitors by the Tempe Evergreen and the Tempe Escalante projects. He inquired if there was a problem with the emissions by those monitors. Mr. Person responded that the monitoring data provided by MAG at previous meetings has indicated that the Mesa monitor located by these projects is in good shape. He commented on including another variable in evaluating the projects which would be protecting the monitors. Mr. Person mentioned that after reading the detailed information provided in the packet, the two Tempe projects jumped out as being the closest to the monitors that are in existence. He commented that he agreed with Ms. Fish that those monitors are not the ones of concern. However, his concept was to take into consideration the monitoring systems along with the cost-effectiveness and PM-10 emission reductions. He noted that the Tempe Evergreen project almost has a higher PM-10 emission reduction than the other two projects combined. Mr. Person added that he was analyzing the data in terms of the region's biggest problem, which is PM-10.

Mannie Carpenter, Valley Forward, inquired if there would be any reductions from potentially increasing speed limits by paving unpaved roads. This could reduce nitrogen oxide and carbon monoxide emissions given the reduction in travel time. Mr. Giles responded that MAG has not

evaluated the projects for that purpose. Mr. Carpenter stated that there may be other advantages to the road paving projects.

Mr. Anderson moved to recommend Attachment B with the addition of the Tempe Evergreen and the Fountain Hills projects. He added that these projects are the next two that could be funded and are cost-effective. Mr. Anderson noted that adding the Peoria #1 project would be over the funding limit. Mr. O'Donnell seconded, and the motion to forward Attachment B with the addition of the Tempe Evergreen and the Fountain Hills projects passed unanimously.

6. Update on the EPA Proposed Partial Approval and Disapproval of the MAG 2007 Five Percent Plan for PM-10

Lindy Bauer, MAG, provided an update on the Environmental Protection Agency (EPA) proposed partial approval and disapproval of the MAG 2007 Five Percent Plan for PM-10. She stated that in the last agenda packet, MAG mailed out the first batch of answers to questions that were posed to the Environmental Protection Agency. Ms. Bauer indicated that the answers have again been included in the agenda packet along with answers to the remaining questions posed to EPA. She noted that the new responses begin after page seven and start with question number 13. Ms. Bauer stated that concern was expressed with EPA's short timeline for final action. Ms. Bauer noted that MAG, along with the Arizona Department of Environmental Quality (ADEQ), Maricopa County, and several other entities, requested an extension. She mentioned that EPA responded that they did not anticipate that the U.S. District Court or the Arizona Center for Law in the Public Interest would agree to any kind of extension to their time table, which is to take final action on the 2007 MAG Five Percent Plan for PM-10 on January 28, 2011.

Ms. Bauer referred to question number 14. She stated that when the EPA Region IX Administrator came to Phoenix, there was additional language in the EPA conformity paper that MAG thought may have some promise that had not been seen before in any of the regulations. The language indicated that EPA could act on the budgets separately and possibly lift the freeze earlier. However, when MAG posed the question, EPA stated that after further consideration they do not think this idea would be workable since everything is tied together.

Ms. Bauer stated that another question asked was how long it would take EPA to take action on the revised Five Percent Plan for PM-10 once it is submitted. She mentioned that EPA gave the usual timeline. EPA indicated that once the revised Five Percent Plan for PM-10 is submitted, it would take six months to determine if it is complete and 12 months to take action on the plan, for a total of 18 months. In addition, EPA stated that rulemakings usually take approximately six to eight months. Ms. Bauer noted that the time period would be very short if EPA goes final on January 28, 2011 with an effective date of February 28, 2011. The region would then have 18 months to fix the plan, have EPA make a completeness determination, and take approval action.

Ms. Bauer referred the Committee to the last paragraph on the page. It notes that if, at the time EPA proposes action on a revised plan, there are sufficient measured exceedances to preclude attainment by the attainment date projected in the plan, EPA will not be able to propose full approval of the plan. She stated that the best course of action is three years of clean data at the monitors. Ms. Bauer indicated that if a revised plan is submitted and the region does not have a year of clean data and EPA does not concur that there are exceptional events, EPA will not be able to give full approval. She stated that full approval is needed since a partial approval or disapproval is the same as a disapproval.

Ms. Bauer stated that MAG provided the map of the monitor locations to the elected officials on the MAG Regional Council, Air Quality Technical Advisory Committee, City and Town Managers, and Intergovernmental Coordinators. She added that the maps have also been given to the Greater Phoenix Chamber of Commerce.

Ms. Bauer stated that one of the unanswered questions has to do with the base year that is used for modeling. She mentioned that MAG has discussed with EPA about taking credit for the Five Percent Plan measures. Ms. Bauer indicated that we want to take credit for them again in the revision. She mentioned that it was proposed to EPA that MAG would be able to use a 2007 base updated with the most accurate inventory, which would be the Maricopa County 2008 Periodic Emissions Inventory. Ms. Bauer commented that MAG discussed this suggestion with EPA and they are currently looking at the information. She stated that EPA has indicated June 12, 2012 as the attainment date. Ms. Bauer added that the best course of action is to have three years of clean data at the monitors by the time the plan is submitted. She indicated that if the region is able to have clean data, potentially a lesser plan could be submitted under their clean data policy. Ms. Bauer stressed that the best chance for success is to stay clean at the monitors.

Ms. Fish inquired if the region's ability to show clean data at the monitors has a direct relationship to EPA approving the exceptional events. Ms. Bauer responded yes and added that EPA is behind on their schedule for fixing the issues with the Exceptional Events Rule. She commented that EPA was going to have a briefing with Janet McCabe, EPA, in October 2010, which has been delayed. Ms. Bauer mentioned that EPA is now going to develop a process memorandum. She stated that the notice will most likely be released during the first part of the year. Ms. Bauer added that the region will still need to press to get the flawed Exceptional Events Rule fixed since high winds will always be present in the region.

Mark Hajduk, Arizona Public Service Company, inquired if MAG is still pursuing to extend the finalization of the determination in January. Ms. Bauer responded that fixing the Exceptional Events Rule is very much in the forefront at MAG. She added that it is critical that the Exceptional Events Rule be fixed. Ms. Bauer noted that she was reporting on some of the answers that EPA provided to the technical questions pertaining to the approvability issues. She indicated that MAG and ADEQ will continue to press EPA to fix the Exceptional Events Rule.

Mr. Hajduk stated that EPA will be forced to finalize the partial disapproval in January based on the court decision. He added that it seemed that MAG wanted to extend the action to avoid the sanction clocks from starting and EPA responded no to an extension. Mr. Hajduk inquired if MAG will continue to try to extend that action regardless of what EPA has answered. Ms. Bauer responded that MAG just received this answer from EPA and has already submitted comments to EPA previously asking for an extension. She added that the Congressional Delegation, ADEQ, and Maricopa County have also requested an extension. Ms. Bauer mentioned that the hope is to avoid a conformity freeze and be able to fix the Plan to avoid the sanctions.

Grant Smedley, Salt River Project, inquired if anyone has talked to the Arizona Center for Law in the Public Interest about the extension. He added that it seemed like the extension is contingent on their approval. Mr. Smedley noted that EPA does not seem optimistic that the Arizona Center for Law in the Public Interest is willing to approve an extension. He indicated that everyone is working hard to resolve the issue and to provide an approveable plan. Ms. Bauer commented that EPA is the entity that

is in the consent decree with the Arizona Center for Law in the Public Interest and MAG is not a party to that consent decree.

Mr. DeLaCruz stated that the material he has read mentions additional measures may have to be developed depending on a revised plan. He inquired if there are any ideas on additional measures. Ms. Bauer responded that this is one of the unanswered questions. She added that EPA has indicated that MAG would have to conduct a Best Available Control Measure Analysis. Ms. Bauer noted that MAG is not expecting to find a lot of additional measures. She indicated that there are 53 measures in the Five Percent Plan for PM-10 and 77 measures in the Serious Area Plan. Ms. Bauer commented that Maricopa County has updated its Rule 310 and EPA has also approved Rule 316 recently. She mentioned that MAG is not expecting to find a big list of measures.

7. Draft 2010 MAG CMAQ Methodologies

Cathy Arthur, MAG, provided a presentation on the Draft 2010 MAG CMAQ Methodologies. She stated that she gave a presentation to the Committee in June indicating that the CMAQ methodologies would be updated this year. Ms. Arthur added that a copy of the Draft 2010 CMAQ Methodologies has been included in the agenda packet. She noted that the Congestion Mitigation and Air Quality Improvement Program began almost 20 years ago. Ms. Arthur indicated that nationally there is a large sum of money over a five year period that is authorized for financing CMAQ projects. The purpose of the program is to fund transportation projects that improve air quality.

Ms. Arthur stated that the apportionment of CMAQ funding to the State of Arizona occurs based on a formula. She added that in order to qualify, the area has to be designated as a nonattainment or maintenance area for carbon monoxide or ozone. Ms. Arthur noted that Maricopa County is the only area in Arizona that currently qualifies for CMAQ funding. She indicated that the formula is based on whether the region is a carbon monoxide or ozone nonattainment or maintenance area or both and it is multiplied by the census population estimate. Ms. Arthur commented that the federal formula is currently using the 2000 U.S. Census data for Maricopa County and will most likely start to use the 2010 Census in 2012, which should be a positive for the region. She mentioned that there was approximately \$54 million apportioned to the State of Arizona in FY 2010. Ms. Arthur noted that the MAG region receives all of the CMAQ funds allocated to Arizona.

Ms. Arthur stated that the CMAQ Program was established by the Intermodal Surface Transportation Efficiency Act of 1991 and each of the succeeding federal authorizations for transportation have continued with the program. She added that the latest authorization is the Safe, Accountable, Flexible, Efficient Transportation Equity Act - A Legacy for Users (SAFETEA-LU). Currently the program is under continuing resolutions so it has been carried over from FY 2009. Ms. Arthur indicated that once a new federal authorization is in place, we will find out whether CMAQ will continue to be a funded program.

Ms. Arthur provided an overview of the requirements for evaluating a CMAQ project for potential funding. She added that the Federal Highway Administration (FHWA) provided guidelines in 2008. Ms. Arthur indicated that the last set of procedures drafted by MAG staff were finalized in April 2009. She noted that MAG felt it was important to update these procedures since the new EPA MOVES2010 mobile source emissions model changes the emission factors dramatically.

Ms. Arthur stated that the guidance provided to MAG member agencies on CMAQ project eligibility is included in the Transportation Programming Guidebook which is located on the MAG website. She added that the guidebook is updated every year. Ms. Arthur discussed the ways MAG uses the CMAQ methodologies. Typically, the MAG CMAQ methodologies are applied each year to evaluate: CMAQ eligible projects proposed for the last year of a new Transportation Improvement Program; CMAQ eligible projects proposed for Fiscal Year-End Closeout funds; PM-10 certified street sweepers proposed for purchase; proposed projects to pave unpaved roads, alleys and shoulders; and projects implemented with CMAQ funds in the prior calendar year for the annual report required by FHWA. Ms. Arthur noted that MAG identifies in the annual report the emission reduction benefits of projects that were funded in that year. Ms. Arthur presented a list of the general types of projects that are eligible for CMAQ funding. She added that there are projects that do not fall into the general categories and MAG makes every effort to quantify the air quality benefits of those projects, as well.

Ms. Arthur stated that MAG hired Sierra Research in 2008 to evaluate the CMAQ methodologies and compare them with the methodologies used in other parts of the country, in particular, the western United States. She stated that Sierra Research indicated that the methodologies used by MAG are some of the most sophisticated in the Country. She added that Sierra Research did have some minor recommendations, which MAG has tried to address in subsequent revisions to the CMAQ methodologies.

Ms. Arthur discussed the recommendations from Sierra Research. She stated that MAG had already updated the methodologies in 2009 to be consistent with assumptions in the 2007 Ozone Plan and the Five Percent Plan for PM-10. Ms. Arthur added that MAG has since updated the survey reports that provide the new activity data. She indicated that another recommendation from Sierra Research was to look at the Texas Transportation Institute (TTI) methodologies for evaluating projects. Sierra Research had stated that the TTI methodologies were more sophisticated. Ms. Arthur mentioned that Sierra Research pointed out that their methodologies are used to develop air quality plans for Texas and not to evaluate CMAQ projects. She added that in early 2010 MAG contracted with the Texas Transportation Institute and Lee Engineering to update the region's methodology for Intelligent Transportation Systems (ITS).

Mr. O'Donnell inquired why zero is used for the weight of carbon monoxide. Ms. Arthur responded that the region has been in attainment for the carbon monoxide standard for many years. She added that the region has been reclassified as a maintenance area; therefore, we are no longer a nonattainment area for carbon monoxide. In addition, the trends for carbon monoxide are continuing to go down as a result of the tailpipe emission standards. She commented that all of this is subject to input from Committee members and will be discussed at the workshop being held in December 2010. Ms. Arthur added that the priority weight for carbon monoxide have been zeroed out for the last three or four iterations of the report.

Ms. Arthur stated that the MOVES2010 mobile source emissions model is different than MOBILE6. She added that the categories of vehicles and types of facilities are a little different. Ms. Arthur commented that for the 2010 methodologies, MAG had to consider both the emissions on the network, which include exhaust emissions from vehicles traveling on the network, and emissions from vehicles that are not moving. She clarified that the off-network emissions are the vehicles that are stationary and the on-network emissions are moving vehicles. Ms. Arthur mentioned that when comparing the 2010 methodologies with the 2009 methodologies, in every case where there are exhaust emissions,

both off-network and on-network emission factor calculations are provided. Therefore, it is almost double the calculations relative to the previous methodologies.

Ms. Arthur also stated that speed curves in the MOVES2010 emissions model are different. For example, the nitrogen oxide curve with MOBILE6 was u-shaped with the bottom being approximately 30 miles per hour. The new curves go up at about 60 to 65 miles per hour, resulting in a broader u-shaped curve. Therefore, more cost-effectiveness is received from projects that improve speed. Ms. Arthur added that PM-10 emissions are also now sensitive to changes in speeds. She discussed priority weights and added that in the April 2009 version of the CMAQ methodologies, nitrogen oxide had a priority weight of 0.89 and 1.03 for volatile organic compounds. Ms. Arthur indicated that the priority weights for nitrogen oxide, volatile organic compounds, and PM-10 have now been set equal one. She stated that the biggest change in the Draft 2010 CMAQ Methodologies is the revision to the ITS methodology to incorporate recommendations from Texas Transportation Institute/Lee Engineering. Ms. Arthur noted that the equations are much more sophisticated. Ms. Arthur mentioned that a workshop on the Draft 2010 CMAQ Methodologies will be held on December 6, 2010 at 1:30 p.m. and added that more detailed information on the changes will be provided.

Ms. Arthur provided additional information on the revised ITS methodology. She stated that Texas Transportation Institute/Lee Engineering provided MAG with sophisticated equations; however, they indicated that MAG needs to use local input data. Ms. Arthur noted that MAG has a contract to measure nonrecurring congestion in the region which should be completed by the end of the summer. Texas Transportation Institute/Lee Engineering recommended the use of a simpler equation until the local data is available. The equation provides a comparison of speeds before and after the project. Ms. Arthur inquired about Texas Transportation Institute/Lee Engineering sharing data from Texas. However, they decided that the coefficients are too locally driven and did not feel comfortable with MAG using the Texas values. She indicated that their recommendations included using speed equations for ITS projects until the results from the MAG study are available.

Ms. Arthur discussed cost-effectiveness. She stated that the more emissions reduced per CMAQ dollar spent, the higher the ranking of a CMAQ project. She referred to Attachment A for the CMAQ evaluations discussed in an earlier agenda item as an example. Ms. Arthur mentioned time constraints on calculations. She noted that MAG only has a couple of weeks to apply the methodologies, calculate cost-effectiveness, and rank the CMAQ project requests.

Ms. Arthur presented a list of example projects in a ranked order by cost-effectiveness. She added that the ranked order is very similar to the list for the 2009 methodologies. Ms. Arthur mentioned that the only significant change is the ITS project which is now located in the middle of the list and was previously closer to the bottom of the list. Therefore, the new methodology did have a positive impact on ITS projects. Ms. Arthur noted that generally the order has not been impacted much by all the changes. She commented that even though the methodologies are updated whenever new information is available, the relative order of the projects is not that flexible.

8. Call for Future Agenda Items

Mr. Kukino asked the Committee for suggestions on future agenda items. Beverly Chenausky, Arizona Department of Transportation, commented on having a discussion at the next meeting on the new ozone standard if EPA finalizes the standard by the end of the year. Mr. Kukino announced that

the next meeting of the Committee has been tentatively scheduled for Thursday, January 27, 2011 at 1:30 p.m. With no further comments, the meeting was adjourned at 2:21 p.m.

Environmental Protection Agency Responses to Maricopa Association of Governments, Maricopa County Air Quality Department and Arizona Department of Environmental Quality Additional Questions Regarding a Revised 189 (d) Plan for the Maricopa PM-10 Nonattainment Area (Received December 17, 2010)

Q1: What year should be the starting point for the 5% reductions in the new plan?

A1: The reductions are to begin from the date of submission of the plan. Therefore, if the new plan is submitted in 2011, then the emission reductions should begin in 2011. The reductions should be taken from the 2010 annual inventory, which would be based on the 2008 periodic emissions inventory.

Q1(A): Lindy's question: We understand that the reductions begin from the date of submission, but how do we do the modeling? The old attainment date was 12/31/06. If the plan is withdrawn, can MAG model 2007 as the base year and update it to 2008, then project it forward?

A1(A): Yes, MAG can use the existing modeling for an old episode and update its emissions to any desired year to use as a base for further assessments, such as progress projected to a different year in the future. (MAG could also do completely new modeling, but that is not necessary and may not be a good use of resources. New modeling would require a new modeling protocol that discusses which year and episode make sense to model.) **(Note: This is Colleen's understanding of Lindy's question. I think to be safe the modeling folks from each agency should talk directly about this question.)**

To avoid confusion, we want to clarify that the attainment date is not 12/31/06. The attainment deadline remains as expeditiously as practicable but not later than June 2012, until or unless we approve an extension.

Q2: If we start reductions in 2011 from a controlled 2010 baseline, is there any way to account for the benefits of the measures we implemented to support the 189(d) plan we submitted in 2007?

A2: If the control measures are getting increasing emission reductions after 2010, then one can take credit for that increase. For example, imaginary measure #XX increases compliance with rule 310.01 by the following estimated amounts:

2008: 2%
 2009: 3%
 2010: 4%
 2011: 5%
 2012: 6%

Assuming that the new plan begins in 2011, it would be reducing the 2010 inventory. So, the 4% improvement in 2010 would already be reflected in that new baseline. But, the new 189(d) plan could take credit for the additional 1% improvement in 2011, and additional 2% improvement in 2012 and so on. Note that to be creditable, there must be a reliable basis for the projected percentage increase in compliance.

Q3: The new 189(d) plan would have to reduce the annual inventory of PM-10 sources by 5% per year. The source mix for the annual inventory is different than the source mix for the days when we have exceedances due to high winds. Since we've successfully addressed stagnation exceedances, we'd be forced to control sources that are arguably not contributing to violations of the standard.

A3: We applaud MAG and ADEQ for your apparent success in eliminating PM-10 exceedances during stagnation episodes. We concur that the next plan should emphasize controlling sources of windblown dust. Given that windblown dust from disturbed land comprises 20% of the annual PM-10 inventory, that shouldn't be a problem. However, it is up to you to determine where the reductions should come from, as long as you can demonstrate attainment. The reductions PM-10 or PM-10 precursors need to be taken from the 2010 annual emissions inventory for the nonattainment area.

exercise her judgment concerning the appropriate revisions to the Ozone NAAQS Rule, the EPA Administrator recently determined that additional advice from the Clean Air Scientific Advisory Committee (“CASAC”) may prove useful and important in evaluating the scientific and other information before her. CASAC is the statutorily-mandated “independent scientific review committee,” 42 U.S.C. § 7409(d)(2)(A), charged to give EPA advice on setting and revising NAAQS, *id.* § 7409(d)(2)(B). EPA’s proposal to revise the Ozone NAAQS Rule within a particular range took account of the prior CASAC advice EPA received on these matters. 75 Fed. Reg. at 2992-93 & 2996-98. EPA intends to submit questions to the CASAC panel for the Ozone NAAQS Rule requesting additional advice, with the expectation that, for example, CASAC’s advice “may aid the Administrator in most appropriately weighing the strengths and weaknesses of the scientific evidence and other information before her, and thus aid her in the exercise of judgment as to the appropriate standard for ozone under CAA section 109(b).” McCarthy Dec. ¶ 9 (attached hereto as Exhibit 1). The CASAC process also includes an opportunity for the public to submit comments to CASAC and EPA. Thereafter, the Administrator will consider CASAC’s further advice and any additional public comments, together with the other record information, to reach her final decision. *Id.* ¶ 10. EPA expects that this process will require just over an additional seven months, until July 29, 2011. *Id.*

Accordingly, EPA revises the relief requested in its prior motion and requests that the Court continue to hold these consolidated cases in abeyance, with the parties to file motions to govern further proceedings 14 days after EPA signs the

final action completing its ongoing rulemaking reconsidering the Ozone NAAQS Rule, or by August 12, 2011, whichever is sooner. This request supersedes the relief requested by EPA in its partially unopposed motion to govern filed November 1, 2010.

The State Petitioners, in their response to EPA's prior motion to govern, stated that they did not oppose EPA's motion of November 1, 2010. State Petitioners' Response to [EPA's Motion] and Cross-Motion for Affirmative Relief, at 1 (dated Nov. 15, 2010). Those petitioners also included a cross-motion for affirmative relief, in which they requested that the Court order EPA to complete its ongoing rulemaking by the date EPA previously stated it would take final action (i.e., December 31, 2010), or, in the alternative, if EPA requires more time beyond that date to complete its rulemaking, that the abeyance lift after December 31, 2010, unless EPA submits evidence in advance of that date clearly demonstrating the need for additional time. In view of this instant revised motion and schedule, the specific relief requested by State Petitioners in their cross-motion could be considered moot and therefore denied. EPA also recognizes, however, that the State Petitioners may not consider their cross-motion moot, or that they otherwise may renew their request for relief, adapted to reflect EPA's new schedule. Accordingly, we respond to these arguments in State-Petitioners cross-motion.

As explained below, their request for a writ of mandamus, to order EPA to complete its ongoing rulemaking by a date certain, should be denied. EPA has been diligently working to complete its ongoing rulemaking reconsidering the Ozone NAAQS Rule, and the additional time, until July 29, 2011, by which EPA intends

to take final action, hardly warrants issuance of the extraordinary relief of a writ of mandamus. EPA recognizes that its new schedule for completing its ongoing rulemaking is longer than it previously reported to the parties and the Court – in total, eleven months longer than EPA’s initial anticipated schedule to undertake its rulemaking reconsidering the Ozone NAAQS Rule, for a combined period less than two years. Although EPA has had to revise the schedules it previously represented to the Court, that cannot supplant the Administrator’s current determination that her deliberations would likely benefit from the additional advice described above. Neither the statute nor caselaw would support a writ of mandamus conflicting with the Administrator’s charge to consider the relevant information and reach a reasonable decision that is requisite to protect public health and welfare.

Nor should the Court grant Petitioners’ alternative request for relief, to decide in advance what judicial standard or measure of evidence EPA must satisfy or provide in any future motion, should the Agency conclude that additional time is necessary to complete its ongoing rulemaking. On this issue, we note that EPA is providing with this filing a declaration by its Assistant Administrator for Air and Radiation explaining the reasons for the additional time EPA needs and the steps EPA intends to take to complete its ongoing rulemaking by July 29, 2011. See McCarthy Dec. As further explained, EPA believes that this warrants a continued abeyance of these cases. State Petitioners’ request, however, that the Court enunciate a particular judicial standard that must be satisfied to justify an extension, should be denied.

STATUTORY AND PROCEDURAL BACKGROUND

I. Primary and Secondary Ozone NAAQS

EPA promulgates “primary” and “secondary” NAAQS to protect public health and welfare for certain pervasive pollutants in the ambient atmosphere. 42 U.S.C. § 7409(a)(1), (b)(1)-(2). “Primary” standards are set at levels which, “in the judgment of the Administrator,” are “requisite to protect the public health” with “an adequate margin of safety”; “secondary” standards are set to protect public welfare “from any known or anticipated adverse effects,” *id.* § 7409(b)(1)-(2), which include “effects on soils, water, [and] vegetation.” *Id.* § 7602(h). Every five years EPA must review published air quality criteria and promulgate any revised or new standards as may be appropriate. *Id.* § 7409(d)(1).

When setting a NAAQS, EPA must consider the recommendations of a statutorily-mandated “independent scientific review committee,” 42 U.S.C. § 7409(d)(2), commonly referred to as the Clean Air Scientific Advisory Committee (“CASAC”). At five-year intervals, CASAC must provide its “recommend[ations] to [EPA] of any new [NAAQS] and revisions of existing . . . [scientific-based air quality criteria and NAAQS].” *Id.* § 7409(d)(2)(B). For any significant departure from CASAC's advice, EPA must provide “an explanation of the reasons for such differences.” *Id.* § 7607(d)(3).

II. EPA’s Decision to Reconsider the 2008 Ozone NAAQS Rule

Ozone is the principal component of smog and causes numerous adverse health effects, including emergency room visits and hospital admissions for respiratory causes, and possibly cardiovascular-related morbidity and cardiopulmonary mortality. The primary and secondary Ozone NAAQS

promulgated by EPA in 1997 are identical, and are set at a level of 0.08 parts per million (“ppm”) using an 8-hour daily averaging time. These 1997 Ozone NAAQS were upheld after extensive litigation. American Trucking Ass'ns v. EPA, 283 F.3d 355 (D.C. Cir. 2002) (omitting history).

As part of its review of the 1997 ozone standard, CASAC found a “large body of data clearly demonstrates adverse human health effects at the current level” of the 1997 standard, concluded that the 1997 standard “needs to be substantially reduced to protect human health, particularly in sensitive subpopulations’,” 72 Fed. Reg. 37,818, 37,869 (July 11, 2007) (quoting 2006 CASAC Letter), and advised EPA to adopt a level between 0.060 to 0.070 ppm. Id. at 37,877/3. In the final Ozone NAAQS Rule challenged in these cases, EPA adopted a revised standard of 0.075 ppm, 73 Fed. Reg. at 16,436, and explained that it reached a different judgment than CASAC. Id. at 16,483/1.

On the secondary standard, CASAC recommended that EPA depart from its practice of setting the secondary NAAQS identical to the primary NAAQS, and given the nature of ozone exposures that adversely affect vegetation during maximum growth periods, that EPA “establish an alternative cumulative secondary standard for [ozone] . . . that is distinctly different in averaging time, form and level from the currently existing or potentially revised 8-hour primary standard.” 72 Fed. Reg. at 37,899-900 (quoting 2006 CASAC Letter). After internal debate, President Bush “concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard,” 73 Fed. Reg. at 16,497/2,

and EPA ultimately concluded that a secondary standard identical to the primary standard would be sufficient. Id. at 16,500. Petitions for review challenging the Ozone NAAQS Rule were filed in 2008 by aligned industry petitioners and the State of Mississippi, alleging that the revised NAAQS are too stringent, and by numerous States (New York, et al.), environmental and public health groups alleging that the primary and secondary revised NAAQS are not sufficiently protective.

On March 10, 2009, EPA requested that the Court hold the cases in abeyance, “to allow time for appropriate EPA officials that are appointed by the new Administration to review the [2008 Ozone NAAQS] Rule to determine whether the standards established in [that] Rule should be maintained, modified or otherwise reconsidered.” EPA’s motion was unopposed by all the parties in these cases. On March 19, 2009, the Court granted EPA’s unopposed motion and directed EPA to notify the Court by September 16, 2009, of the actions it will be taking with respect to the Ozone NAAQS Rule and its schedule for undertaking such actions. In accordance with this Order, EPA notified the parties and Court on September 16, 2009, that EPA had concerns regarding whether the 2008 standards satisfied the requirements of the Act and that it would reconsider those standards through notice-and-comment rulemaking. See EPA’s Notice That It Is Reconsidering the Rule Challenged in These Cases. EPA further explained that its schedule was to sign a Notice of Proposed Rulemaking by December 21, 2009, and to sign any Final Action by August 31, 2010. Id. As further required, on October 16, 2009, EPA filed a joint motion with the environmental, public health, and State

petitioners, requesting a continued abeyance of these cases pending completion of EPA's rulemaking to reconsider its 2008 Ozone Rule.

Over the objections of the industry petitioners, the Court granted EPA's joint motion and placed these cases in abeyance. Order (dated Jan. 21, 2010).^{1/} In its briefing on that motion, EPA explained that its decision to reconsider the Ozone NAAQS Rule and request to hold these cases in abeyance were appropriate given, among other things, this Court's recent decision in American Farm Bureau Federation v. EPA, 559 F.3d 512 (D.C. Cir. 2009). In that case, the Court rejected EPA's 2006 decision not to promulgate a more stringent primary NAAQS for fine particulate matter ("PM"), concluding that EPA inadequately explained its departure from CASAC's recommendation that EPA set a lower standard. Id. at 528-29. On the secondary standard, the Court concluded that "EPA's decision to set secondary fine PM NAAQS identical to the primary NAAQS was unreasonable and contrary to the requirements" of the Act, id. at 531, and criticized EPA's failure to justify its departure from CASAC's recommendation for a more protective secondary standard that is different from the primary standard. Id. at 530.

^{1/} In their motion to govern (dated October 16, 2009), the Industry Petitioners and Mississippi opposed EPA's joint motion to hold these cases in abeyance, because they then preferred to brief their issues challenging the Ozone NAAQS Standard, and in the alternative they requested that the Court stay the Ozone NAAQS Rule pending EPA's reconsideration. EPA and the Environmental and State Petitioners opposed the Industry Petitioners' motion, which the Court denied. Order (dated Jan. 21, 2010); see EPA's Opposition to the Motion to Govern Further Proceedings of Mississippi and the Industry Petitioners (dated Nov. 10, 2009); Environmental and State Petitioners' Joint Opposition to Motion to Govern (dated Nov. 10, 2009). Neither the Industry Petitioners nor the Environmental Petitioners opposed EPA's subsequent November 1, 2010, motion to continue to hold these cases in abeyance as EPA reconsiders the Ozone NAAQS Rule.

ARGUMENT

I. THE COURT SHOULD CONTINUE TO HOLD THESE CASES IN ABEYANCE, PENDING EPA'S COMPLETION OF ITS ONGOING RULEMAKING BY JULY 29, 2011.

The time EPA has taken, and continues to take, to complete its ongoing rulemaking reconsidering the Ozone NAAQS Rule is reasonable and warrants the continued abeyance of these cases. Specifically, in accordance with the Court's abeyance order of March 19, 2009, EPA timely notified the Court on September 16, 2009, of its intention to reconsider the Ozone NAAQS through a notice-and-comment rulemaking, which EPA then expected to complete by August 31, 2010. EPA worked expeditiously, and four months after its notice to the Court, on January 19, 2010, EPA published in the Federal Register its notice of proposed rulemaking reconsidering the Ozone NAAQS. 75 Fed. Reg. 2938; see McCarthy Dec. ¶ 4.²

Thereafter, EPA provided a 62-day public comment period on its proposal, until March 22, 2010, conducted three public hearings in which the Agency heard testimony from approximately 210 interested stakeholders, and has since been reviewing the more than 5,000 unique comments received from citizens, industry groups, public health organizations, States and public interest groups. McCarthy

² Under the statute, EPA's notice of proposed rulemaking must be accompanied by a detailed statement of its basis and purpose, including the factual data on which the proposal is based and the methodology used in obtaining and analyzing the data. 42 U.S.C. § 7607(d)(3). In the case of a NAAQS rulemaking, the Act further requires that the proposal "set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments" made by the Clean Air Scientific Advisory Council and explain any important departures from that advice. EPA diligently worked to develop its proposal, and as noted EPA published its rulemaking proposal just four months after its decision to reconsider the Ozone NAAQS Rule.

Dec. ¶ 5. These comments touch on all aspects of the primary and secondary ozone NAAQS under reconsideration, and EPA is evaluating the issues raised. Id. Before EPA can take final action, the Administrator must determine whether any revisions are warranted and the Agency must draft the final rulemaking decision and supporting technical documents, and include a detailed statement of basis and purpose, an explanation of the reasons for any major changes from the proposal, and a response to each significant comment submitted in written or oral presentations during the comment period. 42 U.S.C. § 7607(d)(6). Finally, this rulemaking is subject to interagency review under Executive Order No. 12866, during which the Office of Management and Budget coordinates review within the Executive Branch for major regulatory actions such as this rulemaking. See McCarthy Dec. ¶ 10.

The Agency has been diligently proceeding with this work, together with the necessary briefings for the Administrator and others on the complex issues involved and the Agency's internal deliberations over the issues raised. Id. ¶ 6. EPA previously believed that it could complete this rulemaking in the identified time period, and most recently informed this Court that it was committed to issuing a final rule by December 31, 2010. EPA's Partially Unopposed Motion (dated November 1, 2010). However, in the process of considering the information and issues before her and determining how to exercise her judgment concerning the appropriate revisions to the Ozone NAAQS Rule, the Administrator decided that seeking additional advice from CASAC may serve to facilitate her exercise of judgment about the scientific and other information in the administrative record.

McCarthy Dec. ¶¶ 7-9. “[T]he Administrator believes that additional advice from CASAC may be useful, especially in the context of a more specific and focused solicitation of scientific advice. For example, the advice from CASAC may aid the Administrator in most appropriately weighing the strengths and weaknesses of the scientific evidence and other information before her, and thus aid her in the exercise of judgment as to the appropriate standard for ozone under CAA section 109(b). 42 U.S.C. § 7409(b). McCarthy Dec. ¶ 9.

Accordingly, EPA intends to take final action on its ongoing rulemaking reconsidering the Ozone NAAQS Rule by July 29, 2011. During the approximately seven months and three weeks between this filing and that date, EPA intends to take the following steps:

During December 2010 and January 2011, EPA intends to prepare a set of questions for CASAC and provide them for CASAC's review. The questions are expected to request additional advice focused on the scientific evidence and other information before the Administrator. EPA anticipates that CASAC will hold a public meeting in February 2011 to discuss their response, and anticipates that CASAC will provide its additional advice to the Agency by letter shortly thereafter. The CASAC process includes an opportunity for the public to submit comments to CASAC and EPA.

McCarthy Dec. ¶ 10. Thereafter, EPA would consider CASAC's additional advice as well as any public comments received, prepare a final rule and accompanying rulemaking documents, and conduct the appropriate interagency review under Executive Order No. 12866 before issuing a final decision on its reconsideration rulemaking. *Id.* EPA believes this schedule will provide the Administrator with the opportunity to obtain the additional advice and comments she seeks as well as to conduct the appropriate deliberations, and for the Agency to complete the remaining

steps necessary to take final action by July 29, 2011.

This is a reasonable schedule for EPA to conduct its rulemaking, in all a total of approximately 22 months from the time EPA determined to reconsider the Ozone NAAQS Rule, and just over 18 months from the time EPA issued its rulemaking proposal on January 19, 2010. As explained above, EPA has been working, and will continue to work, diligently to complete this important rulemaking. In Sierra Club v. Thomas, 828 F.2d 873, 798 (D.C. Cir. 1987), this Court found reasonable a rulemaking schedule in which the Agency had taken just less than 3 years from proposal without final action. In so finding, the Court explained that “[a] simple reading of the Clean Air Act reveals that whether to impose a certain type of regulation often involves complex scientific, technological, and policy questions. EPA must be afforded the amount of time necessary to analyze such questions so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion.” Id. at 799.

Likewise, a continued abeyance pending this process will preserve judicial economy as well as the resources of the parties, and will serve the public interest, by ensuring that the primary ozone NAAQS EPA promulgates is “requisite to protect the public health” with “an adequate margin of safety,” 42 U.S.C. § 7409(b)(1), and that the secondary NAAQS “is requisite to protect the public welfare.” Id. § 7409(b)(2). Moreover, recourse to active briefing on the Ozone NAAQS Rule now would be needless and impractical, especially since any rulemaking decision to revise the standards will supersede the 2008 standards of the Ozone NAAQS Rule. In such circumstances, an abeyance of litigation to

accommodate agency reconsideration is appropriate. See Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978) (“Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.”).

II. STATE PETITIONERS CANNOT MEET THEIR HIGH BURDEN TO JUSTIFY ISSUANCE OF A WRIT OF MANDAMUS, AND ARE IN THE WRONG COURT TO SEEK SUCH RELIEF

The State Petitioners’ request for a court order that EPA complete its ongoing rulemaking by the date EPA previously stated that it would complete this process effectively seeks a writ of mandamus. To the extent that the State Petitioners reassert that request given EPA’s revised schedule discussed above, it should be denied. Such relief is neither available nor appropriate in this case for several reasons.

As an initial matter, while the Court may have mandamus authority to enforce a prior judgment, State Petitioners here do not seek such relief, but rather seek extraordinary relief relating to an ongoing rulemaking. In 1990 Congress amended the Clean Air Act citizen suit provision, placing a claim for unreasonable delay over ongoing rulemakings exclusively in federal district court within the Circuit in which the final action, once taken, would be reviewed. 42 U.S.C. § 7604(a) (text after (a)(3)). Thus, at a minimum, to obtain the relief State Petitioners here seek, they must comply with the Act’s citizen suit requirements and file a

complaint in U.S. District Court for the District of Columbia.^{3/} Filing an appropriate complaint in district court not a mere formality, and State Petitioners' failure to do so alone provides a sufficient basis to deny their request.^{4/}

Beyond this, mandamus is a "drastic" remedy available only in "extraordinary situations." Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 403 (1976); In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). A petitioner seeking mandamus relief has the burden of showing that the respondent owes it a "clear and compelling" duty, Cheney, 406 F.3d at 729; Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), a duty "so plainly prescribed as to be free from doubt and equivalent to a positive command," Consol. Edison Co. of N.Y., Inc. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002) (quoting

^{3/} The Administrative Procedure Act provides a claim for an order to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). Prior to Congress' 1990 amendment to the CAA citizen suit provision, jurisdiction for a petition for review asserting such a claim may have existed in the D.C. Circuit. See Sierra Club v. Thomas, 828 F.2d. at 791-92.

^{4/} State Petitioners cite two cases and appear to argue (at 8) that they may forego filing a separate petition for mandamus or claim for unreasonable delay. Neither of the cases they cite, however, supports this claim, nor supersedes the exclusive grant of jurisdiction under the CAA citizen suit provision. In Potomac Elec. Power Co. v. Interstate Commerce Comm'n, 702 F.2d 1026 (D.C. Cir. 1983), op. supplemented by 705 F.2d 1343 (D.C. Cir. 1983), the Court in a prior case had issued a merits decision and remanded the challenged rate decision to the Commission. Id. at 1028-29. In the new case, the court issued a writ of mandamus to the Commission because its continuing delay responding to the remand "violates our earlier mandate [remanding the rate decision] or because it jeopardizes our future review." Id. at 1033. In contrast, here the Court has not remanded the Agency's Ozone NAAQS Rule and it continues to have jurisdiction over State Petitioners' pending petition challenging that rule. Similarly, Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958), only involved the Court's authority to issue a stay pending judicial review while it considered whether intervention should have been granted in that same proceeding.

Wilbur v. United States, 281 U.S. 206, 218-19 (1930)).

In Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"), this Court emphasized that the liability analysis of an unreasonable delay claim focuses on “whether the agency's delay is so egregious as to warrant mandamus.” 750 F.2d at 79 (emphasis added). The Court adopted a six-part test for this inquiry as providing “useful” but “hardly ironclad” guidance:

(1) the time agencies take to make decisions must be governed by a ‘rule of reason,’ . . . ; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason . . . ; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake . . . ; (4) the court should consider the effect of expediting agency action on agency activities of a higher or competing priority . . . ; (5) the court should also take into account the nature and extent of the interests prejudiced by delay . . . ; and (6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”

Id. at 80 (citations and internal quotations omitted). Application of these factors to this case demonstrates that EPA's action on its ongoing rulemaking reconsidering the ozone NAAQS has not been dilatory, let alone unreasonably delayed.

A. EPA Has Neither Missed a Statutory Deadline Nor Unreasonably Delayed Completing Its Rulemaking.

EPA’s decision to reconsider the Ozone NAAQS Rule is discretionary; so too is its ongoing rulemaking reconsidering that Rule. No statute requires such reconsideration or establishes a schedule for EPA’s rulemaking to do so. In such a situation, “an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference.” Sierra Club v. Thomas, 828 F.2d at 797. Here, as discussed above, EPA has been proceeding reasonably in its ongoing rulemaking

reconsidering the Ozone NAAQS Rule. Further, its schedule to complete its rulemaking by July 29, 2011, accommodates important interests described above to facilitate the Administrator's decision-making. The fact that EPA requires additional time beyond its initial estimates to complete this rulemaking hardly warrants the issuance of a writ of mandamus. This is particularly true given that EPA has not breached any statutory time frame governing its ongoing rulemaking. See Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991, 993-95 (D.C. Cir. 1996) (agency receives considerable deference even where the agency's own initial estimated deadlines have passed; declining to issue a writ of mandamus).

EPA acknowledges that the process to reach a final decision will take longer than initially expected. In its previous notices to the Court, EPA "made its best good faith estimate on how much time would be needed to complete the various steps necessary to reach a conclusion on the reconsideration." McCarthy Dec. ¶ 7. For the reasons stated above, however, more time is needed: specifically, approximately 11 months beyond the little more than seven-month period (until August 31, 2010) that EPA initially believed would be required to take final action after its January 19, 2010, proposal. But this delay hardly provides the factual predicate for the extraordinary relief State Petitioners request.

Given the importance and complexity of the issues, and the necessary steps detailed above, it is not unreasonable for EPA to take more time to reconsider the Ozone NAAQS Rule. By July 29, 2011, EPA will have spent just over 18 months since its January 19, 2010, proposal was published, and during the remaining seven months of this time EPA intends to obtain additional advice from CASAC, a

process which may also result in additional public comment, and take the remaining steps necessary to take final action. This rulemaking pace is clearly reasonable, and does not warrant relief from the Court. See Sierra Club v. Thomas, 828 F.2d at 798 (approximately three years of agency deliberations on a proposed Clean Air Act rule was not unreasonable); see also In re Monroe Commc'ns Corp., 840 F.2d 942, 945-46 (D.C. Cir. 1988) (five-year delay does not warrant mandamus); Oil, Chem. & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (no need for court order when agency intends to take final action in two years). For these reasons, not only would an order that EPA take final action by July 29, 2011 (let alone December 31, 2010), not be justified, such an order risks improperly cutting off necessary time for EPA to complete its deliberations and properly conclude all work necessary to support its final action.

B. A Compelling Deadline is Not Required to Protect Public Health and Welfare.

Petitioners cite only generalized public health concerns caused by ozone pollution and argue that implementation may be delayed. But it is appropriate to allow EPA the time it believes necessary to complete its ongoing rulemaking reconsidering the Ozone NAAQS Rule, as any resulting revision of the NAAQS will be designed to ensure that the public health and welfare are adequately protected. Petitioners' generalized claims of harm provide no basis to curtail the Agency's rulemaking. Furthermore, the Ozone NAAQS Rule remains in effect pending EPA's reconsideration, Order at 2 (dated Jan. 21, 2010), the continued effectiveness of which the State Petitioners strongly supported. Environmental and

State Petitioners' Joint Opposition to Motion to Govern, at 7-15 (dated Nov. 10, 2009). Moreover, State Petitioners' reference to additional needed public health protection based upon a revised standard presupposes the outcome of EPA's ongoing rulemaking.

In any event, EPA is well aware of the public health and welfare issues at stake whenever the Agency revises a NAAQS under the Clean Air Act, as well as the particular risks posed by ozone pollution. EPA must, however, have the time it believes necessary to complete its rulemaking properly, so it can consider the "complex scientific, technological, and policy questions" raised, reach "considered results," and establish a defensible standard that is requisite to protect public health and welfare. Sierra Club v. Thomas, 828 F.2d at 798. As this Court explained in Sierra Club v. Thomas, "by decreasing the risk of later judicial invalidation and remand to the agency, additional time spent reviewing a rulemaking proposal before it is adopted may well ensure earlier, not later, implementation of any eventual regulatory scheme." Id. at 798-99.

C. Judicial Review Will Not Be Frustrated Absent Mandamus.

State Petitioners (at 8) cite two cases, suggesting that the Court should issue an order to prevent the frustration of judicial review or its prior orders. Neither of these cases, however, displaces the heavy burden State Petitioners bear to justify mandamus based upon a claim of unreasonable delay discussed above. See supra at 14-15 & n.4. Significantly, the State Petitioners did not request that the abeyance be lifted on their challenge to the Ozone NAAQS Rule and that active litigation resume, through issuance of a briefing schedule. Indeed, in opposing the Industry

Petitioners' prior efforts to preclude EPA's reconsideration, State Petitioners opposed precisely this course, as did EPA, preferring instead that EPA reconsider the Ozone NAAQS Rule without the burden of a pending briefing schedule. Environmental and State Petitioners' Joint Op. to Motion to Govern, at 4-5 (dated Nov. 11, 2009). Especially given this, State Petitioners should not now be heard to argue that an order is necessary at this juncture to prevent the frustration of judicial review. Accordingly, the Court should deny State Petitioners' request for an order requiring EPA to take final action by December 31, 2010.

III. THE COURT SHOULD DECLINE STATE PETITIONERS' ALTERNATIVE REQUEST

As an alternative, Petitioners request an advisory decision from the Court that sets out, in advance of any future motion EPA may file, a judicial standard and evidentiary threshold for EPA to justify any further time that may prove necessary for EPA to complete its ongoing rulemaking. Such extraordinary relief is not warranted.

As explained above, although EPA has taken longer than it initially expected, it is proceeding diligently to complete its rulemaking, particularly given the magnitude of the task and complexity of the issues. Nothing in the facts here warrants the extraordinary relief State Petitioners request. Moreover, the case relied upon by State Petitioners to justify the relief they seek is wholly inapposite. The text they quote in American Lung Ass'n v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998), referring to EPA's heavy obligation to explain its reasoning, applies to EPA's final rule establishing a NAAQS "requisite to protect the public health"

under 42 U.S.C. § 7409(b)(1), not a standard under which EPA must justify more time to complete its ongoing rulemaking.

State Petitioners further speculate that time spent by EPA to conduct its rulemaking will cascade into delay implementing any revised ozone NAAQS EPA may issue upon completing its rulemaking. Again, State Petitioners offer only the generalized and theoretical specter of harm. This cannot displace the time necessary for EPA to complete its ongoing rulemaking, especially since any EPA decision to revise the standards in the Ozone NAAQS Rule will be designed to ensure that the public health and welfare are adequately protected; it is appropriate for EPA to take the time necessary to do so properly.

Finally, EPA notes that it has provided a declaration detailing the time necessary and steps the Agency will take to complete its ongoing rulemaking by July 29, 2011. This fact, however, does not warrant the relief State Petitioners request, that the now Court enunciate a judicial standard or measure of evidence that must be satisfied for any future extension.

CONCLUSION

For the reasons set forth above, the Court should continue to hold these consolidated cases in abeyance and direct the parties to file motions to govern further proceedings 14 days after EPA signs the final action completing its ongoing rulemaking reconsidering the Ozone NAAQS Rule, or by August 12, 2011, whichever is sooner. Further, the Court should deny State Petitioners' cross-motion for additional relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on December 8, 2010, using the CM/ECF system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's CM/ECF system.

/S/ David Kaplan

TENTATIVE MEETING SCHEDULE FOR THE
MAG AIR QUALITY TECHNICAL ADVISORY COMMITTEE

JANUARY - NOVEMBER 2011

Saguaro Conference Room

Thursday, January 27, 2011 - 1:30 p.m.

Thursday, February 24, 2011 - 1:30 p.m.

Thursday, March 24, 2011 - 1:30 p.m.

Thursday, April 28, 2011 - 1:30 p.m.

TUESDAY, May 24, 2011 - 1:30 p.m.

Thursday, June 30, 2011 - 1:30 p.m.

Thursday, July 28, 2011 - 1:30 p.m.

Thursday, August 25, 2011 - 1:30 p.m. IF NECESSARY

Thursday, September 22, 2011 - 1:30 p.m.

Thursday, October 27, 2011 - 1:30 p.m.

TUESDAY, November 29, 2011 - 1:30 p.m.

Note: This schedule is subject to change. Flexibility is needed to meet federal Clean Air Act mandates and changes in guidance from the Environmental Protection Agency.