

October 16, 2014

TO: Members of the MAG Air Quality Technical Advisory Committee

FROM: William Mattingly, Peoria, Chair

SUBJECT: MEETING NOTIFICATION AND TRANSMITTAL OF TENTATIVE AGENDA

Thursday, October 23, 2014 - 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 McNeely 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.

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 September 23, 2014 Meeting Minutes

4. Evaluation of Proposed PM-10 Certified Street Sweeper Projects for FY 2015 CMAQ Funding

An evaluation of proposed PM-10 Certified Street Sweeper Projects for Fiscal Year 2015 Congestion Mitigation and Air Quality Improvement (CMAQ) Funds has been conducted. The deadline for submitting project applications was September 30, 2014.

The FY 2015 Unified Planning Work Program and Annual Budget and FY 2014-2018 MAG Transportation Improvement Program contain \$1,404,238 in FY 2015 CMAQ funding to encourage the purchase and utilization of PM-10 certified street sweepers. A minimum local cash match of 5.7 percent is required.

Seventeen projects requesting approximately \$3.79 million in federal funds were evaluated.

2. For information.

3. Review and approve the September 23, 2014 meeting minutes.

4. For information, discussion, and recommendation of a prioritized list of proposed PM-10 Certified Street Sweeper Projects for FY 2015 CMAQ funding to the MAG Management Committee.

The MAG Air Quality Technical Advisory Committee is requested to recommend a prioritized list of proposed PM-10 Certified Street Sweeper Projects for FY 2015 CMAQ funding to the MAG Management Committee. Please refer to the enclosed material.

5. Update on the Arizona Center for Law in the Public Interest Lawsuit on the MAG 2012 Five Percent Plan for PM-10

On September 24, 2014, the MAG Regional Council approved MAG's Washington legal counsel to file a motion for MAG to intervene on behalf of the respondent in the lawsuit filed by the Arizona Center for Law in the Public Interest to challenge the EPA approval of the MAG 2012 Five Percent Plan for PM-10. MAG is coordinating closely with Maricopa County on a potential joint motion to intervene. On August 28, 2014, the Arizona Department of Environmental Quality had filed a motion to intervene in the lawsuit on behalf of the respondent. On September 24, 2014, the U.S. Ninth Circuit Court of Appeals granted the State's motion to intervene.

According to the mediation questionnaire, the Center for Law in the Public Interest indicated that the most significant issue is the reliance upon the EPA Exceptional Events Rule to demonstrate attainment of the standard. The Center for Law in the Public Interest contends that the EPA concurrence in excluding the exceptional event exceedances is an abuse of discretion. The Center's opening brief is due on October 17, 2014 and the respondents's answering brief is due on November 17, 2014. An update will be provided.

6. Update on the Winter Holiday No Burn Campaign and Speciation Analysis

The Arizona Department of Environmental Quality and Maricopa County Air Quality Department will be conducting a Winter Holiday No Burn Campaign designed to reduce concentrations of PM-2.5 during the winter holiday season. Historically, the Valley

5. For information and discussion.

6. For information and discussion.

has exceeded the EPA's 24-hour PM-2.5 standard over weekends and on holidays during the time period between late November and early January. The principal cause has been wood smoke from fires that are lit at gatherings or in celebration of the season. An update on the No Burn Campaign and speciation analysis will be provided by the Maricopa County Air Quality Department.

7. Update on the Ozone Monitoring Data

The Maricopa eight-hour ozone nonattainment area is classified as a Marginal Area for the 2008 ozone standard of 0.075 parts per million. The attainment date for Marginal Areas is December 31, 2015. Now that the 2014 ozone season is over, a final update will be provided on the ozone monitoring data. Please refer to the enclosed material.

8. MAG Air Quality Technical Advisory Committee Vice Chair Vacancy-Letters of Interest

On August 21, 2013, the MAG Regional Council approved the updated MAG Committee Operating Policies and Procedures. 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 appointed by the Executive Committee to complete the remainder of the Vice Chair's term.

Mr. Philip McNeely has resigned from his position at the City of Phoenix, and has relinquished his position as MAG Air Quality Technical Advisory Committee Chair. Vice Chair, Mr. William Mattingly from the City of Peoria, has ascended to the Chair position. Incoming Chair Mattingly will serve out the remainder of Chair McNeely's tenure, which is due to expire on June 30, 2015.

Those member agencies interested in the now vacant Vice Chair position of the MAG Air Quality Technical Adviosry Committee should

7. For information and discussion.

8. For information and discussion.

submit a letter of interest to the Regional Council Chair. The letters of interest are requested to be submitted by Monday, October 27, 2014 to Mayor Michael LeVault, MAG Regional Council Chair, MAG Office, 302 N. 1st Avenue, Suite 300, Phoenix, Arizona 85003.

9. Call for Future Agenda Items

The next meeting of the Committee has been tentatively scheduled for **Thursday, December 4, 2014 at 1:30 p.m.** The Chair will invite the Committee members to suggest future agenda items.

9. For information and discussion.

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

Tuesday, September 23, 2014
MAG Office
Phoenix, Arizona

MEMBERS ATTENDING

- Philip McNeely, Phoenix, Chairman
- William Mattingly, Peoria, Vice Chair
- Paul Lopez for Drew Bryck, Avondale
- John Minear, Buckeye
- # Jon Sherrill for Jim Weiss, Chandler
- * Jamie McCullough, El Mirage
- * Jessica Koberna, Gilbert
- Megan Sheldon, Glendale
- * Cato Esquivel, Goodyear
- # Rudolfo Lopez for Kazi Haque, Maricopa
- # Greg Edwards for Scott Bouchie, Mesa
- Sam Brown for Tim Conner, Scottsdale
- # Antonio DeLaCruz, Surprise
- # Oddvar Tveit, Tempe
- * Youngtown
- * Ramona Simpson, Queen Creek
- * Walter Bouchard, American Lung Association of Arizona
- Barbara Cenalmor for Kristin Watt, Salt River Project
- # Rebecca Hudson, Southwest Gas Corporation
- * Ann Carlton, Arizona Public Service Company
- # Gina Grey, Western States Petroleum Association
- * Robert Forrest, Valley Metro/RPTA
- * Dave Berry, Arizona Motor Transport Association
- Jeannette Fish, Maricopa County Farm Bureau
- Steve Trussell, Arizona Rock Products Association
- * Claudia Whitehead, Greater Phoenix Chamber of Commerce
- # Amanda McGennis, Associated General Contractors
- * Spencer Kamps, Homebuilders Association of Central Arizona
- * Mannie Carpenter, Valley Forward
- # Kai Umeda, University of Arizona Cooperative Extension
- Joonwon Joo for Beverly Chenausky, Arizona Department of Transportation
- Diane Arnst, Arizona Department of Environmental Quality
- * Environmental Protection Agency
- Corky Martinkovic, Maricopa County Air Quality Department
- Scott DiBiase, Pinal County
- * Michelle Wilson, Arizona Department of Weights and Measures
- Ed Stillings, Federal Highway Administration
- * Judi Nelson, Arizona State University
- Stan Belone, 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
- Matt Poppen, Maricopa Association of Governments
- Julie Hoffman, Maricopa Association of Governments
- Kara Johnson, Maricopa Association of Governments
- Randy Sedlacek, Maricopa Association of Governments
- Cathy Arthur, Maricopa Association of Governments
- Taejoo Shin, Maricopa Association of Governments
- Patrick Shaw, Maricopa Association of Governments
- Dean Giles, Maricopa Association of Governments
- Shane Kiesow, City of Apache Junction
- Joe Gibbs, City of Phoenix
- Susan Avans, City of Buckeye
- Miguel Aceves, Civil & Environmental Consultants, Inc.
- Mark Suehl, Civil & Environmental Consultants, Inc.
- Rusty Van Leuven, Arizona Department of Agriculture

1. Call to Order

A meeting of the Maricopa Association of Governments (MAG) Air Quality Technical Advisory Committee (AQTAC) was conducted on September 23, 2014. Philip McNeely, City of Phoenix, Chair, called the meeting to order at approximately 1:30 p.m. Greg Edwards, City of Mesa; Jon Sherrill, City of Chandler; Gina Grey, Western States Petroleum Association; Amanda McGennis, Associated General Contractors; Rebecca Hudson, Southwest Gas Corporation; Oddvar Tveit, City of Tempe; Kai Umeda, University of Arizona Cooperative Extension; Antonio DeLaCruz, City of Surprise; and Rudolfo Lopez, City of Maricopa, attended the meeting via telephone conference call.

Chair McNeely indicated that copies of the handouts for the meeting are available. He noted for members attending through audio conference, the presentations for the meeting will be posted on the MAG website under Resources for the Committee agenda, whenever possible. If it is not possible to post them before the meeting, they will be posted after the meeting.

Chair McNeely stated that this would be his last meeting as Chair. He indicated that he will be leaving the City of Phoenix to become the new Air Quality Director for Maricopa County. William Mattingly, City of Peoria, congratulated Chair McNeely. Lindy Bauer, Maricopa Association of Governments, thanked Chair McNeely for serving as Chair of the AQTAC. She stated that MAG will be working closely with Chair McNeely at Maricopa County, along with the Arizona Department of Environmental Quality (ADEQ) and the Arizona Department of Transportation (ADOT).

2. Call to the Audience

Chair McNeely 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 that fall under the jurisdiction of MAG and nonaction agenda items. Chair McNeely noted that no public comment cards had been received.

3. Approval of the June 26, 2014 Meeting Minutes

The Committee reviewed the minutes from the June 26, 2014 meeting. John Minear, City of Buckeye, moved and Mr. Mattingly, seconded and the motion to approve the June 26, 2014 meeting minutes, carried unanimously.

4. Arizona Center for Law in the Public Interest Petition for Review of the EPA Approval of the MAG 2012 Five Percent Plan for PM-10

Ms. Bauer provided an overview on the Arizona Center for Law in the Public Interest Petition for Review of the Environmental Protection Agency (EPA) Approval of the MAG Five Percent Plan for PM-10. She indicated that on August 20, 2014, EPA notified MAG that the Arizona Center for Law in the Public Interest (ACLPI) filed a petition for review of the EPA approval of the MAG 2012 Five Percent Plan for PM-10 in the U.S. Ninth Circuit Court of Appeals. Ms. Bauer noted that the information on the lawsuit was transmitted to the Committee on August 21, 2014 and was also included in the agenda packet for today's meeting. She stated that according to the mediation questionnaire, ACLPI indicated that the most significant issue is the reliance upon the EPA Exceptional

Events Rule to demonstrate attainment of the standard. The Center for Law in the Public Interest contends that the EPA concurrence in excluding the exceptional event exceedances in 2011 and 2012 is an abuse of discretion. Ms. Bauer indicated that the ACLPI opening brief is due on October 17, 2014 and the respondent's answering brief is due on November 17, 2014.

Ms. Bauer stated that on August 28, 2014, ADEQ filed a motion to intervene in the lawsuit on behalf of the respondent, EPA. Ms. Bauer noted that on September 24, 2014, MAG Regional Council may also provide authorization for MAG to intervene in the lawsuit. She added that MAG has special Washington legal counsel, which it has not had in the past. Washington legal counsel would then file a motion for MAG to intervene in the lawsuit. Ms. Bauer indicated that MAG has spent considerable resources on the Air Quality Plans, as the Regional Air Quality Planning Agency, as well as, provided assistance to ADEQ on exceptional events. She noted that the MAG member agencies and ADEQ are implementing measures that have been developed through the planning process. Additionally, the MAG transportation plans have at times been at risk due to the threat of sanctions. Ms. Bauer mentioned that MAG has considerable items at stake. Therefore, MAG staff will be requesting authorization to file a motion. She stated that if a motion is filed, that the motion would be filed late. She noted that once a petition is filed, thirty days are allotted for motions to intervene.

Chair McNeely inquired about the benefits of filing a motion to intervene. Ms. Bauer responded that those who intervene have a seat at the table. She mentioned that ADEQ intervened to have a seat at the table. If we do not intervene, only the briefs that are filed are available to review. Additional advantages of MAG intervening in the lawsuit include first hand information on the thinking of EPA as they respond to ACLPI. Ms. Bauer stated that the ACLPI lawsuit is filed against EPA for approval of the MAG 2012 Five Percent Plan for PM-10. She stated that MAG will also have an opportunity to submit helpful information as the Regional Air Quality Planning Agency. Ms. Bauer reported that if MAG is allowed by the Court to intervene, MAG will be in step with ADEQ through the lawsuit proceedings.

Diane Arnst, Arizona Department of Environmental Quality, stated that if the motion to intervene was not filed, ADEQ would not be able to provide input on the negotiations of a schedule that EPA may set with the litigant, if a new plan is required. She stated that ADEQ has many responsibilities and providing input on a potential schedule is important.

5. EPA Approval of the MAG 2009 Eight-Hour Ozone Redesignation Request and Maintenance Plan

Ms. Bauer presented that on August 20, 2014, the Environmental Protection Agency issued final approval of the MAG 2009 Eight-Hour Ozone Redesignation Request and Maintenance Plan. EPA has redesignated the region to attainment status for the 1997 eight-hour ozone standard of 0.08 parts per million (ppm). There have been no violations of the standard since 2004. Ms. Bauer noted that the final approval was published in the Federal Register on September 17, 2014 and becomes effective October 17, 2014. Ms. Bauer stated that this is good news for the region.

6. Update on the Ozone Monitoring Data

Julie Hoffman, Maricopa Association of Governments, provided an update on the ozone monitoring data. She stated that the Maricopa eight-hour ozone nonattainment area is classified as a Marginal Area for the 2008 ozone standard of 0.075 ppm. The attainment date for Marginal Areas is December 31, 2015. Ms. Hoffman reported that the standard is calculated by a three year average of the fourth high.

She noted that the values from 2013, 2014, and 2015 will be used to determine attainment of the standard for the December 2015 attainment date. Ms. Hoffman stated that MAG closely tracks the monitoring data and is providing an update to the Committee on the 2014 ozone season. A list of ozone exceedances for the 2014 ozone season have been provided at each place.

Ms. Hoffman displayed a chart on the number of monitors violating the eight-hour ozone standards. She noted that for the 2008 ozone standard of 0.075 ppm, there are four violating monitors in 2014, based on preliminary ozone data. This is down from the 10 violating monitors in 2013. Ms. Hoffman added that there have been no violating monitors of the 1997 eight-hour ozone standard of 0.08 ppm since 2004.

Ms. Hoffman presented the highest three year average of the fourth highest eight-hour ozone concentration in the Maricopa nonattainment area. She reported that in 2014, the highest three year average of the fourth high is 0.08 ppm which is down slightly from 0.081 ppm in 2013.

Ms. Hoffman displayed the fourth highest eight-hour ozone concentration at the monitors for years 2012-2014, as well as the three year average of the fourth high. The four violating monitors for 2014 are: North Phoenix at 0.08 ppm, Phoenix Supersite at 0.077 ppm, Pinnacle Peak at 0.078 ppm, and West Phoenix at 0.078 ppm. Ms. Hoffman noted that there can be no violating monitors in 2015 in order to meet the December 31, 2015 attainment date. However, if the region is close to attaining the standard, Ms. Hoffman indicated that an extension of the attainment date may be an option. On June 6, 2013, EPA published a proposed rule on the Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements. According to the proposed rule, an area is eligible for a one year extension of the attainment date if, for the attainment year, the area's fourth highest daily eight-hour average is at or below 0.075 ppm. Additionally, an area is eligible for a second one year extension if the area's fourth highest daily eight-hour value, averaged over both the original attainment year and the first extension year, is at or below 0.075 ppm. Ms. Hoffman noted that this may be an option for the region.

Ms. Hoffman discussed the 2015 eight-hour ozone monitoring data needed to meet the standard by the December 31, 2015 attainment date. She stated that there are a few monitors that may be a challenge, specifically the Mesa, North Phoenix, Phoenix Supersite, and Pinnacle Peak monitors. Ms. Hoffman noted that the 2015 fourth highest value needed to meet the standard at these monitors would need to be at 0.070 ppm or 0.071 ppm. She indicated that this fourth high is low compared to the fourth high experienced in previous years at these monitors. However, the numbers have been coming down and MAG will continue to track the ozone monitoring data.

Mr. Mattingly asked about the attainment date extension option. Ms. Hoffman responded that the attainment date extension was mentioned as a option if the standard is not met by December 31, 2015. She indicated that the region may request an extension of the attainment date if the area's fourth highest daily eight-hour average is at or below 0.075 ppm.

Steve Trussell, Arizona Rock Products Association, inquired about the ozone increases during years 2011 and 2012. Ms. Bauer replied that ozone concentrations were high in 2011 and 2012 across the country. She stated that prior to those years, ozone concentrations were decreasing in the region and that there was only one violating monitor. Ms. Bauer indicated that MAG staff have been conducting

an in-house modeling study and it appears meteorology was the primary factor for the ozone increases in 2011-2012.

7. Update on the EPA Review of the Eight-Hour Ozone Standard

Matthew Poppen, Maricopa Association of Governments, presented an update on the EPA review of the National Ambient Air Quality Standards (NAAQS) for ozone. He indicated that in August 2014, EPA made available the final Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards. The final Policy Assessment is prepared by EPA staff and presents staff conclusions regarding the adequacy of the current standards and potential alternative standards appropriate for consideration.

Mr. Poppen discussed the final EPA staff conclusions. With regard to the primary ozone standard, EPA staff reached the overall conclusion that the available health evidence and exposure/risk information call into question the adequacy of the public health protection provided by the current standard of 0.075 ppm. Mr. Poppen stated that EPA staff concluded that it is appropriate in the review to consider a revised primary ozone standard level within the range of 70 to 60 parts per billion or 0.070 to 0.060 ppm. With regard to the secondary ozone standard, EPA staff reached the overall conclusion that the available vegetation and ecosystem effects evidence and exposure/risk information call into question the adequacy of the public welfare protection provided by the current standard of 0.075 ppm. Mr. Poppen indicated that EPA staff concluded that it is appropriate to consider a revised secondary standard in terms of the cumulative, seasonal, concentration-weighted form, called the W126 index, within a range of levels from 17 to 7 parts per million-hours.

Mr. Poppen reviewed a potential 2015 ozone NAAQS schedule. Under a court-ordered date, EPA would have a proposed rule by December 1, 2014. The court-ordered date for the final rule is October 1, 2015. States would then submit designation recommendations to EPA by October 2016 that would likely utilize ozone data from years 2013-2015. After the submittal of State designation recommendations, EPA would finalize designations, classifications, attainment dates, and nonattainment area State Implementation Plan rules and guidance documents by October 2017. Mr. Poppen noted that States would then submit attainment plans by December 2020-2021. He indicated that the nonattainment area attainment dates would be as soon as December 2020 for Marginal Areas or as late as December 2037 for Extreme Nonattainment Areas.

Ms. Bauer reported on proposed Senate Bill (S.B.) 2514, the Ozone Regulatory Delay and Extension of Assessment Length (ORDEAL) Act. She stated that the bill was introduced by United States Senator Jeff Flake on January 24, 2014. The ORDEAL Act would amend the Clean Air Act so that the review of the National Ambient Air Quality Standards would occur every 10 years rather than every five years. She noted that for ozone, this would delay the review. The review could occur no earlier than February 1, 2018 and no later than December 31, 2018. Ozone would then be reviewed in 10 year intervals thereafter. Ms. Bauer noted that there is a companion bill, H.R. 4947, in the House of Representatives that was sponsored by Representative Matt Salmon. She stated that the bill has been introduced, however it has not moved.

Chair McNeely inquired if the delayed ozone review would include the current ozone review of 0.07 and 0.06 ppm. Ms. Bauer responded that if S.B. 2514 passed, it is her understanding that the ozone

review would not occur until February 1, 2018 through December 31, 2018. She noted that reviews of the ozone standard would then occur at 10 year intervals.

Ms. Arnst asked if Tier III tailpipe standards were assessed in the MAG ozone study. Ms. Bauer replied that the MAG staff has been running MOVES 2014 in which the Tier III tailpipe standards and benefits are built into 2014.

8. Call for Future Agenda Items

Chair McNeely requested suggestions for future agenda items. He indicated that the next meeting of the Committee has been scheduled for Thursday, October 23, 2014 at 1:30 p.m.

Ms. Arnst requested the 2014 Maricopa County No-Burn Campaign for a future agenda item. With no further comments, the meeting was adjourned at approximately 2:00 p.m.



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October 16, 2014

TO: Members of the MAG Air Quality Technical Advisory Committee

FROM: Dean Giles, Air Quality Planning Program Specialist

SUBJECT: EVALUATION OF PROPOSED PM-10 CERTIFIED STREET SWEEPER PROJECTS FOR FY 2015 CMAQ FUNDING

The Maricopa Association of Governments staff has evaluated proposed PM-10 Certified Street Sweeper Projects for emission reductions and corresponding cost-effectiveness for FY 2015 Congestion Mitigation and Air Quality Improvement (CMAQ) Funds. Seventeen projects requesting approximately \$3.79 million in federal funds were evaluated. The evaluation of these projects and supplemental information are included in the attachment. The proposed projects have been listed in order of cost-effectiveness based on the amount of CMAQ funding requested. Following consideration of this information, the MAG Air Quality Technical Advisory Committee will be requested to recommend a prioritized list of PM-10 Certified Street Sweeper Projects for FY 2015 CMAQ funding to the MAG Management Committee.

BACKGROUND

The purchase of PM-10 certified street sweeper projects supports the measure "PM-10 Efficient Street Sweepers" in the Revised MAG 1999 Serious Area Particulate Plan for PM-10. In addition, the MAG 2012 Five Percent Plan for PM-10 includes PM-10 Certified Street Sweepers. The FY 2015 Unified Planning Work Program and FY 2014-2018 MAG Transportation Improvement Program contain \$1,404,238 in FY 2015 CMAQ funding to encourage the purchase and utilization of PM-10 certified street sweepers. The purpose of the CMAQ program is to fund projects and programs in nonattainment and maintenance areas that assist in achieving air quality standards. A minimum local cash match of 5.7 percent on the CMAQ eligible portion of the project is required.

On August 28, 2014, MAG solicited PM-10 certified street sweeper projects in the PM-10 nonattainment areas from member agencies. Eligible street sweepers are defined as those which have been certified by the South Coast Air Quality Management District as meeting that agency's Rule 1186 certification standards. Project applications were due by September 30, 2014.

EVALUATION AND PROJECT RANKING

According to the approved MAG Federal Fund Programming Guidelines and Procedures, project applications are to be reviewed by the MAG Street Committee. On October 14, 2014, the Street Committee conducted a review of the PM-10 Certified Street Sweeper project applications. A summary of the discussion from the meeting is attached.

MAG staff estimated the emission reductions and cost-effectiveness utilizing the September 30, 2011 MAG CMAQ Methodologies. Federal CMAQ guidance requires that the estimated emission reductions for each project submitted for CMAQ funding be considered during project selection. The FY 2015 PM-10 Certified Street Sweeper project evaluation and supplemental information are provided in the attachment. The proposed projects have been listed in descending order of cost-effectiveness based on the amount of CMAQ funding requested.

Following consideration of this information, the MAG Air Quality Technical Advisory Committee will be requested to make a recommendation on a prioritized list of proposed projects for FY 2015 CMAQ funding to the MAG Management Committee. After the MAG Regional Council approval of projects for funding, MAG will issue a formal authorization to proceed with the purchase of the proposed street sweepers in a letter to the project sponsor. To address new Federal Highway Administration procedures to minimize inactive obligations and to assist MAG in reducing the amount of obligated federal funds, MAG is requesting that street sweepers be purchased and reimbursement be requested by the project sponsor within one year from the date of the MAG Regional Council authorization.

If you have any questions or need additional information, please contact me at (602) 254-6300.

Attachments

List of Proposed PM-10 Certified Street Sweeper Projects for FY 2015 CMAQ Funding

\$1,404,238 in CMAQ Funding is Available for Sweeper Projects

										Supplemental Information			
Agency	Federal Cost	Local Cost	Total Cost*	Daily Emission Reduction (Kilograms/day)	Cost-Effectiveness (CMAQ dollar cost per annual metric ton reduced)	The requested certified street sweeper will:				Have local resources been committed for staff or equipment to support the sweeper project?		Please indicate in what geographical area(s) the requested certified street sweeper will operate	Number of certified street sweepers owned and operated by your agency. ++
						Replace non-certified sweeper	Expand	Increase Frequency	Replace older certified sweeper	Yes	No		
Phoenix #1 +	\$220,936	\$13,355	\$234,291	1,407	\$61				✓	✓		Area from 107 th Ave. to 16 th St., Camelback Rd. to Dobbins Rd.	34
Phoenix #2 +	\$220,936	\$13,355	\$234,291	547	\$158				✓	✓		Area from 107 th Ave. to 16 th St., Camelback Rd. to Dobbins Rd.	34
Peoria +	\$231,215	\$13,976	\$245,191	159	\$567				✓	✓		City limits from Northern Ave. to SR 74 and 67 th Ave. to El Mirage Rd.	5
Goodyear +	\$218,884	\$13,230	\$232,114	66	\$1,293				✓	✓		Dysart Rd. to Perryville Rd. from Camelback Rd. to Riggs Rd.	4
Surprise #1 +	\$214,750	\$12,981	\$227,731	64	\$1,307				✓	✓		Citywide.	9
Surprise #2 +	\$214,750	\$12,981	\$227,731	64	\$1,307				✓	✓		Citywide.	9
Surprise #3 + ♦	\$214,750	\$12,981	\$227,731	61	\$1,376				✓	✓		Citywide.	9
Subtotal	\$1,536,221												
Amount Available	\$1,404,238												
Balance	-\$131,983												
Surprise #4 +	\$214,750	\$12,981	\$227,731	61	\$1,376				✓	✓		Citywide.	9
Pinal County #1 +	\$223,473	\$13,508	\$236,981	16	\$5,292	✓					✓	San Tan Area: Thompson Rd. to Quail Run Ln.; Bella Vista Rd. to Germann Rd.	4
Buckeye +	\$222,863	\$13,471	\$236,334	13	\$6,489		✓		✓	✓		Rooks Rd. to 195 th Ave., Indian School Rd. to Beloit Rd.	4
Maricopa #1 +	\$238,687	\$14,428	\$253,115	10	\$9,243				✓	✓		Citywide.	4
Maricopa #2 +	\$238,687	\$14,428	\$253,115	10	\$9,243				✓	✓		Citywide.	4
Chandler #2 +	\$236,822	\$14,315	\$251,137	8	\$11,904				✓	✓		Dobson Rd. south of Queen Creek Rd. jogging south east to McQueen Rd. and Hunt Hwy., then east to Val Vista Rd., then north along city boundary to Gilbert Rd. and Queen Creek Rd.	10
Scottsdale	\$201,444	\$12,176	\$213,620	5	\$15,194				✓	✓		Bell Rd. to Doubletree Ranch Rd., and Loop 101 Fwy. to 144 th St.	7
Chandler #1 +	\$236,822	\$14,315	\$251,137	5	\$17,558				✓	✓		Price Rd. south of Western Canal to Chandler Blvd., then east to Gilbert Rd., then north along city boundary back to Western Canal between Arizona Ave. and McQueen Rd.	10

										Supplemental Information			
Agency	Federal Cost	Local Cost	Total Cost*	Daily Emission Reduction (Kilograms/day)	Cost-Effectiveness (CMAQ dollar cost per annual metric ton reduced)	The requested certified street sweeper will:				Have local resources been committed for staff or equipment to support the sweeper project?		Please indicate in what geographical area(s) the requested certified street sweeper will operate	Number of certified street sweepers owned and operated by your agency. ++
						Replace non-certified sweeper	Expand	Increase Frequency	Replace older certified sweeper	Yes	No		
Pinal County #2 +	\$223,473	\$13,508	\$236,981	5	\$19,109	✓					✓	Stanfield Area: Interstate-8 to SR 238, Fuqua Rd. to Western Pinal County Line.	4
Pinal County #3 +	\$223,473	\$13,508	\$236,981	1	\$60,355	✓					✓	Apache Junction Area: Meridian Rd. to Barkley Rd. and Baseline Rd. to McDowell Rd. alignment.	4
Total	\$3,796,715												

* Total cost for the CMAQ eligible portion of the project, excludes ineligible equipment.

+ Proposed sweeper projects for Phoenix #1, Phoenix #2, Peoria, Goodyear, Surprise #1, Surprise #2, Surprise #3, Surprise #4, Pinal County#1, Buckeye, Maricopa #1, Maricopa #2, Chandler #2, Chandler #1, Pinal County #2, and Pinal County #3 indicate sweeping within four miles of a PM-10 monitor.

++ The total number of certified street sweepers owned and operated by the agency, regardless of funding source.

◆ For Surprise #3 sweeper project, initial funding of \$82,767 is available in FY 2015 CMAQ. The remaining \$131,983 of the \$241,750 requested for the project may become available due to year-end closeout including any additional funding received by the region.

FY2015 Street Sweeper Applications Received

Count	Application ID	Agency	Procured date of Sweeper being replaced	Description of Area	Federal Cost	Local Cost	Total Cost	Agency ID	Notes and Questions: Street Committee 10-14-2014
1	BKY-01	Buckeye	3/1/2006	Rooks Road to 195th Ave, Indian School Road to Beloit Road	\$ 222,863	\$ 27,756	\$ 250,619		Buckeye noted that over the life of the current sweeper that maintenance and repair costs have exceeded \$205,000.
2	CHN-01	Chandler	1/1/2005	Price rd s. of western canal to Chandler Blvd, then east to Gilbert rd, then north along city boundary back to western canal between Ariz ave and Mc Queen.	\$ 236,822	\$ 14,315	\$ 251,137		
3	CHN-02	Chandler	3/1/2006	Dobson s. of Queen Creek jogging south east to Mc Queen & hunt hwy, then east to Val vista, then north along city boundary to Gilbert rd & Queen Creek.	\$ 236,822	\$ 14,315	\$ 251,137		
4	GDY-01	Goodyear	2/2008	Dysart Road to Perryville Road from Camelback Road to Riggs Road	\$ 218,884	\$ 13,230	\$ 232,114		A member asked if the 8 year useful life will be met. It was noted by staff that pending on Regional Council action, and subsequent Federal authorization and procured date, that it can be evaluated.
5	MAR-01	Maricopa	10/1/2008	City of Maricopa	\$ 238,687	\$ 15,228	\$ 253,915		
6	MAR-02	Maricopa	10/1/2008	City of Maricopa	\$ 238,687	\$ 15,228	\$ 253,915		A member noted an error on the application for total price. Corrected to \$253,915.
7	PEO-01	Peoria	9/1/2007	Peoria City Limits: Northern Ave to Sr 74 and 67th Ave to El Mirage Rd	\$ 231,215	\$ 23,476	\$ 254,691		
8	PHX-01	Phoenix	Oct, 2001	107th Ae to 16th St, Camelback Rd. to Dobbins Rd.	\$ 220,936	\$ 31,178	\$ 252,114	#133322	Phoenix noted that both sweepers have high mileage and one sweeper was down 60% of the time for repairs.
9	PHX-02	Phoenix	8/1/2006	107th ave to 16th St, Camelback Rd. to Dobbins Rd.	\$ 220,936	\$ 31,178	\$ 252,114	#633910	
10	PNL-01	Pinal Co.	NA	San Tan Area - thompson Rd to Quail Run Ln, Bella Vista Rd to Germann Rd	\$ 223,473	\$ 26,518	\$ 249,991		A member questioned whether all roads to be swept were paved or if some were chip sealed and if the sweeper would do an efficient job cleaning chip seal.
11	PNL-02	Pinal Co.	NA	Stanfield Area - I-8 to SR238, Fuqua Road to Western Pinal County Line	\$ 223,473	\$ 26,518	\$ 249,991		A member asked if the sweeping area could be combined with another area for a higher efficiency of the sweeper. Volumns seem low on this application.
12	PNL-03	Pinal Co.	NA	Apache Junction Area - Meridian Rd to Barkley Rd and Baseline Rd to McDowell Alignment	\$ 223,473	\$ 26,518	\$ 249,991		
13	SCT-01	Scottsdale	8/14/2006	Bell Road to Doubletree Ranch Road, and Loop 101 Freeway to 144th Street.	\$ 201,444	\$ 12,176	\$ 213,620		A member asked if the cost for the sweeper was accurate (lowest submitted). Scottsdale rep responded that the city would stand by the submittal, and would cover additional costs if needed, and did not want to change their application.
14	SUR-01	Surprise	DEC-06	City Wide	\$ 214,750	\$ 14,101	\$ 228,850		
15	SUR-02	Surprise	1/1/2006	City Wide	\$ 214,750	\$ 14,101	\$ 228,850		
16	SUR-03	Surprise	7/1/2005	City Wide	\$ 214,750	\$ 14,101	\$ 228,850		
17	SUR-04	Surprise	12/1/2006	City Wide	\$ 214,750	\$ 14,101	\$ 228,850		
Total					\$ 3,796,714	\$ 334,036	\$ 4,130,751		

Available	\$1,404,238
Demand	270%

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Case No.:14-72327

SANDRA L. BAHR, and DAVID MATUSOW,

Petitioners,

v.

GINA McCARTHY, Administrator United States Environmental Protection Agency;
JARED BLUMENFELD, Regional Administrator, EPA Region IX; and **UNITED
STATES ENVIRONMENTAL PROTECTION AGENCY**,

Respondents.

ON PETITION FOR REVIEW OF AGENCY ACTION

OPENING BRIEF FOR PETITIONERS

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STATEMENT OF JURISDICTION

This is a petition for review of final action by the United States Environmental Protection Agency (“EPA”) in approving a revision to the Arizona State Implementation Plan (“SIP” or “plan”) for the Maricopa County PM-10 Nonattainment Area (“Area”) submitted pursuant to Section 189(d) of the Clean Air Act (“CAA” or “Act”). 42 U.S.C. § 7513a (d). The submitted SIP revision consists of the “Maricopa Association of Governments 2012 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area” and “the “2012 Five Percent Plan for the Pinal County Township 1 North, Range 8 East Nonattainment Area,” (collectively the “2012 Five Percent Plan”). The action Petitioners appeal from is final, in that it is labeled by EPA as a “final” rule. Excerpt of Record (“ER”) at 1, Administrative Record (“AR”) at H.3. This Court therefore has jurisdiction to review EPA’s action pursuant to 42 U.S.C. § 7607(b)(1). Notice of the action was published in the Federal Register on June 10, 2014 and the Petition for Review was filed in this Court on July 29, 2014. Pursuant to 42 U.S.C. § 7607(b)(1), the Petition for Review was timely because it was filed within sixty days of publication of the notice in the Federal Register.

ATTORNEYS’ FEES

Petitioners intend to seek attorneys’ fees in this matter pursuant to 42 U.S.C. § 7607(f) if they prevail.

STATEMENT OF ISSUES

1. Whether EPA abused its discretion when it concurred in the State's request to exclude from the air quality monitoring data for the Area a total of 135 exceedances that occurred over twenty five days during a two-year period as "exceptional events" and thereby ignore significant violations of the national ambient air quality standard for particulate matter at fifteen of the Area's monitors.

2. Whether EPA acted unlawfully in approving the 2012 Five Percent Plan where the plan fails to satisfy all of the requirements of Section 110 of the Clean Air Act applicable to the Maricopa County PM-10 Nonattainment Area, specifically the "best available control measures" and "most stringent measures" required by Sections 189(b) and 188(e), respectively, of the CAA. 42 U.S.C. §§ 7513a(b)(1); 7513(e).¹

3. Whether EPA abused its discretion and acted contrary to law when it allowed the State to satisfy the CAA's requirement of contingency measures, which are measures that are to be immediately implemented to protect the public health if a milestone for reasonable further progress or attainment is not met, with control measures that the State is already implementing, so that in the event contingency measures would otherwise be triggered under the Act, there are no

¹ All relevant statutes, regulations, and ordinances are included in an Addendum appended at the end of this Opening Brief.

additional control measures immediately available to address the threat to public health.

STATEMENT OF THE CASE

On February 6, 2014, EPA proposed to approve a revision to the Arizona SIP relating to the control of airborne particulate pollution in the Phoenix area. ER 211, AR A.2. Petitioners are Phoenix residents who are adversely affected by unhealthy levels of particulate pollution in their community. On March 10, 2014 Petitioners submitted timely comments to EPA in opposition to the proposed revision, contending that EPA's proposal to exclude 135 exceedances from the air quality data under the exceptional events policy was an abuse of discretion, that the state had failed to demonstrate that the plan complied with specific mandatory provisions of the Act relating to SIPs, and that the plan failed to provide them with the level of air quality protection that the Act guarantees them. ER 356-71; AR E.7 & E.10. EPA approved the plan in its entirety on May 30, 2014 and published notice of its approval on June 10, 2014. ER 1; AR H.2 & H.3. Petitioners filed a timely Petition for Review in this Court on July 29, 2014.

STANDARD OF REVIEW

The applicable standard of review for the issues presented in the Petition for Review is whether EPA's actions were (1) arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law; or (2) in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right. 42 U.S.C. § 7607(d)(9)(A) & (C); *see also Abramowitz v. U.S. EPA*, 832 F.2d 1071, 1074-75 (9th Cir. 1987).

STATEMENT OF FACTS

I. Particulate Pollution and the Clean Air Act.

Particulate matter is a deadly form of air pollution. The term describes a broad class of chemically and physically diverse substances existing as distinct solid or liquid particles that become suspended in the ambient air. *See* 62 Fed. Reg. 38652, 38653 (July 18, 1997). Particulates can range in size from the small to the microscopic; however, EPA has concluded that particles smaller than or equal to 10 micrograms in diameter, approximately one-seventh the width of a human hair, present the greatest concern to health. *See* 61 Fed. Reg. 65638, 65648 (Dec. 13, 1996). Unlike larger airborne particles, PM-10 pollution can pass through the natural filters in the nose, mouth and throat, penetrate the upper airways, and travel deep into the lungs. H.R. Rep. No. 490, 101st Cong., 2d Sess., pt. 1 at 207 (1990) (“House Report”). There, it can produce an array of adverse health effects, including reduced lung capacity, aggravation of respiratory disease, cancer, and even death. *Id.* at 210. Children are especially vulnerable to PM-10 pollution due to their high respiratory rates and small lungs. *Id.* at 149, 210; 136 Cong. Rec.

H2511, H2527 (5/21/90). Other vulnerable populations include the elderly, asthmatics, and victims of respiratory disease. House Report at 210.

Even short-term exposures to high PM-10 levels can be particularly deadly. Scientific studies show a strong association between elevated daily particulate levels and increased deaths. *See, e.g.*, Samet, et al., “The National Morbidity, Mortality and Air Pollution Study: Methods and Methodologic Issues” www.healtheffects.org. Annual premature deaths from exposure to PM-10 concentration in Arizona have been estimated at 963, including 557 in Maricopa County. Arizona Department of Environmental Quality Annual Report 2000, Appendix I, Air Quality Report, p. 22-23.

In 2006 the Arizona Department of Environmental Quality (ADEQ) launched an effort to address the connection between PM-10 air pollution and the growing incidence of asthma among children in Arizona. “Protecting Our Children: Assessing the Link between PM10 Pollution and Childhood Asthma in Maricopa County,” Children’s Health Challenge Grant Project, Dec. 2008 <http://www.azdeq.gov/ceh/download/Exchange%20Grant%20Summary.pdf> (last accessed 10/13/2014). According to ADEQ’s study, asthma is the most common chronic childhood disease in Arizona and a leading cause of absences from school for many Arizona children. *Id.* at 1. Asthma also can contribute to long-term lung damage and other serious health impacts in children. *Id.* ADEQ’s

study demonstrated a significant increase in the likelihood that children may experience an asthma event with a relatively small PM-10 increase in ambient air. *Id.* at 11. ADEQ concluded that “[t]hese findings suggest that the at-risk population overall is greater than previously observed.” *Id.* Among children ages 5-18 years there was a 13.7% increase in the occurrence of an asthma event when the PM-10 concentration increased by 36.4 $\mu\text{g}/\text{m}^3$ (the change in daily average PM-10 from the 25th to 75th percentile). *Id.* at 10; *see also*, H.J.S. Fernando and others, “Children’s Health Project: Linking Asthma to PM10 in Central Phoenix – a report to the Arizona Department of Environmental Quality” Arizona State University’s Center for Environmental Fluid Dynamics and Center for Health Information and Research, February 16, 2009.

The 1970 Clean Air Act, as amended in 1977 and 1990, was adopted specifically to attack these kinds of health threats. Pursuant to the Act, EPA has adopted National Ambient Air Quality Standards (“NAAQS”) for various air contaminants as pollution limits necessary to protect public health and welfare. 42 U.S.C. § 7409(a) & (b). Under the CAA, any area that does not meet a NAAQS is designated as a “nonattainment” area. 42 U.S.C. § 7407(d). For each such area, the Act requires states to submit a SIP to EPA to provide for attainment of the NAAQS. 42 U.S.C. §§ 7410, 7502. These SIPs must be adopted by the states after notice and public hearing, and must contain enforceable measures backed by

commitments of adequate resources and legal authority to implement them. 42 U.S.C. § 7410(a)(1) & (2).

In 1987, EPA adopted two NAAQS for PM-10: (1) a 24-hour standard of 150 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) (not to be exceeded more than once per year on average over a 3-year period) to protect against acutely hazardous levels of PM-10; and (2) an annual average standard of 50 $\mu\text{g}/\text{m}^3$ to protect against chronic exposures.² 52 Fed. Reg. 24634 (July 1, 1987). As amended in 1990, the Act provided that areas violating these standards be designated as “moderate” nonattainment areas for PM-10. 42 U.S.C. § 7513(a). The Act further required states to submit SIPs for these areas by November 15, 1991. 42 U.S.C. § 7513a(a)(2)(A).

In addition to the general SIP requirements, these moderate area PM-10 SIPs were required to: (1) assure that reasonably available control measures would be implemented no later than December 10, 1993; and (2) provide for attainment of the PM-10 standards “as expeditiously as practicable,” but no later than December 31, 1994, except to the extent the state demonstrated that attainment by that date impracticable. 42 U.S.C. §§ 7513(c)(1), 7513a(a)(1)(B). If an area failed to meet the December 31, 1994 attainment deadline, then EPA was required to reclassify it

² After extensive study and an extended public comment process, EPA revoked the annual standard in 2006, but retained the 24 hour standard without change. *See* 71 Fed. Reg. 61144 (Oct. 17, 2006).

as a “serious” PM-10 nonattainment area. 42 U.S.C. § 7513(b)(2). A serious area was still subject to all of the moderate area SIP requirements, but the state also had to demonstrate that its SIP included the “best available control measures” (“BACM”) to reduce PM-10 emissions, and tighter controls on large sources of PM-10 pollution. 42 U.S.C. § 7513a(b)(1). The serious area SIP revision had to ensure attainment of the standards as expeditiously as practicable, but not later than December 31, 2001. 42 U.S.C. §§ 7513(c)(2), 7513a(b)(1)(A).

The CAA authorized EPA to extend the December 31, 2001 attainment date for a serious area for up to five years if attainment by 2001 was impracticable. 42 U.S.C. § 7513(e). In order to obtain such an extension, however, a state must have complied with all requirements and commitments pertaining to that area in the implementation plan, and must have demonstrated that the plan for the area included the “most stringent measures” (“MSM”) that were included in the implementation plan of any state or achieved in practice in any state and could feasibly be implemented in the area. *Id.*

Finally, the CAA also provides that serious PM-10 nonattainment areas that fail to attain by either the December 2001 deadline, or an extended deadline, are required to submit within 12 months of the applicable attainment date, “plan revisions which provide for attainment of the PM-10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM-10 or

PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area.”

42 U.S.C. § 7513a(d).

II. The Phoenix PM-10 Plans

The metropolitan area of Phoenix, Arizona has violated federal health standards for particulates for more than 30 years. 40 C.F.R. § 81.303 (2002 and prior versions). Prior to this most recent EPA approval (which only found the area in attainment by excluding data that documented violations of the 24 hour NAAQS) the Phoenix metropolitan area has never attained the PM-10 standards and has a long history of proposing inadequate plans to address the problem. As the following review of that history demonstrates, since the 1990 Amendments to the Clean Air Act, both the State and EPA have had a poor track record of adequately responding to the problem of PM-10 pollution in the Phoenix metropolitan area. Far too often the burden has fallen on citizens to enforce the requirements of the Act. This Petition for Review is the most recent in what has become a decades-long effort by Phoenix area citizens to require their State to clean the air.

A. The First Moderate Area Plan – Disapproved.

On March 15, 1991, portions of Maricopa County, including Phoenix and adjacent cities, were designated nonattainment for the PM-10 NAAQS and

originally classified as “moderate” pursuant to section 188(a) of the Act. 56 Fed. Reg. 11101 (Mar. 15, 1991). The State submitted a moderate area PM-10 SIP for the Phoenix nonattainment area to EPA on November 15, 1991. 59 Fed. Reg. 38402, 38403 (July 28, 1994). On March 4, 1992, EPA rejected the 1991 plan as being incomplete, because, *inter alia*, the State had not shown adequate legal authority to implement the plan. *Id.* This action started a clock that would require EPA to impose a Federal Implementation Plan (“FIP”) in two years (*i.e.*, by March 4, 1994) unless the state submitted a revised SIP that EPA approved before then. 42 U.S.C. § 7410(c)(1)(A).

B. Revised Moderate Area Plan -- *Ober v. Browner I*

The State made minor revisions to the 1991 plan in 1993 and early 1994, but EPA delayed action on the revised plan. The deadline for EPA to adopt a PM-10 FIP for Phoenix – March 4, 1994 – came and went without EPA either adopting a FIP or approving the State’s PM-10 SIP. Accordingly, in June 1994 two Phoenix residents filed suit in U.S. District Court for the District of Arizona under the Act’s citizen suit provision to require EPA to promulgate a FIP. *Ober v. Browner*, No. CIV 94-1318 PHX PGR (D. Ariz.). That suit was settled by a consent decree that required EPA to approve or disapprove the Phoenix PM-10 SIP by March 1, 1995, and adopt a PM-10 FIP for Phoenix by March 1, 1996 if the SIP was disapproved. *Id.*, consent decree lodged 11/8/94, signed 2/28/95.

On April 10, 1995, EPA published a Notice of Final Rulemaking approving the Phoenix PM-10 SIP along with the State's claim that timely attainment of the standards was impracticable. 60 Fed. Reg. 18010 (Apr. 10, 1995). On petition for review by the same Phoenix residents, this Court vacated EPA's action. *Ober v. EPA*, 84 F.3d 304, 307 (9th Cir. 1996) ("*Ober I*"). The Court found that EPA had acted illegally in approving the Phoenix plan because, *inter alia*: (1) The State had not even tried to show attainment or impracticability of attainment of the 24-hour PM-10 standard, and had not implemented all reasonably available control measures to address 24-hour violations; and (2) EPA had illegally relied on *post hoc* justifications offered by the State for rejecting numerous control measures and claiming impracticability as to the annual standard. *Id.* The Court remanded to EPA with instructions to correct these deficiencies. *Id.* at 316.

At the time *Ober I* was argued, the December 31, 1994 attainment deadline for moderate areas had passed, and EPA had proposed to reclassify Phoenix as a "serious" PM-10 nonattainment area. *Id.* at 311, n.2. This Court explicitly held, however, that reclassification to serious would not relieve the state of its obligation to prepare a moderate area plan meeting all of the Act's requirements. *Id.* EPA finalized reclassification of Phoenix to serious on May 10, 1996, and directed the State to submit a serious area SIP revision for Phoenix by December 10, 1997. 61 Fed. Reg. 21372 (May 10, 1996).

In the wake of *Ober I*, EPA directed the State to submit a PM-10 SIP revision for Phoenix by May 9, 1997 that met the moderate area requirements with respect to the 24-hour standard. 62 Fed. Reg. 41856, 41857 (Aug. 4, 1997). As for the annual standard, EPA said that the State could submit corrections to its moderate area plan at the same time it submitted its serious area plan, due December 10, 1997. *Id.* Meanwhile, the plaintiff residents resumed their District Court action to compel EPA to adopt a PM-10 FIP. That litigation led to a second consent decree that required EPA to approve or disapprove the State's plan to address 24-hour violations (*i.e.*, the one due 5/9/97) by July 18, 1997. If the agency disapproved the SIP, in whole or in part, the decree required EPA to promulgate a FIP by July 18, 1998.

C. Moderate Area Plan No. 2 (the “Microscale Plan”) -- Disapproved in Part

On May 9, 1997, the State submitted the SIP revision to address violations of the 24-hour PM-10 standard in Phoenix at the five specific monitoring sites.³ 62 Fed. Reg. at 41857. The plan indicated that 24-hour violations in Phoenix were caused primarily by fugitive dust – that is, dust or particles that become airborne due to wind, agricultural activity, traffic on unpaved roads and parking lots, earth

³ This “microscale” plan was intended as a limited, locally-targeted plan meeting both the moderate and serious area requirements, in response to this Court's remand in *Ober I* and the redesignation of the Area as Serious. 62 Fed. Reg. at 41857

moving, and other soil disruption. *Id.* at 41857. To address these sources, the plan proposed several improvements in the implementation of a local dust control ordinance, Maricopa County Rule 310. *Id.* These improvements were primarily targeted at sources such as earth-moving, disturbed cleared roads, and industrial haul roads. *Id.* The plan did not provide any new measures to address other major fugitive dust sources, including agricultural operations, vacant lots, unpaved roads, and unpaved parking lots. *Id.*

On August 4, 1997, EPA disapproved the State's plan in part because: (1) it failed to demonstrate attainment or impracticability of attainment of the 24-hour standard at two of the sites that were regularly violating the standard, or to show reasonable further progress at those sites; and (2) it failed to include all reasonably available control measures for agricultural sources, vacant lots, unpaved roads, and unpaved parking lots. 62 Fed. Reg. at 41857-8. As for agricultural sources, EPA noted in its proposed rule that the plan provided for a process to identify appropriate controls, but did "not contain any actual controls nor is there any analysis as to why RACM/BACM implementation on these sources is infeasible." 62 Fed. Reg. 31025, 31035 (May 9, 1997). EPA found that this process did not satisfy the Act's requirements and disapproved the RACM/BACM demonstrations for these sources. *Id.*

D. The Federal Implementation Plan –*Ober v. Browner II*

Pursuant to the second consent decree, EPA's partial disapproval of the second moderate area SIP triggered the Agency's duty to promulgate a moderate area FIP for Phoenix addressing both the annual and 24-hour violations. EPA proposed this FIP on April 1, 1998. 63 Fed. Reg. 15920 (Apr. 1, 1998). The proposal consisted of a fugitive dust rule to control PM-10 emissions from vacant lots, unpaved parking lots and unpaved roads in Phoenix. *Id.* at 15921. EPA did not, however, propose any new controls on agricultural emissions, but instead proposed to set up a committee to adopt unspecified agricultural controls by April 2000. *Id.* EPA projected that the FIP measures would not be adequate to attain either the annual or the 24-hour standard in Phoenix by the serious area deadline of December 31, 2001 (which EPA said was the applicable attainment date because the moderate area deadline of December 31, 1994 had passed). *Id.* at 15926.

With respect to agricultural emissions, EPA found that RACM "is not being fully implemented for agricultural fields and aprons in the Phoenix area," and that "federal measures are needed to reduce PM-10 from these sources." *Id.* at 15935. The Agency noted that "wind-blown dust from agricultural fields and aprons (*i.e.*, farm access roads and equipment turnaround areas) significantly contributes to exceedances of the 24-hour standard at the Gilbert and West Chandler" sites. *Id.* EPA further acknowledged that stronger controls on agricultural emissions had

been adopted and implemented in Southern California, but contended that such controls might not be appropriate in Phoenix and suggested further study. *Id.*

On August 3, 1998, EPA adopted its final PM-10 FIP for Phoenix. 63 Fed. Reg. 41326 (Aug. 3, 1998). The plan continued to defer adoption of agricultural rules. In defense of its action, EPA asserted that an enforceable commitment to adopt measures in the future was sufficient. *Id.* at 41332. The Agency said that it wanted to conduct further consultation with local agribusiness interests, and asserted that such an approach was more likely to lead to effective controls. *Id.* EPA also repeated its claim that control measures adopted in California might not be appropriate in Phoenix, and that more study was needed on the matter. *Id.* at 41333. EPA further asserted that the specific agricultural controls identified by the Governor's task force were initially intended to be voluntary and would be further evaluated during EPA's collaborative process. *Id.*

Once again, citizens filed a Petition for Review of EPA's action in promulgating the FIP. *Ober v. Whitman*, 243 F. 3d 1190 (9th Cir. 2001). On January 15, 1999, *Ober II* petitioners filed their opening brief in which they contended that the FIP violated the Clean Air Act because, among other things, it illegally deferred controls on agricultural pollution. *See* Brief for Petitioners filed in No. 98-71158. The *Ober II* Petitioners also challenged EPA's failure to apply RACM to sources that it deemed were "*de minimis*." *Ober II*, 243 F. 3d at 1190.

Before filing its response brief, EPA proposed a revision to the Arizona SIP which addressed agricultural emissions. On May 29, 1998, Arizona Governor Hull signed into law Senate Bill 1427 which revised title 49 of the Arizona Revised Statutes by adding section 49-457. Ariz. Sess. Laws Ch. 217 (1998). This legislation established an agricultural best management practices (“BMP’s”) committee for the purpose of adopting by June 10, 2000 an agricultural general permit rule specifying BMP’s for regulated agricultural activities to reduce PM-10 emissions in the Phoenix PM-10 nonattainment area.⁴ 63 Fed. Reg. 71815, 71816 (Dec. 30, 1998).

On September 4, 1998, the State submitted A.R.S. § 49-457 to EPA for inclusion in the SIP for the Phoenix PM-10 nonattainment area as meeting the RACM requirements of CAA section 189(a)(1)(c) for agricultural sources. 63 Fed. Reg. at 71816-17; *see* 42 U.S.C. § 7513a(a)(1)(C). The State requested that the Agency approve the legislation into the Arizona SIP and withdraw the FIP commitment to develop controls on agricultural sources. 63 Fed. Reg. at 71815. EPA gave notice of its intention to do just that in a proposed rulemaking dated December 30, 1998. *Id.*

⁴ “Regulated agricultural activities” were defined as “commercial farming practices that may produce PM-10 particulate emissions within the Maricopa PM-10 particulate nonattainment area.” A.R.S. § 49-457(N)(5).

E. Agricultural BMP Committee – *Ober v. Browner III*

Arizona citizens again petitioned for review, asserting that the substituted commitment by the State to adopt controls in the future was inadequate for the same reason that EPA's commitment in the FIP was inadequate. *Ober v. Browner*, No. 99-71107. (*Ober III*). This Court, however, never reached that issue. While *Ober III* was pending, the State completed the rulemaking for the agricultural BMPs and the action with regard to that issue was dismissed as moot. With respect to the remaining issue raised in *Ober II*, whether EPA could properly exempt *de minimis* sources from RACM, this Court found that EPA could exempt such sources because the statute did not expressly exclude it from doing so and the requirement that the state adopt "reasonably" available control measures allowed for the exercise of agency judgment. 243 F. 3d at 1195.

F. Serious Area Plan

As noted above, while *Ober I* was pending, the Phoenix area was reclassified as serious nonattainment. Pursuant to section 189(b)(2) of the Act, 42 U.S.C. § 7513a(b)(2), the State was required to submit a serious area plan addressing both the 24 hour and annual PM-10 NAAQS for Phoenix by December 10, 1997. On February 25, 1998, EPA published its finding that Arizona had failed to submit the required serious area plan. 63 Fed. Reg. 9423 (Feb. 25, 1998) (effective February 6, 1998). This finding triggered both a sanctions clock and a

FIP clock. *Id.* at 9424. Thus, the Administrator was required to promulgate a PM-10 FIP for Phoenix by February 6, 2000, unless by that date the Administrator approved the state's serious area PM-10 plan for Phoenix. 42 U.S.C. § 7410(c)(1).

On February 16, 2000, the state submitted a Serious Area PM-10 Plan ("SAPP") to EPA, which EPA found "complete" on February 25, 2000. 65 Fed. Reg. 19964, 19970 (Apr. 13, 2000). Pursuant to section 110(k)(2) of the Act, the Administrator had until February 25, 2001 to approve or disapprove the SAPP. *Id.*; 42 U.S.C. § 7410(k)(2).

On April 13, 2000, EPA proposed to approve the SAPP for the annual standard, but took no action on that portion of the plan which addressed the 24 hour standard. 65 Fed. Reg. at 19964. Consequently, in May 2001, Petitioners filed a citizen suit in U.S. District Court on behalf of Phoenix residents to compel EPA to take action. *Bahr v. Whitman*, CIV 01-0835 PHX ROS (D. Ariz.) Once again, the parties entered into a Consent Decree requiring EPA to take action on the 24 hour standard on or before September 14, 2001, and to approve or disapprove the entire plan by January 14, 2002. *Id.*, 66 Fed. Reg. 44343 (Aug. 23, 2001).

Because the Phoenix area was designated "serious nonattainment," its area plan was required to include "provisions to assure that the best available control measures for the control of PM-10 shall be implemented no later than 4 years after

the date the area is classified (or reclassified) as a Serious Area.” 42 U.S.C. § 7513a(b)(1)(B). Phoenix was reclassified as “serious” on May 10, 1996, effective June 10, 1996. Therefore, all, BACM was to be implemented by June 10, 2000.

In the SAPP submitted to EPA, the State also claimed that it was unable to attain either the annual or 24 hour standard by the serious area deadline of December 2001 and, therefore, sought an extension of the attainment date of December 31, 2001 pursuant to 42 U.S.C. § 7513(e). As noted above, in order to qualify for an extension under this provision, however, the plan must include the most stringent measures (“MSM”) that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area.” 42 U.S.C. § 7513(e).

EPA’s final approval of the SAPP was published on July 25, 2002. 67 Fed. Reg. 48718 (Jul. 25, 2002). The approval also granted the Phoenix area the maximum five year extension of the attainment deadline, giving the area until December 31, 2006 to come into compliance with the NAAQS. *Id.* Arizona citizens once again filed a Petition for Review of the SAPP with this Court. *Vigil v. Leavitt*, 381 F. 3d 826 (9th Cir. 2004). The Petition for Review asserted that the State had failed to comply with the BACM and MSM requirements in its SAPP when it failed to include CARB diesel as a control measure for diesel emissions

and failed to include all feasible controls in its permit program for agricultural emissions.

This Court granted the Petition in part and denied it in part. It upheld EPA's action on the agricultural control measures, rejecting the argument that they were not sufficiently stringent, but held that EPA's approval with respect to CARB diesel was arbitrary and capricious and remanded the action to EPA for further consideration of whether Arizona's decision to reject CARB diesel as an emissions control measure satisfied BACM and MSM. The Court also remanded the question of Arizona's eligibility for the extension of the attainment deadline insofar as that question depended on EPA's determination regarding MSM. *Vigil*, 381 F. 3d at 847.

In June 2005, EPA proposed to reapprove the BACM and MSM demonstrations and the SAPP and finalized the re-approval in July 2006. 71 Fed. Reg. 43979 (Aug. 3, 2006). Citizens again petitioned for review. *Silver v. Johnson*, No. 06-74701. However, that action was resolved through a voluntary remand when it became apparent that under the SAPP the state would not be able to meet the extended December 31, 2006 deadline for attainment. In March 2007, EPA filed a proposed finding of nonattainment and the final notice of nonattainment was published on June 6, 2007. 72 Fed. Reg. 31183 (June 6, 2007).

G. The 2007 Five Percent Plan—*Withdrawn in the face of proposed disapproval*

The notice of nonattainment by the extended December 2006 deadline triggered the obligation on the part of the state, under section 189(d) of the CAA, to submit within twelve months of the missed deadline, a plan demonstrating attainment and an annual reduction of PM-10 or PM-10 precursors of at least 5% based on the latest emissions inventory. 42 U.S.C. § 7513a(d).

Arizona submitted its “MAG 2007 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area”(“2007 Five Percent Plan”) to EPA by the December 2007 deadline and EPA had six months, or until June 30, 2008 to find the plan “complete.” 42 U.S.C. § 7410(k)(1)(b). Because EPA did not take action by that date, the plan was deemed “complete” by operation of law and EPA had 12 months to approve or disapprove the plan. *Id.* at (k)(2). Thus, in the case of the 2007 Five Percent Plan, EPA had until June 30, 2009 to approve or disapprove the submitted plan. When, once again EPA missed its deadline and failed to take action on the 2007 Five Percent Plan, Petitioners filed an action in federal district court requesting enforcement of that deadline. *Bahr v. Jackson*, CV09-2511-PHX-MHM (D. Ariz.).

Once again, the parties negotiated a Consent Order. The Order set two deadlines: a deadline of September 3, 2010 for the EPA to take proposed action on the 2007 Five Percent Plan and a deadline of January 28, 2011 for EPA to take

final action. 75 Fed. Reg. 38520 (July 2, 2010). In September, 2010, the EPA proposed to disapprove substantial parts of the plan finding that it was deficient, for several reasons. EPA found that the State did not correctly inventory the sources of PM-10, resulting in a plan that did not satisfy the requirements of the Act. Further, although the Area's monitors had recorded numerous exceedances of the 24 hour standard in both 2008 and 2009⁵, the State had flagged all but one of those exceedances as "exceptional events" under the Exceptional Events Rule ("EER") codified at 40 C.F.R. § 50.1 and § 50.14. 75 Fed. Reg. 54806, 54,814 (Sept. 9, 2010), ER 372-387, AR C.13. After evaluating four of the flagged 2008 exceedances recorded at the West 43rd Avenue monitor in south-central Phoenix, EPA concluded that they did not meet the requirements of the EER and, therefore, did not concur with the State's request to exclude the data. Because those four exceedances were enough to prevent the State from demonstrating attainment by the December 2010 deadline as projected in the 2007 Five Percent Plan, EPA proposed to disapprove the attainment demonstration. EPA declined to evaluate the remaining exceptional event claims for 2008 or the claims for 2009. *Id.* at fn. 19.

⁵ According to Table 3-4 of the 2012 Five Percent Plan, ER 285, AR B.1.a at p. 3-11, in 2008 the Area recorded 15 exceedances over 11 days and flagged 14 of them as exceptional events. In 2009, the Area recorded 25 exceedances over 7 days. *Id.*

Although EPA found the 2007 Five Percent Plan noncompliant with respect to the emissions inventory and the attainment demonstration, it nonetheless proposed a partial approval. Specifically, EPA proposed to approve additional control measures that had been adopted by the state legislature since those controls had the effect of strengthening the SIP. *Id.* at 54811-12.

However, EPA singled out one of those additional control measures for special treatment and discussion. The State had included an updated “Agricultural PM-10 General Permit” (ACC R18-2-611), in the 2007 Five Percent Plan as a contingency measure. EPA noted that although the rule had been approved as BACM in 2002 and the State had strengthened the Rule in 2007 by increasing the number of best management practices that were required under each category from 1 to 2, by 2010, other nonattainment areas had adopted programs to control agricultural emissions that were significantly stronger and did not have the enforceability issue found in the Maricopa BMP Rule. Thus, EPA concluded that the rule no longer qualified as BACM. *Id.* at 54813.⁶

In response to EPA’s proposed action, on January 25, 2011, the state withdrew its 2007 Five Percent Plan. A few days later, on January 31, 2011, the

⁶ EPA had previously written a letter to the Chairman of the Agricultural Best Management Practices Committee discussing the need to strengthen the 2007 Rule and, in particular, include control measures specific to high wind events (Letter dated April 14, 2010 from Colleen McKaughan to Dan Thelander). ER 357.

EPA found that Arizona failed to make a SIP submittal required under the CAA for the Maricopa County PM-10 nonattainment area by the required deadline. 76 Fed. Reg. 8300-8303 (Feb. 14, 2011). This finding triggered an 18-month clock for mandatory sanctions and a two year clock for a yet another FIP. *Id.*

H. The Replacement Five Percent Plan.

On May 25, 2012, the State submitted the 2012 Five Percent Plan, its 5% replacement plan, to the EPA. 79 Fed. Reg. 7118, 7119 (Feb. 6, 2014). The agency was required to approve or disapprove the 2012 Five Percent Plan by February 14, 2013. Once again, however, EPA failed to act by the nondiscretionary deadline. So, once again, Petitioners filed a lawsuit in federal district court, *Bahr v. McCarthy*, 2:13-cv-00872 SMM. The lawsuit resulted in a negotiated consent judgment with agreed upon dates for EPA to act. In accordance with the deadlines set forth in the consent decree, EPA published its proposal to approve the 2012 Five Percent Plan in early February 2014. 79 Fed. Reg. at 7118. ER 211-219; AR A.2.

In the proposed rulemaking, EPA explained that it was approving the plan and finding that the area “attained” the standard by December 2012 despite the fact that monitors in the area had reported 133 exceedances of the 24 hour standard during the years 2010, 2011, and 2012. *Id.* at 7122; ER 215. At the request of the

state, EPA had agreed to treat a total of 131 exceedances over 25 separate days⁷ during 2011 and 2012 as “exceptional events” and exclude them from the data. *Id.* If these exceedances were not excluded, 15 of the 16 monitoring sites that reported exceedances would be violating the standard by a significant measure. ER 359-60; AR E.7 pp. 4-5.

At the time of these exceedances, by EPA’s own assessment, BACM were not in place. That is because 105 of the exceedances that EPA has proposed to exempt occurred in 2011. During that time period, the 2007 Maricopa BMP Rule was the only control measure in place for agricultural emissions and, as noted above, EPA had expressly found in its 2010 proposed rulemaking that the Rule no longer represented BACM for agricultural emissions. Further, in 2010, EPA wrote the BMP Committee and suggested that in light of all of the High Wind Exception Event requests, the Committee should consider making no till and no harvest mandatory on high wind days. ER 357; AR E.7 p. 2. The revised BMP rule, which was adopted in December 2011 and went into effect in March 2012, did not include such a provision. A.A.C. R 18-2-610.01. Nor was that Rule included in the 2015 Five Percent Plan. 2012 Five Percent Plan, Appendix D. ER 353-355; AR B.1.c.

⁷ As EPA acknowledged in the final rulemaking, there was some discrepancy in the actual number of exceedances in the proposed rulemaking. The actual number concurred in by EPA was 135 exceedances. ER 4.

In its rulemaking, EPA also proposed to approve the attainment demonstration without first resolving the status of thirty additional exceedances that had occurred over six days in 2013 which ADEQ had also flagged as “exceptional events” but had not yet been analyzed or concurred in by EPA. 79 Fed. Reg. at 7122, n. 16. ER 215, AR A.2 at 7122.

Petitioners raised these concerns, along with others, in the comments they submitted to EPA. ER 256-371, ARE.7 &10. However, EPA finalized the proposed rule and approved the 2012 Five Percent Plan on May 30, 2014. AR H.2, published 79 Fed. Reg. 33107 (June 10, 2014), ER 1, AR H.3.

SUMMARY OF ARGUMENT

The 2012 Five Percent Plan adopted by the State of Arizona for the Phoenix nonattainment area and approved by EPA, is, once again, inadequate. Rather than actually addressing the long-standing problem of PM-10 pollution, the 2012 Five Percent Plan demonstrates “attainment” by ignoring multiple monitor violations by treating 135 exceedances, many of which are “severe” by EPA’s own definition, as “exceptional events.” EPA’s decision to concur with the State’s request to exclude this data is not only inconsistent with the guidelines set forth in its Interim Guidance on high wind events, but fails to even acknowledge or address that inconsistency, and completely ignores its own earlier finding in a 2010 proposed

rulemaking that the agricultural control measures in the nonattainment area are no longer BACM.

EPA's approval of the 2012 Five Percent Plan is also contrary to the CAA because the plan fails to include a BACM demonstration required by Section 189(b)(1)(B) for serious area plans, or a demonstration that the plan contains MSM, which is required as a result of the 5 year deadline extension granted to the State under Section 188(e). In fact, as EPA has recognized previously, the current SIP, even with the revisions included in the 2015 Five Percent Plan, does not satisfy the BACM or MSM requirements.

Finally, EPA acted contrary to the clear requirements of the CAA when it allowed the State to satisfy the requirement of "contingency measures"—specific measures to be undertaken in the future if the Area fails to achieve timely progress or attainment—with control measures that are already being implemented. Existing controls cannot serve the function of contingency measures, which must consist of additional measures to be triggered if the area fails to achieve timely progress or attainment.

ARGUMENT

I. EPA's Proposal to Exclude 135 Exceedances that Occurred Over Twenty Five Days Within a Two-Year Period As "Exceptional Events" Represents an Abuse of Discretion and Is Contrary to Law.

In 2005, Congress amended the Clean Air Act to require EPA to promulgate regulations governing air quality monitoring during “exceptional events.” 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). Congress explained that EPA’s implementing regulations should allow for exclusion of air quality data caused by exceptional events, “which are part of natural ecological processes, which generate pollutants themselves *that cannot be controlled ...*” H.R. Conf. Rep. No. 109-203, 109th Cong., 1st Sess. at 1066-67 (2005) (emphasis added). Thus, EPA may exclude monitoring data indicating an air quality exceedance only in very narrow circumstances - i.e., if the exceedance is caused by an event that meets the statutory definition of an “exceptional event,” if the State demonstrates that there is a “clear causal relationship” between the measured exceedance and the exceptional event based on “reliable, accurate data,” and if there is a public process for determining whether the event in question is exceptional. 42 U.S.C. §

7619(b)(3)(B). Section 319 emphasizes that, in exercising this authority, EPA must follow the principle that “*protection of public health is the highest priority.*” *Id.* § 7619(b)(3)(A)(i) (emphasis added). The courts have further held that, under the Clean Air Act, where Congress has “delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national importance in which individuals’ lives and welfare hang in the balance,” EPA has the “heaviest of obligations” to explain its reasoning. *American Lung Ass’n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998).

In 2007, EPA, as directed by Congress, promulgated the EER, the regulation which would govern the exclusion of emissions data during “exceptional events.” 72 Fed. Reg. 13560 (Mar. 22, 2007). The final rule’s definition of “exceptional events,” codified at 40 C.F.R. § 50.1(j), repeats the statutory language. The EER further defines “natural event” as “an event in which human activity plays little or no direct causal role.” 40 C.F.R. § 50.1(k). In the preamble to the EER, EPA explained that “high wind events” would fall under the category of “natural events,” (as opposed to “an event caused by human activity that is unlikely to recur at a particular location”), and that an event involving windblown dust solely from undisturbed natural sources is clearly a natural event. However, where high wind events involve windblown dust from anthropogenic sources, the event will only be considered a “natural event,” if the state demonstrates that those sources are

“reasonably well-controlled at the time that the event occurred” 72 Fed. Reg. at 13576. The rule also establishes a procedure where states “flag” anomalous data caused by exceptional events, and EPA then reviews the flagged data to 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. The Rule requires that data “shall not be excluded” from an attainment determination “unless and until, following the State’s submittal of its demonstration . . . EPA notifies the State of its concurrence.” *Id.* § 50.14(c)(2)(ii).

In May 2013, EPA published an “Interim Guidance on the Preparation of Demonstrations in Support of Requests to Exclude Ambient Air Quality Data Affected by High Winds Under the Exceptional Events Rule,” (“Interim Guidance”). ER 109-190, AR C.18. According to the Interim Guidance, it is intended to provide guidance and interpretation of the EER and is not binding on any party. Interim Guidance at 1; ER 109. The Interim Guidance sets forth the elements of the technical demonstration that states must make for “high wind dust events,” and states that if a demonstration does not sufficiently address one of the elements, EPA will not be able to concur with the request to exclude data under the EER. *Id.* at 2, ER 110. EPA further states that it will employ a “weight-of-evidence” approach to assess demonstrations on a “case-by-case” basis. *Id.*

Among the elements set out by EPA is the requirement that the state demonstrate that an exceedance or violation sought to be excluded was “not reasonably controllable or preventable.” *Id.* at 3, ER 111. The Interim Guidance states that “EPA anticipates all upwind areas of disturbed soil to be considered potential contributing sources.” *Id.* at p. 42, (6.3.2.3 Basic controls analysis), ER 153. Further, “[a] basic controls analysis should identify all contributing emission sources in upwind areas and provide evidence that those sources were reasonably controlled, whether anthropogenic or natural.” *Id.*

Notably, EPA advises that “[e]xceedances caused in whole or in part by anthropogenic dust sources within the air agency’s control are unlikely to be eligible for treatment as exceptional events under the EER, *even under conditions of elevated winds*, unless the air agency shows that the event, including the emissions from the anthropogenic dust sources, was not reasonably controllable or preventable.” *Id.* at 3 (emphasis added) ER 114. In evaluating whether an event is “reasonably controllable,” the Interim Guidance states that EPA will consider among other things, the controls in place, the controls required by the SIP, the frequency and severity of the exceedances, contributing sources, and other factors. *Id.* The Guidance defines “frequent” as “enough exceedances from high wind dust events to cause [a] violation of the NAAQS.” *Id.* at p. 13, fn. 25, ER 124.

Likewise, it defines a “severe exceedance” as having a 24 hour average PM-10 concentration of greater than 250 $\mu\text{g}/\text{m}^3$. *Id.* at fn. 26.

In this case in order to approve the 2012 Five Percent Plan and find that the Area “attained” the NAAQS for PM-10 by the extended December 2012 deadline, EPA had to exempt 135 exceedances that occurred over 25 days during 2011 and 2012. By excluding the data, EPA and ADEQ misrepresent the extent of the particulate pollution in the Area to the grave detriment of public health. If these exceedances were not excluded, 15 of the 16 monitoring sites that reported exceedances that EPA agreed to treat as exceptional events would be violating the standard (a three year average of not more than one exceedance) by a significant measure (the violating monitors are in bold):

Recorded Exceedances When Data is Not Excluded⁸

Monitor/Site	2011	2012	3 yr. avg.
Apache Junction	6*	0	2
Buckeye	10*	2*	4
Central Phoenix	8	1	3
Durango Complex	8	4	4

⁸ Petitioners submitted a similar chart in their comments; however, the chart set forth here differs slightly. As explained in Petitioners’ comment letter, there was some inconsistency in the administrative record about the actual number of exceedances which EPA proposed to exclude. The chart in the comment letter was based on 127 exceedances; this chart includes all 135 exceedances, the number clarified by EPA in the final rulemaking. It also includes additional exceedances recorded but not submitted by the State as exceptional events as reflected on the “Exceptional Event Concurrence Tracking Sheet” that was posted to the docket on June 10, 2014, the date the final rulemaking was published. ER 108; AR F.4.

Dysart	5	1	2
Glendale	5	1	2
Greenwood	7	2	3.33**
Higley	8	4*	4
JLG Supersite	10	2	4
North Phoenix	4	1	1.66
South Phoenix	9*	3	4
Tempe	0	1	.33
West 43rd	7	7*	4.66
West Chandler	11	5*	5.33
West Phoenix	8	1	3
Zuni Hills	3	2*	1.66
Total	105	30	

*Includes one or more recorded exceedance not submitted as EE per tracking sheet;

**Includes one exceedance recorded in 2010.

Thus, given the number of monitors recording enough exceedances to cause violations, the exceedances are, by EPA’s definition, very “frequent.” Moreover, as the following chart shows, 46 of the 135 exceedances that EPA has proposed to exclude are greater than 250 µg/m³, the threshold that EPA has identified as “severe” in its interim guidance. *Id.* at fn. 26 (“A severe exceedance could be a 24-hour average PM-10 concentration >250 µg/m³”) ER 124. And the severe exceedances are spread over 14 different days:

Exceedances with 24 Averages > 250 µg/m³

Date	Monitoring Site	24 hour Avg.
7/3/2011	Greenwood	254
7/3/2011	Zuni Hills	260
7/3/2011	Durango Complex	277
7/3/2011	Central Phoenix	279
7/3/2011	South Phoenix	280
7/3/2011	Buckeye	385

7/5/2011	Central Phoenix	277
7/5/2011	West Phoenix	278
7/5/2011	JLG Supersite	331
7/5/2011	West Chandler	360
7/5/2011	Higley	362
7/7/2011	Higley	266
7/18/2011	Durango Complex	267
7/18/2011	South Phoenix	303
8/18/2011	Buckeye	296
8/25/2011	Dysart	273
8/25/2011	West Chandler	278
8/25/2011	Central Phoenix	308
8/25/2011	South Phoenix	308
8/25/2011	West 43 rd	369
8/25/2011	Buckeye	388
8/25/2011	Durango Complex	436
8/27/2011	Durango Complex	261
8/27/2011	West 43 rd	292
8/27/2011	South Phoenix	301
8/28/2011	Apache Junction	283
9/2/2011	Central Phoenix	308
9/2/2011	South Phoenix	339
9/2/2011	West Chandler	387
10/4/2011	West Chandler	251
11/4/2011	Durango Complex	251
11/4/2011	Higley	258
11/4/2011	Zuni Hills	258
11/4/2011	West Phoenix	279
11/4/2011	Buckeye	284
11/4/2011	West Chandler	670
6/27/2012	Zuni Hills	285
6/27/2012	Greenwood	323
6/27/2012	JLG Supersite	329
6/27/2012	JLG Supersite	344

6/27/2012	Glendale	337
6/27/2012	Central Phoenix	340
6/27/2012	South Phoenix	342
7/11/2012	South Phoenix	285
8/14/2012	West 43 rd	254

Given the frequency and severity of the exceedances that ADEQ submitted as “exceptional events,” as well as the Area’s status as serious nonattainment and the State’s previous withdrawal of its earlier Five-Percent Plan, EPA’s analysis regarding whether the sources of the exceedances were not reasonably controllable or the exceedances were preventable should have been probing and consistent with the Interim Guidance. Instead, in the analysis accompanying the concurrence letters, EPA simply took at face value the assertions by ADEQ that BACM level controls were in place at the time of the events—even though EPA had itself advised the State that the current agricultural controls were no longer BACM. EPA simply concurred—without acknowledging the inconsistency—that the events were not reasonably preventable. See Concurrence Documents, ER 11-107, *passim* (discussed more fully below).

Moreover, when the 135 exceedances from 2011 and 2012 are considered in the aggregate, and compared to the exceedances that the state also flagged as due to exceptional events in 2006, 2007, 2008, and 2009, as well as the 30 exceedances

flagged in 2013, there is a clear pattern that demonstrates that these are neither exceptional nor isolated events:

Exceedances Flagged As Exceptional Events by Month

Monitors Reporting Exceedances (number of days exceedances reported)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2013				12(1)		10(1)	2(1)	5(2)		1		
2012		1				20(2)	4(1)	4(2)	1			
2011		2(1)					36(6)	30(6)	18(3)	2(1)	17(1)	
2010												
2009			2(2)	1			15(2)		2(1)	5(1)		
2008			2(2)	1	1	3(1)	2(2)			2(2)	4(2)	
2007			1	2(1)	1	2(1)	6(1)	4(3)		2(2)	2(1)	
2006			3(1)	12(2)	1	1						
Total		3(2)	8(6)	28(6)	3(3)	36(6)	65(13)	43(13)	21(5)	12(7)	23(4)	

Rather, they are predictable events that are seasonal in nature and could be significantly ameliorated if the State were to adopt appropriate control measures for windblown dust both within the attainment area and statewide. By treating these exceedances as “exceptional events,” EPA is allowing the State to avoid addressing the serious issue of windblown dust and is abdicating its responsibility

to protect the public health and safety. The reasons EPA's concurrence is contrary to law are discussed more fully below.

A. The State's Claim that the Exceptional Events Were Not Reasonably Controllable or Preventable Is Refuted by the Fact that BACM Level Controls Were Not in Place within the Area.

In its EER submissions, ADEQ repeatedly made the claim that the events were not reasonably controllable or preventable because "BACM-approved" control measures were in place, an assertion accepted at face value by EPA in its concurrence analysis. *See* "Excerpts from State Submittals on Exceptional Events", ER 191-210, which catalogs the boilerplate language repeatedly used by the State in each of its EER submissions. That assertion, however, is misleading at best. Moreover, although having BACM in place during the time of the event is an important consideration, as noted above, EPA has indicated that it may not be sufficient on its own. Interim Guidance, p 15, ER 127. According to EPA, BACM measures may be insufficient if the SIP has not been recently reviewed. *Id.* In its Interim Guidance, EPA indicated that it generally will only consider windblown dust BACM to constitute "reasonable controls" for exceptional event purposes if the measures have been reviewed and approved in the context of a SIP revision for the emission SIP within the past three years. *Id.* Further, the controls must be specific to windblown dust, as opposed to other conditions, such as winter stagnation events. *Id.*

As set forth in the Statement of Facts above, the last full BACM demonstration approved by EPA for the Area was in 2002, with a supplemental analysis of CARB diesel (not a control specific to windblown dust) in response to a remand in 2006, well outside the three year window recognized by EPA in its guidance. Moreover, 105 of the 135 exceedances that EPA has proposed to exempt as Exceptional Events occurred in 2011. During that time period, the 2007 Maricopa BMP Rule was the only control measure in place for agricultural emissions and EPA had expressly found in its 2010 proposed rulemaking that the Rule no longer represented BACM for agricultural emissions. Although as noted above, the Maricopa BMP Rule was subsequently revised in 2011, the Rule revision was not submitted to the Arizona Secretary of State until December 29, 2011 and commercial farmers did not have to begin implementing it until late March 2012 at the earliest. 2015 Five Percent Plan, Appendix D, AR B.1.c, ER 353-55; A.C.C. R18-2-610.01(B) (“A commercial farmer, who begins a regulated agricultural activity after January 1, 2012, shall comply with this Section within three months of beginning the regulated agricultural activity.”) Thus, for at least 105 of the 135 exceedances at issue, the State cannot satisfy the requirement that dust originating from anthropogenic sources within the nonattainment area were actually controlled with BACM.

As for the exceedances that occurred after the Rule was revised, the record does not support the State's claim (and EPA's concurrence) that BACM was in place during that time period either. In 2010, while revisions to the Maricopa BMP Rule were being considered, EPA wrote the BMP Committee and suggested that in light of all of the High Wind Exceptional Event requests, the Committee should consider making "no till" and "no harvest" mandatory on high wind days. The Committee, however, ignored that suggestion and the revised Maricopa BMP Rule continues to treat no till / no harvest on high wind days only as voluntary—one of several control measures that a source can choose to implement. A.C.C. R18-2-610.01(E)(6)(7). Nor does the current rule require a commercial farmer to adopt the most effective BMP that is feasible. A farmer in a serious nonattainment area need only select any two control measures off the menu regardless of efficacy; and a farmer in a moderate nonattainment area is only required to select one. *Id.* at (C) and (D). Thus, although agricultural controls were in place at the time of the 2011 and 2012 events, by EPA's own assessment, they weren't BACM level controls at least through the entirety of 2011, and likely into 2012.

Yet, in spite of these previous pronouncements by EPA that the Agricultural BMP Rule no longer qualified as BACM, both in a formal rulemaking and in official correspondence with the State, in its concurrence analysis, EPA ignored its earlier assessments and simply repeated the State's assertion that "BACM-

approved control measures on significant anthropogenic sources were in place and enforced during the events....” ER 11-107 *passim*.⁹ EPA did not even address the fact that the BACM analysis relied upon by the State, completed in 2002, was far outside the minimum three year window it had identified in the Interim Guidance let alone attempt to explain why it was departing from that recommendation. Nor did EPA make any attempt to determine or even address whether, notwithstanding the out of date demonstration, the controls in place during the events did, in fact, represent BACM. EPA and ADEQ simply ignored the EPA’s finding in 2010 that the Agricultural BMP Rule was no longer BACM, and relied instead, without explanation, upon the outdated, prior approval of the Rule over a decade ago to claim that there were “BACM-approved controls” in place.

It is a well established principle that an agency has a duty to explain when it makes a decision that departs from precedent. *See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion) (describing an “agency’s duty to explain its departure from prior norms” and holding that when an agency departs from prior norms, its reasons “must be clearly set forth so that the reviewing court may understand the basis of the agency’s

⁹ As a review of the documentation shows, just as the State’s submittals included boilerplate language regarding “BACM-approved” measures (See ER 191-120 for quoted excerpts), the EPA’s concurrence document simply quoted that boilerplate uncritically, accepting it at face value. *See e.g.* AR D.3.a at p. 2-3 (ER 14-15); AR D.3.b at pp. 5, 9, 14, 23, 29 (ER 26, 30, 35, 44, 50 respectively).

action and so may judge the consistency of that action with the agency's mandate"). This principle applies when an agency applies a legal standard inconsistently, *see, e.g., W. States Petroleum Ass'n v. EPA*, 87 F.3d 280, 285 (9th Cir. 1996), or departs from longstanding practice "without supplying a reasoned analysis for its change of course," *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-88 (9th Cir. 2007). As this Court explained in *Northwest Environmental*, "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Id.* (internal quotation omitted). The same principle applies when an agency departs from its own guidance, *see, e.g., Redland Genstar, Inc. v. United States*, 39 Fed. Cl. 220, 234 (Fed. Cl. 1997) ("The Corps is certainly entitled to depart from previous practice and the non-binding engineering guidance ...but it must provide a rational basis for doing so.").

Thus, EPA's decision to exclude all 135 exceedances under the EER without first addressing its own earlier conclusions regarding the lack of BACM level controls on agricultural emissions in the nonattainment area or explaining its departure from the stated requirement in the Interim Guidance that BACM demonstrations must be relatively recent, preferably within three years, to establish

that anthropogenic sources were “reasonably controlled,” was arbitrary and capricious and contrary to law.

In the final rulemaking, EPA attempts to justify the reliance on the 2002 demonstration by first asserting that most of the emissions in the area are from construction, paved and unpaved road dust, and windblown dust, and then claiming without any record support that “the range of potential measures for controlling emissions from these source categories...have not significantly changed since 2002.” 79 Fed. Reg. at 33112, ER 6. Thus, EPA concludes that it was appropriate to rely upon the 2002 BACM demonstrations. However, EPA immediately undercuts that rationalization by pointing out that since 2002, the State has submitted and EPA has approved several SIP revisions to rules regulating windblown dust which are more stringent than those found to be BACM in 2002. This increase in stringency clearly indicates that the control measures found to be BACM in 2002 are no longer the “best available control measures,” or certainly “most stringent measures.” It may be that with the intervening SIP revisions and their more stringent controls, the measures currently in place are, indeed, BACM and/or MSM. However, because EPA has declined to require an updated BACM and MSM demonstration and failed to address the issue in its concurrence, we cannot know whether that is true or not.

Finally, EPA argues that the Interim Guidance's three year guideline does not preclude the State or EPA from relying upon a BACM demonstration more than three years old. *Id.* Petitioners do not disagree. Yet, it is fundamental that if the State and EPA are going to depart from the Guidance's recommendation, it is incumbent upon them to acknowledge the departure and explain why it is justified under the circumstances. Not only did they fail to do so here, they ignored EPA's own findings that at least some of the controls were, in fact, no longer BACM.

EPA's excuse for ignoring its earlier pronouncements regarding the Agricultural BMP Rule is to downplay the significance of agricultural emissions in the area. *Id.* This rationale, provided only in the final rulemaking in the response to comments and not discussed anywhere in the concurrence documents, might have some validity if EPA had focused on the source of emissions for the exceedances at issue, as opposed to the annual inventory. The State's submittals for the exceedances clearly recognize that agricultural emissions, both inside and outside the Area, are among the sources of windblown dust, which is undoubtedly why the documentation also includes the Agricultural BMP Rule among the control measures that the State claims are "BACM-approved." (The Maricopa Agricultural BMP Rule is cited as a BACM-approved control measure in every single EER submission) *see, e.g.* AR D.3.f, pp. 39-40; D.3.g, 2/19/2011 submission, pp. 17-18; 7/18/2011 submission, p. 18.

What is even more indefensible, however, is EPA's final claim that because the State was able to model its required 5% reduction without relying on additional reductions from the Maricopa Agricultural BMP Rule, those reductions were not necessary to demonstrate "attainment." 79 Fed. Reg. at 33109, ER 3. This "through-the-looking-glass" justification completely ignores that the demonstrated attainment is a fiction, and that the State was only able to "demonstrate" it by ignoring 135 exceedances of which at least 105 occurred when the state, by EPA's own assessment, did not have BACM level control measures in place all anthropogenic sources. Instead of simply ignoring the multiple violations of the standard to achieve "attainment" on paper, EPA should be insisting that the State adopt and implement BACM level controls both within and outside the nonattainment area so that in the future, high winds do not routinely create a wall of dust that overtakes the region and the public health is protected. In other words, require actual attainment.

B. The State Failed to Demonstrate that Sources Outside of the Area Were Subject to Reasonable Controls, and, in Fact, They Were Not.

The State's claim and EPA's concurrence in the demonstrations that the events were caused by winds transporting dust from desert areas of Pima and Pinal counties does not adequately address the issue of whether the events were reasonably controllable or preventable. The Interim Guidance states that "all

upwind areas of disturbed soil [are] to be considered potential contributing sources.” Interim Guidance, 6.3.2.3 Basic controls analysis, ER 153. Further, “[a] basic controls analysis should identify all contributing emission sources in upwind areas and provide evidence that those sources were reasonably controlled, whether anthropogenic or natural.” *Id.* None of the demonstrations submitted by the State or the concurrence documents prepared by EPA indicate that control measures outside of Maricopa County were even evaluated for their “reasonableness” under the circumstances.

First, in all but one of the exceptional events demonstrations submitted by the State, it claims that the events were caused by “winds transporting dust from desert areas” of Pinal County or Pima and Pinal counties. See ER 191-210. However, the State makes no attempt to determine the various contributing sources located in the region, as required under the Interim Guidance. *See, e.g.* Interim Guidance 3.1.5.1 (“[T]he air agency should identify likely contributing sources in the upwind source area....”), ER 130. Using virtually identical language in each submittal, the State attempts to excuse this omission by, essentially, claiming that it is too hard:

The nature of these monsoonal dust events is such that specific source areas are difficult to determine as outflow from thunderstorms can carry dust over vast distances encompassing many source areas. Because of this, it is more appropriate to speak of general source regions for these monsoonal dust storms which typically are identified based upon the locations

of the thunderstorms that are believed to have created the dust generating and carrying outflow winds.

See ER 191-210. Other than characterizing the source region as “desert” of Pinal County or “deserts” of Pinal and Pima Counties, the State makes no effort to identify the specific sources of the dust or to distinguish between natural sources and anthropogenic sources. However, that issue is critical to the determination of whether the event qualifies as a “natural event” under the EER.

While several of the thunderstorms that gave rise to the high winds in question no doubt traveled over undisturbed, natural desert, the region to the south of the Area also contains a significant number of anthropogenic sources of dust. In fact, western Pinal County, designated nonattainment for PM-10, 77 Fed. Reg. 32024 (May 31, 2012), records some of the highest monitor readings for particulate matter in the State of Arizona. See “U.S. EPA Fact Sheet, West Pinal County, Arizona Redesignation to Nonattainment for the 1987 24-hour PM10 National Ambient Air Quality Standard, May 22, 2012, available at <http://www.epa.gov/region9/air/az/pinal/Pinal-PM10-factsheet.pdf> (last accessed 10/12/2014) (“Fact Sheet”). Sources for PM-10 emissions in the West Pinal Nonattainment Area include on-road emissions, cattle operations, agriculture, and construction. 77 Fed. Reg. at 32027. These sources of PM-10 are located throughout the western portion of Pinal County. *Id.* See also, Fact Sheet, p. 4.

Yet, the State's submission makes no effort to assess the extent to which these sources contributed to the exceedances at the Area's monitors.

Second, the fact that some of the sources that contributed to the exceedances are located outside of the Area does not absolve the State of its responsibility to ensure that they are reasonably controlled. Under the Clean Air Act, the EPA generally considers a state (not including areas of Indian country) to be a single responsible actor. Interim Guidance, Frequently Asked Questions, p. 26.

Accordingly, neither the EPA nor the Exceptional Events Rule provides special considerations for intrastate scenarios when an event in one county affects air quality in another county in the same state, assuming that the event occurs on land subject to state authority (versus tribal government authority). *Id.* Because ADEQ is the single responsible actor for air quality control in Arizona, it had a responsibility to address the public health risk that the Pinal County sources represent.

Finally the controls cited by the State for Pinal County do not qualify as "reasonable controls." As EPA noted in its Interim Guidance, even BACM/RACM level controls may not be sufficient to establish that sources were subject to "reasonable controls." Interim Guidance at 15, ER. 126. And not even the State has suggested that the Pinal County control measures are close to BACM. A review of the control measures cited by the State (Pinal County Article 2 and

Article 3, reproduced in the Addendum) demonstrates that they do not provide “reasonable controls” for all of the emission sources in the case of a high wind event. Article 2 addresses dust-causing activities including some agricultural activities, but does not require any sort of control that is designed to prevent emissions caused solely by high wind events. Article 3 is more specific than Article 2 and admittedly more stringent than Article 2, but its applicability is limited to construction sites. As EPA acknowledged in its final rulemaking, agricultural emissions are a significant source in portions of Pinal County. 79 Fed. Reg. at 33113, ER 7.

The fact that a western section of Pinal County was only recently designated nonattainment and is in the process of preparing its moderate nonattainment SIP does not excuse the required showing that sources in that county were subject to “reasonable controls” in order to exclude the data under the EER. Moreover, had they evaluated the reasonableness of the controls in Pinal County in 2011 and 2012, both ADEQ and EPA should have taken into account the fact high wind events have been particularly problematic in both Pinal County and the Area since at least 2005 (see 2012 Five Percent Plan, Table 3-3; ER 284; AR B.1.a at 3-10). Thus, the State has been on notice of the problem for almost a decade now and has an obligation separate and apart from any SIP requirements for Pinal County to address this serious public health issue

If the State is so determined to achieve “attainment” in the Area by excluding the overwhelming majority of exceedances under the EER, it is obligated, at a minimum, to ensure that the anthropogenic sources of dust outside the nonattainment area and frequently in the path of high winds are subject to some reasonable level of control. Because it has not done that in the case of the 135 exceedances experienced in 2011 and 2012, EPA abused its discretion when it concurred in the submittals and excluded the data.

II. EPA’s Failure to Require State to Demonstrate Compliance with All Applicable CAA Requirements Including an Up-to-Date BACM Analysis Was Contrary to Law.

EPA’s proposed approval of the 2012 Five Percent Plan without an updated BACM and MSM demonstration is an abuse of discretion and contrary to the law. In its finding in 2007 that the Area failed to attain, EPA first noted that serious PM-10 nonattainment areas that fail to attain are required to submit plan revisions which provide for attainment and, from the date of submission until attainment, provide for an annual reduction in PM-10 or PM-10 precursor emissions of not less than 5 percent. 72 Fed. Reg. at 31184. EPA further directed that “[i]n addition to the attainment demonstration and 5 percent requirements, the plans under section 189(d) for the Phoenix. . . nonattainment area[] must address all applicable requirements of the CAA” *Id.* at 31184-85.

In evaluating the 2012 Five Percent Plan, EPA addressed the following CAA requirements: emission inventories (§172(c)(3)); reasonable further progress (RFP) (§172(c)(2)); quantitative milestones for PM-10 plans (§189(c)(1)); contingency measures (§172(c)(9)); transportation conformity and motor vehicle emissions budgets (§176(c)); and adequate authority (§110(a)(20)(E)(i)). 79 Fed. Reg. at 7118 *et seq.*, ER 211-219, AR A.2. However, EPA omitted entirely any discussion or analysis of the requirement for PM-10 serious area plans found in CAA section 189(b)(1)(B) (requiring a BACM demonstration) and CAA section 188(e) (requiring states seeking extension of the attainment date for serious areas to include MSM).

Under the express provisions of the CAA, both of these requirements apply to the Area, which is a serious PM-10 nonattainment area that sought and obtained a five year extension of its attainment date pursuant to §188(e) in 2001, extending its attainment date to December 31, 2006. There was no legitimate reason for EPA to exclude or ignore these continuing requirements when evaluating the 2012 Five Percent Plan, especially when EPA acknowledges that the requirements of §172 and other requirements of §189 apply to a SIP submittal under §189(d).

Of course, if EPA were to require a demonstration of BACM and MSM as part of the 2012 Five Percent Plan submission, the State could not satisfy it. As EPA noted when it proposed a partial disapproval of the 2007 Five Percent Plan in

2010, the Maricopa Agricultural BMP Rule is no longer BACM. Nor is it MSM. Although an earlier version of the Rule was approved as both BACM and MSM in 2002, as EPA has advised the State both in correspondence and in a proposed rulemaking in 2010, since then several air pollution control agencies in California and Nevada have adopted new control measures that are more stringent than Arizona's only SIP-approved BMP Rule.

And, even though Arizona has strengthened its BMP Rule, the revised Rule was not included in the 2012 Five Percent Plan. *See* 2012 Five Percent Plan, Appendix D, ER 343-55, AR B.1.c. Moreover, since the State withdrew the 2007 Five Percent Plan, the 2007 BMP, which EPA also found to be deficient, was never approved into the SIP. Thus, because the only agricultural controls included in the current SIP—those approved in 2002—no longer represent BACM and MSM, there is no way that the State could demonstrate that its SIP satisfies the BACM requirement of §189(b)(1)(B) or the MSM requirement of §188(e).

Similarly, with respect to control measures for other sources, like fugitive dust, or on-road or off-road emissions, without an updated demonstration, it is impossible for EPA to determine whether with the 2012 Five Percent Plan revision, the requirements of Sections 189(b)(1)(B) and 188(e) continue to be met.

In its Response to Comments in the Final Rulemaking, EPA asserts that BACM/MSM are only “triggered” under the Act when an area is reclassified to

Serious or seeks an extension under §188(e). 79 Fed. Reg. at 33109, ER 3. That position, however, is contradicted by EPA's own statements in the 2010 Proposed Rulemaking when it proposed to disapprove the 2007 Five Percent Plan because the Agricultural BMP, which was included as a contingency measure, was no longer BACM.

Further, this most recent suggestion by EPA that the BACM and MSM requirements are somehow static in time is contrary to the long expressed view that under the structural scheme of the CAA, areas with more serious pollution problems are required to implement increasingly stringent control measures but are provided additional time to reach attainment. Addendum, 59 Fed. Reg. at 42010. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 245 (1991)(little deference to changed agency interpretation that conflicts with prior view closer in time to enactment, where agency offers no basis for change).

Because BACM is, by definition, defined by its "availability," it necessarily follows that, over time, what constitutes BACM will inevitably change. And when it changes, nonattainment areas are required to adjust accordingly. *See e.g. Latino Issues Forum v. United States EPA*, 558 F.3d 936, 946 (9th Cir. 2009)("The EPA noted the possibility of new practices in its approval of Rule 4550, stating that BACM might change over time 'to a progressively tighter or more ambitious program at later dates.'"). *See also* 61 Fed. Reg. 59456 (Sept. 23, 2002) (EPA

rejected submitted revision to Arizona SIP that included a previously approved opacity rule because EPA found the existing rule no longer met RACM).

But even if we accept for purposes of argument EPA's contention that BACM is only required when it is "triggered" by something in the Act, it nonetheless follows that the exceptional events provisions serve as such a trigger when a state seeks to exclude data in a serious nonattainment area. According to EPA's own Interim Guidance, whether existing controls satisfy BACM is a crucial inquiry in the evaluation of a state's request to treat an exceedance as an "exceptional event." Here, by concurring in the State's request to exclude 135 exceedances and approving the 2012 Five-Percent Plan, with its fictitious attainment demonstration, without at least requiring the State to make an updated BACM and MSM demonstration, EPA has abused its discretion and acted contrary to law.

III. EPA's Policy of Allowing the State to Satisfy the Requirement of Contingency Measures With Control Measures that are Already Implemented Is Contrary to the Plain Language of the CAA.

Section 172(c)(9) of the Act requires all nonattainment area plans to include contingency measures that will kick in if the area fails to timely achieve emission reductions or attainment. 42 U.S.C. § 7502(c)(9). The Act defines contingency measures as "specific measures to be undertaken *if* the area fails" to achieve timely progress or attainment, not previously mandated measures that have failed to do the

job. 42 U.S.C. § 7509(c)(9)(emphasis added). EPA's own 1992 guidance provided that "contingency measures should consist of *other* available control measures that are *not included* in the control strategy." 57 Fed. Reg. 13498, 13543 (Apr. 16, 1992), AR C.3. (emphasis added). In the context of discussing ozone plans, that same guidance described contingency measures as "*additional* measures *not already adopted* to meet the RFP or other requirements" that provide emission reductions "in addition to those already scheduled to occur in accordance with the plan." *Id.* at 13511 n.2 (emphasis added).

As EPA further explained in the Addendum to its General Preamble,

The purpose of contingency measures is to ensure that additional measures beyond or in addition to the required "core" control measures (i.e. RACM for moderate areas and BACM for serious areas) immediately take effect when the area fails to make RFP or to attain the PM-10 NAAQS *in order to provide interim public health and welfare protection*. The protection is considered "interim" because the statute often provides for a more formal SIP revision in order to correct, for example, the failure of an area to attain the PM-10 NAAQS (e.g., section 189(b)-serious area plan required upon finding of failure of moderate area to attain the PM-10 NAAQS under 188(b)(2)-and 189(d) (plan revisions required upon failure of serious area to attain the PM-10 NAAQS)). Thus, EPA has noted previously that contingency measures should consist of *other available control measures not contained in the applicable core control strategy* (emphasis added).

59 Fed. Reg. 41998, 42015 (Aug. 16, 1994).

The 2012 Five Percent Plan purports to include five "contingency measures." See Plan, Table 6-22; ER 343; AR B.1.a at 6-39. These "contingency

measures,” however, are not, as the Act requires, measures that will be undertaken *if* the area fails to achieve timely progress or attainment. They are measures that have all been completed. Three of the measures involve paving or stabilizing roads and road shoulders, and the projects were completed in 2011. Likewise the measure to lower speed limits on dirt roads and alleys was completed by 2011. The only potentially “continuing” measure is the PM-10 certified sweepers which were all purchased by 2009. *Id.*

The only reason that these control measures are characterized as “contingency measures” in the Plan is because the State did not rely upon them to demonstrate how it planned to achieve the required five percent reductions, reasonable further progress, and attainment. 79 Fed. Reg. at 7124, ER 217.

The problem with this approach is that if the demonstrations prove to be incorrect (which as the Area’s history demonstrates, they often are) and the Area fails to meet the required milestones—even with the already implemented but “uncounted” measures—then when interim public health and safety protections are needed, there are no new measures ready to implement. At that point, the fact that the State did not rely upon the “contingency measures” in its attainment demonstration is meaningless from a public health standpoint. If the state fails to make RFP or fails to attain by its attainment date, protection of the public health is paramount and the Clean Air Act contemplates and requires an immediate

response. Under the 2012 Five Percent Plan, the public does not have that protection.

In its proposed rulemaking, EPA cited *LEAN v. EPA*, 382 F. 3d 575 (5th Cir. 2004) as support for its decision to allow the state to designate already implemented control measures as contingency measures. 79 Fed. Reg. at 7124, ER 217. The holding in that case is premised upon the contention that the Act's language regarding "contingency measures," specifically the phrase, "to be undertaken" is ambiguous. 382 F. 3d. at 583. The court acknowledged that the language of the statute had a prospective, forward-looking orientation, but concluded that because it was silent as to early implementation, it was ambiguous. Thus the court held that given the ambiguity, it would be unfair to penalize an area for implementing a control measure early. *Id.* The *LEAN* court also based its holding regarding early implementation on the fact that the contingency measure in that case was "continuing in nature." *Id.* at 584. Yet, it ultimately held that it was not a proper contingency measure because the control measure involved a facility located outside the nonattainment area. *Id.*

With respect to the plain language of the statute, Petitioners believe the court in *LEAN* was mistaken when it found the provision ambiguous. As the original interpretations by EPA of "contingency measures" make clear, the plain language of Section 172(c)(9) contemplates additional controls that go into effect if and

when an area fails to meet a required milestone. Moreover, the facts of our case are easily distinguishable from the facts in *LEAN*. Here, four of the five “contingency measures” cited by the State are completed, permanent infrastructure that are not intended to change in the face of a missed milestone. The acquisition of the PM-10 certified street sweepers in 2009 does not include any sort of commitment to increase sweeping in the event of a missed deadline. In sum, these control measures offer no additional interim protections to the public if RFP or attainment is not achieved. Rather, they represent a continuation of the status quo.

By not requiring the State to include true contingency measures that would be implemented as additional control measures to protect the public health if and when the Area fails to meet a required milestone, EPA has acted contrary to the express provisions of the Act.

CONCLUSION AND RELIEF REQUESTED

Petitioners respectfully request a determination by this Court that for all of the foregoing reasons, EPA’s approval of the 2015 Five Percent Plan, including the finding of attainment based upon the exclusion of 135 “exceptional events,” was an abuse of discretion and contrary to law. Petitioners further ask that they be awarded attorneys’ fees pursuant to 42 U.S.C. § 7607(f).

Dated this 16th day of October, 2014.

Arizona Center for Law
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2205 E. Speedway Blvd.
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STATEMENT OF RELATED CASES

Petitioners are unaware of any related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Brief for Petitioners is proportionately spaced, has a typeface of 14 points, and contains 12,979 words.

10/16/2014

Date

s/Joy E. Herr-Cardillo

Joy E. Herr-Cardillo

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2014, I electronically transmitted the Petitioners' Opening Brief to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

s/Joy E. Herr-Cardillo
Joy E. Herr-Cardillo

ADDENDUM

CLEAN AIR ACT, 42 U.S.C. §§ 7401, *et seq.* (excerpts)

40 C.F.R. §50.1, §50.14

A.C.C. R18-2-610.01

Pinal County Articles 2 and 3

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*** Current through PL 113-184, approved 9/29/14 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85. AIR POLLUTION PREVENTION AND CONTROL
PROGRAMS AND ACTIVITIES
AIR QUALITY AND EMISSION LIMITATIONS

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42 USCS § 7410

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems.

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 [42 USCS § 7409] for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this Act shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D [42 USCS §§ 7470 et seq., 7501 et seq.];

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C [42 USCS §§ 7470 et seq.] to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 126 and 115 [42 USCS §§ 7426, 7415] (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 128 [42 USCS § 7428], and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 303 [42 USCS § 7603] and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this Act;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D [42 USCS §§ 7501 et seq.] (relating to nonattainment areas);

(J) meet the applicable requirements of section 121 [42 USCS § 7421] (relating to consultation), section 127 [42 USCS § 7427] (relating to public notification), and part C [42 USCS §§ 7470 et seq.] (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Act, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V [42 USCS §§ 7661 et seq.]; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3) (A) [Repealed]

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c), shall be required to revise an applicable implementation plan because one or more exemptions under section 118 [42 USCS § 7418] (relating to

Federal facilities), enforcement orders under section 113(d), suspensions under section 110(f) or (g) [subsecs. (f) or (g) of this section] (relating to temporary energy or economic authority), orders under section 119 [42 USCS § 7419] (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 113(e) (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) [Repealed]

(5) (A) (i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under section 110(a) [42 USCS § 7410(a)] to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under section 110(c) [42 USCS § 7410(c)] respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of section 110(c)(2)(D)(ii) [42 USCS § 7410(c)(2)(D)(ii)]), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations--

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 113(d) or section 119 (relating to primary nonferrous smelter orders) [42 USCS § 7419], the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans. The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation.

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 110(k)(1)(A) [42 USCS § 7410(k)(1)(A)], or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2) (A) [Repealed]

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) [Repealed]

(D) For purposes of this paragraph--

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph [enacted June 22, 1974] by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) [Repealed]

(5) (A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after the date of the enactment of this subparagraph [enacted Aug. 7, 1977], be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D [42 USCS §§ 7501 et seq.].

(d), (e) [Repealed]

(f) National or regional energy emergencies; determination by President.

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that--

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 411 (concerning excess emissions penalties or offsets) of title IV of the Act [42 USCS § 7651j] may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 411 (concerning excess emissions penalties or offsets) of title IV of the Act [42 USCS § 7651j] adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 119, as in effect before the date of the enactment of this paragraph [enacted Aug. 7, 1977] or section 113(d) of this Act, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions.

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines--

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 119 as in effect before the date of the enactment of this paragraph [enacted Aug. 7, 1977], or under section 113(d) upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan.

(1) Not later than 5 years after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited. Except for a primary nonferrous smelter order under section 119 [42 USCS § 7419], a suspension under section 110(f) or (g) [subsec. (f) or (g) of this section] (relating to emergency suspensions), an exemption under section 118 [42 USCS § 7418] (relating to certain Federal facilities), an order under section 113(d) (relating to compliance orders), a plan promulgation under section 110(c) [subsec. (c) of this section], or a plan revision under section 110(a)(3) [subsec. (a)(3) of this section], no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards. As a condition for issuance of any permit required under this title, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this Act.

(k) Environmental Protection Agency action on plan submissions.

(1) Completeness of plan submissions.

(A) Completeness criteria. Within 9 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this Act.

(B) Completeness finding. Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness. Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action. Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval. In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this Act. If a portion of the plan revision meets all the applicable requirements of this Act, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this Act until the Administrator approves the entire plan revision as complying with the applicable requirements of this Act.

(4) Conditional approval. The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 176A or section 184 [42 USCS § 7506a or § 7511c],

or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this Act to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D [42 USCS §§ 7501 et seq.], unless such date has elapsed).

(6) Corrections. Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions. Each revision to an implementation plan submitted by a State under this Act shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171 [42 USCS § 7501]), or any other applicable requirement of this Act.

(m) Sanctions. The Administrator may apply any of the sanctions listed in section 179(b) [42 USCS § 7509(b)] at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 179(a) [42 USCS § 7509(a)] in relation to any plan or plan item (as that term is defined by the Administrator) required under this Act, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this Act relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 179(a) [42 USCS § 7509(a)] to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 179(a) [42 USCS § 7509(a)], such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses.

(1) Existing plan provisions. Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990] shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this Act.

(2) Attainment dates. For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) [enacted Nov. 15, 1990],

shall provide for attainment of the national primary ambient air quality standards within 3 years of the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990] or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas. In the case of an area to which, immediately before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 172(b)(6) [42 USCS § 7502(b)(6)] (relating to establishment of a permit program) (as in effect immediately before the date of enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]) or 172(a)(1) [42 USCS § 7502(a)(1)] (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area

until the Administrator finds that the plan for such area meets the applicable requirements of section 172(c)(5) [42 USCS § 7502(c)(5)] (relating to permit programs) or subpart 5 of part D [42 USCS §§ 7514 et seq.] (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes. If an Indian tribe submits an implementation plan to the Administrator pursuant to section 301(d) [42 USCS § 7601(d)], the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 301(d)(2) [42 USCS § 7601(d)(2)]. When such plan becomes effective in accordance with the regulations promulgated under section 301(d) [42 USCS § 7601(d)], the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports. Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development[,] effectiveness, need for revision, or implementation of any plan or plan revision required under this Act.

HISTORY:

(July 14, 1955, ch 360, Title I, Part A, § 110, as added Dec. 31, 1970, P.L. 91-604, § 4(a), 84 Stat. 1680; June 22, 1974, P.L. 93-319, § 4, 88 Stat. 256; Aug. 7, 1977, P.L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, P.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, P.L. 97-23, § 3, 95 Stat. 142; Nov. 15, 1990, P.L. 101-549, Title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), Title IV, § 412, 104 Stat. 2404, 2422, 2464, 2466, 2634.)

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*** Current through PL 113-184, approved 9/29/14 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85. AIR POLLUTION PREVENTION AND CONTROL
PROGRAMS AND ACTIVITIES
PLAN REQUIREMENTS FOR NONATTAINMENT AREAS
ADDITIONAL PROVISIONS FOR PARTICULATE MATTER NONATTAINMENT AREAS

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42 USCS § 7513

§ 7513. Classifications and attainment dates

(a) Initial classifications. Every area designated nonattainment for PM-10 pursuant to section 107(d) [42 USCS § 7407(d)] shall be classified at the time of such designation, by operation of law, as a moderate PM-10 nonattainment area (also referred to in this subpart [42 USCS §§ 7513 et seq.] as a "Moderate Area") at the time of such designation. At the time of publication of the notice under section 107(d)(4) [42 USCS § 7407(d)(4)] (relating to area designations) for each PM-10 nonattainment area, the Administrator shall publish a notice announcing the classification of such area. The provisions of section 172(a)(1)(B) [42 USCS § 7502(a)(1)(B)] (relating to lack of notice-and-comment and judicial review) shall apply with respect to such classification.

(b) Reclassification as Serious.

(1) Reclassification before attainment date. The Administrator may reclassify as a Serious PM-10 nonattainment area (identified in this subpart [42 USCS §§ 7513 et seq.] also as a "Serious Area") any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM-10 by the attainment date (as prescribed in subsection (c)) for Moderate Areas. The Administrator shall reclassify appropriate areas as Serious by the following dates:

(A) For areas designated nonattainment for PM-10 under section 107(d)(4) [42 USCS § 7407(d)(4)], the Administrator shall propose to reclassify appropriate areas by June 30, 1991, and take final action by December 31, 1991.

(B) For areas subsequently designated nonattainment, the Administrator shall reclassify appropriate areas within 18 months after the required date for the State's submission of a SIP for the Moderate Area.

(2) Reclassification upon failure to attain. Within 6 months following the applicable attainment date for a PM-10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable attainment date--

(A) the area shall be reclassified by operation of law as a Serious Area; and

(B) the Administrator shall publish a notice in the Federal Register no later than 6 months following the attainment date, identifying the area as having failed to attain and identifying the reclassification described under subparagraph (A).

(c) Attainment dates. Except as provided under subsection (d), the attainment dates for PM-10 nonattainment areas shall be as follows:

(1) Moderate Areas. For a Moderate Area, the attainment date shall be as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 107(d)(4) [42 USCS § 7407(d)(4)], the attainment date shall not extend beyond December 31, 1994.

(2) Serious Areas. For a Serious Area, the attainment date shall be as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 107(d)(4) [42 USCS § 7407(d)(4)], the date shall not extend beyond December 31, 2001.

(d) Extension of attainment date for Moderate Areas. Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in paragraph [subsection] (c)(1) if--

(1) The State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan; and

(2) no more than one exceedance of the 24-hour national ambient air quality standard level for PM-10 has occurred in the area in the year preceding the Extension Year, and the annual mean concentration of PM-10 in the area for such year is less than or equal to the standard level.

No more than 2 one-year extensions may be issued under the subsection for a single nonattainment area.

(e) Extension of attainment date for Serious Areas. Upon application by any State, the Administrator may extend the attainment date for a Serious Area beyond the date specified under subsection (c), if attainment by the date established under subsection (c) would be impracticable, the State has complied with all requirements and commitments pertaining to that area in the implementation plan, and the State demonstrates to the satisfaction of the Administrator that the plan for that area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area. At the time of such application, the State must submit a revision to the implementation plan that includes a demonstration of attainment by the most expeditious alternative date practicable. In determining whether to grant an extension, and the appropriate length of time for any such extension, the Administrator may consider the nature and extent of nonattainment, the types and numbers of sources or other emitting activities in the area (including the influence of uncontrollable natural sources and transboundary emissions from foreign countries), the population exposed to concentrations in excess of the standard, the presence and concentration of potentially toxic substances in the mix of particulate emissions in the area, and the technological and economic feasibility of various control measures. The Administrator may not approve an extension until the State submits an attainment demonstration for the area. The Administrator may grant at most one such extension for an area, of no more than 5 years.

(f) Waivers for certain areas. The Administrator may, on a case-by-case basis, waive any requirement applicable to any Serious Area under this subpart [42 USCS §§ 7513 et seq.] where the Administrator determines that anthropogenic sources of PM-10 do not contribute significantly to the violation of the PM-10 standard in the area. The Administrator may also waive a specific date for attainment of the standard where the Administrator determines that nonanthropogenic sources of PM-10 contribute significantly to the violation of the PM-10 standard in the area.

HISTORY:

(July 14, 1955, ch 350, Title I, Part D, Subpart 4, § 188, as added Nov. 15, 1990, P.L. 101-549, Title I, § 105(a), 104 Stat. 2458.)

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TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85. AIR POLLUTION PREVENTION AND CONTROL
PROGRAMS AND ACTIVITIES
PLAN REQUIREMENTS FOR NONATTAINMENT AREAS
ADDITIONAL PROVISIONS FOR PARTICULATE MATTER NONATTAINMENT AREAS

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42 USCS § 7513a

§ 7513a. Plan provisions and schedules for plan submissions

(a) Moderate Areas.

(1) Plan provisions. Each State in which all or part of a Moderate Area is located shall submit, according to the applicable schedule under paragraph (2), an implementation plan that includes each of the following:

(A) For the purpose of meeting the requirements of section 172(c)(5) [42 USCS § 7502(c)(5)], a permit program providing that permits meeting the requirements of section 173 [42 USCS § 7503] are required for the construction and operation of new and modified major stationary sources of PM-10.

(B) Either (i) a demonstration (including air quality modeling) that the plan will provide for attainment by the applicable attainment date; or (ii) a demonstration that attainment by such date is impracticable.

(C) Provisions to assure that reasonably available control measures for the control of PM-10 shall be implemented no later than December 10, 1993, or 4 years after designation in the case of an area classified as moderate after the date of the enactment of the Clean Air Act Amendments of 1990.

(2) Schedule for plan submissions. A State shall submit the plan required under subparagraph (1) no later than the following:

(A) Within 1 year of the date of the enactment of the Clean Air Act Amendments of 1990, for areas designated nonattainment under section 107(d)(4) [42 USCS § 7407(d)(4)], except that the provision required under subparagraph (1)(A) shall be submitted no later than June 30, 1992.

(B) 18 months after the designation as nonattainment, for those areas designated nonattainment after the designations prescribed under section 107(d)(4) [42 USCS § 7407(d)(4)].

(b) Serious Areas.

(1) Plan provisions. In addition to the provisions submitted to meet the requirements of paragraph [subsection] (a)(1) (relating to Moderate Areas), each State in which all or part of a Serious Area is located shall submit an implementation plan for such area that includes each of the following:

(A) A demonstration (including air quality modeling)--

(i) that the plan provides for attainment of the PM-10 national ambient air quality standard by the applicable attainment date, or

(ii) for any area for which the State is seeking, pursuant to section 188(e) [42 USCS § 7513(e)], an extension of the attainment date beyond the date set forth in section 188(c) [42 USCS § 7513(c)], that attainment by that date would be impracticable, and that the plan provides for attainment by the most expeditious alternative date practicable.

(B) Provisions to assure that the best available control measures for the control of PM-10 shall be implemented no later than 4 years after the date the area is classified (or reclassified) as a Serious Area.

(2) Schedule for plan submissions. A State shall submit the demonstration required for an area under paragraph (1)(A) no later than 4 years after reclassification of the area to Serious, except that for areas reclassified under section 188(b)(2) [42 USCS § 7513(b)(2)], the State shall submit the attainment demonstration within 18 months

after reclassification to Serious. A State shall submit the provisions described under paragraph (1)(B) no later than 18 months after reclassification of the area as a Serious Area.

(3) Major sources. For any Serious Area, the terms "major source" and "major stationary source" include any stationary source or group of stationary sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 70 tons per year of PM-10.

(c) Milestones.

(1) Plan revisions demonstrating attainment submitted to the Administrator for approval under this subpart [42 USCS §§ 7513 et seq.] shall contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate reasonable further progress, as defined in section 171(1) [42 USCS § 7501(I)], toward attainment by the applicable date.

(2) Not later than 90 days after the date on which a milestone applicable to the area occurs, each State in which all or part of such area is located shall submit to the Administrator a demonstration that all measures in the plan approved under this section have been implemented and that the milestone has been met. A demonstration under this subsection shall be submitted in such form and manner, and shall contain such information and analysis, as the Administrator shall require. The Administrator shall determine whether or not a State's demonstration under this subsection is adequate within 90 days after the Administrator's receipt of a demonstration which contains the information and analysis required by the Administrator.

(3) If a State fails to submit a demonstration under paragraph (2) with respect to a milestone within the required period or if the Administrator determines that the area has not met any applicable milestone, the Administrator shall require the State, within 9 months after such failure or determination to submit a plan revision that assures that the State will achieve the next milestone (or attain the national ambient air quality standard for PM-10, if there is no next milestone) by the applicable date.

(d) Failure to attain. In the case of a Serious PM-10 nonattainment area in which the PM-10 standard is not attained by the applicable attainment date, the State in which such area is located shall, after notice and opportunity for public comment, submit within 12 months after the applicable attainment date, plan revisions which provide for attainment of the PM-10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area.

(e) PM-10 precursors. The control requirements applicable under plans in effect under this part [42 USCS §§ 7501 et seq.] for major stationary sources of PM-10 shall also apply to major stationary sources of PM-10 precursors, except where the Administrator determines that such sources do not contribute significantly to PM-10 levels which exceed the standard in the area. The Administrator shall issue guidelines regarding the application of the preceding sentence.

HISTORY:

(July 14, 1955, ch 350, Title I, Part D, Subpart 4, § 189, as added Nov. 15, 1990, P.L. 101-549, Title I, § 105(a), 104 Stat. 2460.)

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TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85. AIR POLLUTION PREVENTION AND CONTROL
GENERAL PROVISIONS

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42 USCS § 7619

§ 7619. Air quality monitoring

(a) In general. After notice and opportunity for public hearing, the Administrator shall promulgate regulations establishing an air quality monitoring system throughout the United States which--

(1) utilizes uniform air quality monitoring criteria and methodology and measures such air quality according to a uniform air quality index,

(2) provides for air quality monitoring stations in major urban areas and other appropriate areas throughout the United States to provide monitoring such as will supplement (but not duplicate) air quality monitoring carried out by the States required under any applicable implementation plan,

(3) provides for daily analysis and reporting of air quality based upon such uniform air quality index, and

(4) provides for recordkeeping with respect to such monitoring data and for periodic analysis and reporting to the general public by the Administrator with respect to air quality based upon such data.

The operation of such air quality monitoring system may be carried out by the Administrator or by such other departments, agencies, or entities of the Federal Government (including the National Weather Service) as the President may deem appropriate. Any air quality monitoring system required under any applicable implementation plan under section 110 [42 USCS § 7410] shall, as soon as practicable following promulgation of regulations under this section, utilize the standard criteria and methodology, and measure air quality according to the standard index, established under such regulations.

(b) Air quality monitoring data influenced by exceptional events.

(1) Definition of exceptional event. In this section:

(A) In general. The term "exceptional event" means an event that--

(i) affects air quality;

(ii) is not reasonably controllable or preventable;

(iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and

(iv) is determined by the Administrator through the process established in the regulations promulgated under paragraph (2) to be an exceptional event.

(B) Exclusions. In this subsection, the term "exceptional event" does not include--

(i) stagnation of air masses or meteorological inversions;

(ii) a meteorological event involving high temperatures or lack of precipitation; or

(iii) air pollution relating to source noncompliance.

(2) Regulations.

(A) Proposed regulations. Not later than March 1, 2006, after consultation with Federal land managers and State air pollution control agencies, the Administrator shall publish in the Federal Register proposed regulations governing the review and handling of air quality monitoring data influenced by exceptional events.

(B) Final regulations. Not later than 1 year after the date on which the Administrator publishes proposed regulations under subparagraph (A), and after providing an opportunity for interested persons to make oral presentations of views, data, and arguments regarding the proposed regulations, the Administrator shall promulgate

final regulations governing the review and handling or [of] air quality monitoring data influenced by an exceptional event that are consistent with paragraph (3).

(3) Principles and requirements.

(A) Principles. In promulgating regulations under this section, the Administrator shall follow--

(i) the principle that protection of public health is the highest priority;

(ii) the principle that timely information should be provided to the public in any case in which the air quality is unhealthy;

(iii) the principle that all ambient air quality data should be included in a timely manner, [in] an appropriate Federal air quality database that is accessible to the public;

(iv) the principle that each State must take necessary measures to safeguard public health regardless of the source of the air pollution; and

(v) the principle that air quality data should be carefully screened to ensure that events not likely to recur are represented accurately in all monitoring data and analyses.

(B) Requirements. Regulations promulgated under this section shall, at a minimum, provide that--

(i) the occurrence of an exceptional event must be demonstrated by reliable, accurate data that is promptly produced and provided by Federal, State, or local government agencies;

(ii) a clear causal relationship must exist between the measured exceedances of a national ambient air quality standard and the exceptional event to demonstrate that the exceptional event caused a specific air pollution concentration at a particular air quality monitoring location;

(iii) there is a public process for determining whether an event is exceptional; and

(iv) there are criteria and procedures for the Governor of a State to petition the Administrator to exclude air quality monitoring data that is directly due to exceptional events from use in determinations by the Administrator with respect to exceedances or violations of the national ambient air quality standards.

(4) Interim provision. Until the effective date of a regulation promulgated under paragraph (2), the following guidance issued by the Administrator shall continue to apply:

(A) Guidance on the identification and use of air quality data affected by exceptional events (July 1986).

(B) Areas affected by PM-10 natural events, May 30, 1996.

(C) Appendices I, K, and N to part 50 of title 40, Code of Federal Regulations.

HISTORY:

(July 14, 1955, ch 360, Title III, § 319, as added Aug. 7, 1977, P.L. 95-95, Title III, § 309, 91 Stat. 781.)

(As amended Aug. 10, 2005, P.L. 109-59, Title VI, § 6013, 119 Stat. 1882.)

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TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER C -- AIR PROGRAMS
PART 50 -- NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

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40 CFR 50.1

§ 50.1 Definitions.

[PUBLISHER'S NOTE: *72 FR 13560, 13580*, Mar. 22, 2007, purported to add paragraphs (j) and (k), however text for paragraph (l) was also provided. Paragraph (l) has been added in accordance with the apparent intent of the agency. It is expected that the agency will publish a correction in the Federal Register.]

- (a) As used in this part, all terms not defined herein shall have the meaning given them by the Act.
- (b) Act means the Clean Air Act, as amended (*42 U.S.C. 1857-18571*, as amended by Pub. L. 91-604).
- (c) Agency means the Environmental Protection Agency.
- (d) Administrator means the Administrator of the Environmental Protection Agency.
- (e) Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access.
- (f) Reference method means a method of sampling and analyzing the ambient air for an air pollutant that is specified as a reference method in an appendix to this part, or a method that has been designated as a reference method in accordance with part 53 of this chapter; it does not include a method for which a reference method designation has been cancelled in accordance with § 53.11 or § 53.16 of this chapter.
- (g) Equivalent method means a method of sampling and analyzing the ambient air for an air pollutant that has been designated as an equivalent method in accordance with part 53 of this chapter; it does not include a method for which an equivalent method designation has been cancelled in accordance with § 53.11 or § 53.16 of this chapter.
- (h) Traceable means that a local standard has been compared and certified either directly or via not more than one intermediate standard, to a primary standard such as a National Bureau of Standards Standard Reference Material (NBS SRM), or a USEPA/NBS-approved Certified Reference Material (CRM).
- (i) Indian country is as defined in *18 U.S.C. 1151*.
- (j) Exceptional event means an event that affects air quality, is not reasonably controllable or preventable, is an event caused by human activity that is unlikely to recur at a particular location or a natural event, and is determined by the Administrator in accordance with *40 CFR 50.14* to be an exceptional event. It does not include stagnation of air masses or meteorological inversions, a meteorological event involving high temperatures or lack of precipitation, or air pollution relating to source noncompliance.
- (k) Natural event means an event in which human activity plays little or no direct causal role.

(l) Exceedance with respect to a national ambient air quality standard means one occurrence of a measured or modeled concentration that exceeds the specified concentration level of such standard for the averaging period specified by the standard.

HISTORY: [36 FR 22384, Nov. 25, 1971, as amended at 41 FR 11253, Mar. 17, 1976; 48 FR 2529, Jan. 20, 1983; 63 FR 7254, 7274, Feb. 12, 1998; 72 FR 13560, 13580, Mar. 22, 2007]

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TITLE 40 -- PROTECTION OF ENVIRONMENT
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40 CFR 50.14

§ 50.14 Treatment of air quality monitoring data influenced by exceptional events.

(a) Requirements. (1) A State may request EPA to exclude data showing exceedances or violations of the national ambient air quality standard that are directly due to an exceptional event from use in determinations by demonstrating to EPA's satisfaction that such event caused a specific air pollution concentration at a particular air quality monitoring location.

(2) Demonstration to justify data exclusion may include any reliable and accurate data, but must demonstrate a clear causal relationship between the measured exceedance or violation of such standard and the event in accordance with paragraph (c)(3)(iv) of this section.

(b) Determinations by EPA. (1) EPA shall exclude data from use in determinations of exceedances and NAAQS violations where a State demonstrates to EPA's satisfaction that an exceptional event caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section.

(2) EPA shall exclude data from use in determinations of exceedances and NAAQS violations where a State demonstrates to EPA's satisfaction that emissions from fireworks displays caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section. Such data will be treated in the same manner as exceptional events under this rule, provided a State demonstrates that such use of fireworks is significantly integral to traditional national, ethnic, or other cultural events including, but not limited to July Fourth celebrations which satisfy the requirements of this section.

(3) EPA shall exclude data from use in determinations of exceedances and NAAQS violations, where a State demonstrates to EPA's satisfaction that emissions from prescribed fires caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section provided that such emissions are from prescribed fires that EPA determines meets the definition in § 50.1(j), and provided that the State has certified to EPA that it has adopted and is implementing a Smoke Management Program or the State has ensured that the burner employed basic smoke management practices. If an exceptional event occurs using the basic smoke management practices approach, the State must undertake a review of its approach to ensure public health is being protected and must include consideration of development of a SMP.

(4) [Reserved]

(c) Schedules and Procedures. (1) Public notification.

(i) All States and, where applicable, their political subdivisions must notify the public promptly whenever an event occurs or is reasonably anticipated to occur which may result in the exceedance of an applicable air quality standard.

(ii) [Reserved.]

(2) Flagging of data.

(i) A State shall notify EPA of its intent to exclude one or more measured exceedances of an applicable ambient air quality standard as being due to an exceptional event by placing a flag in the appropriate field for the data record of concern which has been submitted to the AQS database.

(ii) Flags placed on data in accordance with this section shall be deemed informational only, and the data shall not be excluded from determinations with respect to exceedances or violations of the national ambient air quality standards unless and until, following the State's submittal of its demonstration pursuant to paragraph (c)(3) of this section and EPA review, EPA notifies the State of its concurrence by placing a concurrence flag in the appropriate field for the data record in the AQS database.

(iii) Flags placed on data as being due to an exceptional event together with an initial description of the event shall be submitted to EPA not later than July 1st of the calendar year following the year in which the flagged measurement occurred, except as allowed under paragraph (c)(2)(iv) or (c)(2)(v) of this section.

(iv) For PM_{2.5} data collected during calendar years 2004-2006, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than October 1, 2007. EPA may grant an extension, if a State requests an extension, and permit the State to submit the notification of the flag and initial description by no later than December 1, 2007.

(v) For lead (Pb) data collected during calendar years 2006-2008, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than July 1, 2009. For Pb data collected during calendar year 2009, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than July 1, 2010. For Pb data collected during calendar year 2010, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than May 1, 2011.

(vi) When EPA sets a NAAQS for a new pollutant or revises the NAAQS for an existing pollutant, it may revise or set a new schedule for flagging exceptional event data, providing initial data descriptions and providing detailed data documentation in AQS for the initial designations of areas for those NAAQS. Table 1 provides the schedule for submission of flags with initial descriptions in AQS and detailed documentation. These schedules shall apply for those data which will or may influence the initial designation of areas for those NAAQS. EPA anticipates revising Table 1 as necessary to accommodate revised data submission schedules for new or revised NAAQS.

Table 1--Special Schedules for Exceptional Event Flagging and Documentation
Submission for Data To Be Used in Initial Designations for New or Revised
NAAQS

NAAQS pollutant/ standard/(level)/ promulgation date	Air quality data collected for calendar year	Event flagging & initial description deadline	Detailed documentation submission deadline
PM _{2.5} /24-Hr Standard (35 [μg/m ³]) Promulgated October 17, 2006	2004-2006	October 1, 2007	April 15, 2008.
Ozone/8-Hr Standard (0.075 ppm) Promulgated March 12, 2008	2005-2007 2008 2009	June 18, 2009 June 18, 2009 60 days after the end of the	June 18, 2009. June 18, 2009. 60 days after the end of the

Table 1--Special Schedules for Exceptional Event Flagging and Documentation
Submission for Data To Be Used in Initial Designations for New or Revised
NAAQS

NAAQS pollutant/ standard/(level)/ promulgation date	Air quality data collected for calendar year	Event flagging & initial description deadline	Detailed documentation submission deadline
		calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first.	calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first.
NO ₂ /1-Hr Standard (100 ppb) Promulgated February 9, 2010	2008	July 1, 2010	January 22, 2011.
	2009	July 1, 2010 <i>fna</i>	January 22, 2011.
	2010	April 1, 2011	July 1, 2011.
SO ₂ /1-Hr Standard (75 ppb) Promulgated June 22, 2010	2008	October 1, 2010	June 1, 2011.
	2009	October 1, 2010	June 1, 2011.
	2010	June 1, 2011	June 1, 2011.
	2011	60 days after the end of the calendar quarter in which the event occurred or March 31, 2012, whichever date occurs first	60 days after the end of the calendar quarter in which the event occurred or March 31, 2012, whichever date occurs first.
PM _{2.5} /Primary Annual Standard (12 [μg]/m ³) Promulgated December 14, 2012	2010 and 2011	July 1, 2013	December 12, 2013.
	2012	July 1, 2013 <i>fna</i>	December 12, 2013.
	2013	July 1, 2014 <i>fna</i>	August 1, 2014.

fna This date is the same as the general schedule in *40 CFR 50.14*.

Note: The table of revised deadlines only applies to data EPA will use to establish the initial area designations for new or revised NAAQS. The general schedule applies for all other purposes, most notably, for data used by the EPA for redesignations to attainment.

(3) Submission of demonstrations.

(i) A State that has flagged data as being due to an exceptional event and is requesting exclusion of the affected measurement data shall, after notice and opportunity for public comment, submit a demonstration to justify data exclusion to EPA not later than the lesser of, 3 years following the end of the calendar quarter in which the flagged concentration was recorded or, 12 months prior to the date that a regulatory decision must be made by EPA. A State must submit the public comments it received along with its demonstration to EPA.

(ii) A State that flags data collected during calendar years 2004-2006, pursuant to paragraph (c)(2)(iv) of this section, must adopt the procedures and requirements specified in paragraph (c)(3)(i) of this section and must include a demonstration to justify the exclusion of the data not later than the submittal of the Governor's recommendation letter on nonattainment areas.

(iii) A State that flags Pb data collected during calendar years 2006-2009, pursuant to paragraph (c)(2)(v) of this section shall, after notice and opportunity for public comment, submit to EPA a demonstration to justify exclusion of the data not later than October 15, 2010. A State that flags Pb data collected during calendar year 2010 shall, after notice and opportunity for public comment, submit to EPA a demonstration to justify the exclusion of the

data not later than May 1, 2011. A state must submit the public comments it received along with its demonstration to EPA.

(iv) The demonstration to justify data exclusion shall provide evidence that:

(A) The event satisfies the criteria set forth in *40 CFR 50.1(j)*;

(B) There is a clear causal relationship between the measurement under consideration and the event that is claimed to have affected the air quality in the area;

(C) The event is associated with a measured concentration in excess of normal historical fluctuations, including background; and

(D) There would have been no exceedance or violation but for the event.

(v) With the submission of the demonstration, the State must document that the public comment process was followed.

(vi) [Reserved.]

(A) [Reserved]

HISTORY: [72 FR 13560, 13580, Mar. 22, 2007; 72 FR 28612, May 22, 2007; 73 FR 58042, 58046, Oct. 6, 2008, withdrawn at 73 FR 76219, Dec. 16, 2008; 73 FR 66964, 67051, Nov. 12, 2008; 73 FR 70597, Nov. 21, 2008; 74 FR 23307, 23312, May 19, 2009; 75 FR 6474, 6531, Feb. 9, 2010; 75 FR 35520, 35592, June 22, 2010; 78 FR 3086, 3277, Jan. 15, 2013]

Department of Environmental Quality – Air Pollution Control

R18-2-609. Agricultural Practices

A person shall not cause, suffer, allow, or permit the performance of agricultural practices outside the Phoenix and Yuma planning areas, as defined in 40 CFR 81.303, which is incorporated by reference in R18-2-210, including tilling of land and application of fertilizers without taking reasonable precautions to prevent excessive amounts of particulate matter from becoming airborne.

Historical Note

Section R18-2-609 renumbered from R18-2-409 effective November 15, 1993 (Supp. 93-4). Amended by final rulemaking at 6 A.A.R. 2009, effective May 12, 2000 (Supp. 00-2). Amended by final rulemaking at 11 A.A.R. 2210, effective July 18, 2005 (Supp. 05-2).

R18-2-610. Definitions for R18-2-610.01

The definitions in R18-2-101 and the following definitions apply to R18-2-610.01:

1. "Access restriction" means reducing the number of trips driven on agricultural aprons and access roads by restricting or eliminating public access to noncropland with signs or physical obstruction.
2. "Aggregate cover" means gravel, concrete, recycled road base, caliche, or other similar material applied to noncropland to a depth sufficient to reduce dust generated from vehicle movement, wind or other erosive forces.
3. "Area A" means the area delineated according to A.R.S. § 49-541(1).
4. "Best management practice" means a technique verified by scientific research, that on a case-by-case basis is practical, economically feasible, and effective in reducing PM₁₀ emissions from a regulated agricultural activity.
5. "Cessation of Night Tilling" means the discontinuation of night tillage tilling on a day identified by the *Maricopa County Dust Control Forecast* as being high risk of dust generation.
6. "Chemical irrigation" means reducing the number of passes across a commercial farm by applying a fertilizer, pesticide, or other agricultural chemical to cropland through an irrigation system.
7. "Combining tractor operations" means reducing soil compaction and the number of passes across a commercial farm by using a tractor, implement, harvester, or other farming support vehicle to perform two or more tillage, cultivation, planting, or harvesting operations at the same time.
8. "Commercial farm" means 10 or more contiguous acres of land used for agricultural purposes within the boundary of the Maricopa PM₁₀ nonattainment area and Maricopa County portion of Area A or a PM₁₀ nonattainment area designated after June 1, 2009 as stated in A.R.S. § 49-457(P)(1)(f).
9. "Commercial farmer" means an individual, entity, or joint operation in general control of a commercial farm.
10. "Committee" means the Governor's Agricultural Best Management Practices Committee.
11. "Cover crop" means reducing wind erosion and PM₁₀ emissions by using plants or a green manure crop seasonally to protect soil surfaces between crops and control soil movement.
12. "Critical area planting" means reducing PM₁₀ emissions and wind erosion by planting trees, shrubs, vines, grasses, or other vegetative cover on noncropland in order to maintain adequate ground cover.
13. "Cropland" means land on a commercial farm that:
 - a. Is within the time-frame of final harvest to plant emergence;
 - b. Has been tilled in a prior year and is suitable for crop production, but is currently fallow; or
 - c. Is a turn-row.
14. "Cross-wind ridges" means stabilizing soil and reducing PM₁₀ emissions and wind erosion by creating soil ridges in a commercial farm by tillage or planting operations. Ridges should be aligned as perpendicular as possible to the prevailing wind direction. Soil should be stable enough to sustain effective ridges.
15. "Cross-wind strip-cropping" means stabilizing soil and reducing PM₁₀ emissions by growing strips of at least two crops: herbaceous cover or managing crop or herbaceous residue as a protective cover within the same field. Strips should be aligned as perpendicular as possible to the prevailing wind directions.
16. "Equipment modification" means reducing PM₁₀ emissions and soil erosion during tillage and harvest operations by modifying and maintaining an existing piece of agricultural equipment, purchasing new equipment, increasing equipment size, modifying land planting and land leveling, matching the equipment to row spacing, or grafting to new varieties or technological improvements.
17. "Fallow Field" means an area of land that is routinely cultivated, planted and harvested and is unplanted for one or more growing seasons or planting cycles, but is intended to be placed back in agricultural production.
18. "Forage Crop" means a product grown for consumption by any domestic animal.
19. "Genetically Modified" means a living organism whose genetic material has been altered, changing one or more of its characteristics.
20. "GMO: Genetically Modified Organism" means a plant that has been altered by a genetic exchange with another organism.
21. "GPS: Global Position Satellite System" means using a satellite navigation system on farm equipment to calculate position in the field.
22. "Green Chop" means reducing soil compaction, soil disturbance and the number of passes across a commercial farm by harvesting of a Forage Crop without allowing it to dry in the field.
23. "Integrated Pest Management" means reducing soil compaction and the number of passes in a commercial farm for spraying by using a combination of techniques including organic, conventional, and biological farming practices to suppress pest problems.
24. "Limited harvest activity during a high-wind event" means performing no harvest or soil preparation activity when the measured wind speed as measured by a hand held anemometer is more than 25 miles per hour at the commercial farm site.
25. "Limited tillage activity during a high-wind event" means performing no tillage or soil preparation activity when the measured wind speed as measured by a hand held anemometer is more than 25 miles per hour at the commercial farm site.
26. "Maricopa PM₁₀ nonattainment area" means the Phoenix planning area as defined in 40 CFR 81.303, which is incorporated by reference in R18-2-210.
27. "Mulching" means reducing PM₁₀ emissions and wind erosion and preserving soil moisture by applying a protective layer of plant residue or other material that is not produced onsite to a soil surface to reduce soil movement.
28. "Multi-year crop" means reducing PM₁₀ emissions from wind erosion or tillage by protecting the soil surface by

- growing a crop, pasture, or orchard that is grown, or will be grown, on a continuous basis for more than one year.
29. “Noncropland” means any commercial farm land that:
 - a. Is no longer used for agricultural production;
 - b. Is no longer suitable for production of crops;
 - c. Is subject to a restrictive easement or contract that prohibits use for the production of crops; or
 - d. Includes a private farm road, ditch, ditch bank, equipment yard, storage yard, or well head.
 30. “Night Tilling” means preparing the land for the raising of crops between the hours of 2:00 a.m. and 8:00 a.m.
 31. “Organic farming practices” means using biological or non-chemical agricultural methods.
 32. “Organic material application” means applying animal waste or biosolids to a soil surface.
 33. “Permanent cover” means reducing PM₁₀ emissions and wind erosion by maintaining a long-term perennial vegetative cover on cropland that is temporarily not producing a major crop.
 34. “Planting based on soil moisture” means applying water or having enough moisture in the soil to germinate the seed prior to planting.
 35. “Precision Farming” means reducing the number of passes across a commercial farm by using GPS to precisely guide farm equipment in the field.
 36. “Reduce vehicle speed” means reducing PM₁₀ emissions and soil erosion from the operation of farm vehicles or farm equipment on unpaved private farm roads at speeds not to exceed 20 mph.
 37. “Reduced harvest activity” means reducing the number of mechanical harvest passes.
 38. “Reduced tillage system” means reducing the number of tillage operations.
 39. “Regulated agricultural activity” means a regulated agricultural activity as defined in A.R.S. § 49-457(P)(5).
 40. “Regulated area” means a regulated area as defined in A.R.S. § 49-457(P)(6).
 41. “Residue management” means reducing PM₁₀ emissions and wind erosion by managing the amount and distribution of crop and other plant residues on a soil surface between the time of harvest of one crop and the emergence of a new crop.
 42. “Sequential cropping” means reducing PM₁₀ emissions and wind erosion by growing crops in a sequence or close rotation that limits the amount of time bare soil is exposed on a commercial farm to 30 days or less.
 43. “Shuttle System/Larger Carrier” means reducing the number of passes in a commercial farm by using multiple or larger bins/trailers per trip to haul commodity from the field.
 44. “Significant Agricultural Earth Moving Activities” means either leveling activities conducted on a commercial farm that disturb the soil more than 4 inches below the surface, or the creation, maintenance and relocation of: ditches, canals, ponds, irrigation lines, tailwater recovery systems (agricultural sumps) and other water conveyances, not to include activities performed on cropland for crop preparation, cultivation or harvest.
 45. “Stabilization of soil prior to plant emergence” means reducing PM₁₀ emissions by applying water to soil in between planting and crop emergence in order to cause the soil to form a crust.
 46. “Surface roughening” means reducing PM₁₀ emissions and wind erosion by manipulating a soil surface in order to produce or maintain clods.
 47. “Stagnant Air Conditions” means a meteorological regime where warm air aloft overlies cooler air near the surface and little if any vertical mixing occurs.
 48. “Synthetic particulate suppressant” means reducing PM₁₀ emissions and wind erosion by providing a surface barrier or binding soil particles together on noncropland with a manufactured product such as lignosulfate, calcium chloride, magnesium chloride, an emulsion of a petroleum product, an enzyme product, or polyacrylamide that is used to control particulate matter.
 49. “Tillage and harvest” means any mechanical practice that physically disturbs cropland or crops on a commercial farm.
 50. “Tillage based on soil moisture” means reducing PM₁₀ emissions by irrigating fields to the depth of the proposed cut prior to soil disturbances or conducting tillage to coincide with precipitation.
 51. “Timing of a tillage operation” means performing tillage operations that minimize the amount of time the soil surface is susceptible to wind erosion resulting in PM₁₀.
 52. “Track-out control system” means reducing PM₁₀ emissions by using a device or system to remove mud or soil from a vehicle or equipment before the vehicle enters a paved public road.
 53. “Transgenic Crops” means reducing the need for tillage or cultivation operations, the number of chemical spray applications, or soil disturbances by using plants that are genetically modified.
 54. “Transplanting” means reducing the number of passes in a commercial farm and minimizing soil disturbance by utilizing plants already in a growth state as compared to seeding.
 55. “Watering” means reducing PM₁₀ emissions and wind erosion by applying water to noncropland bare soil surfaces during periods of high traffic until the surfaces are visibly moist.
 56. “Wind barrier” means reducing PM₁₀ emissions and wind erosion by constructing a fence or structure, or providing a woody vegetative barrier by planting a row of trees or shrubs, perpendicular or across the prevailing wind direction to reduce wind speed by changing the pattern of air flow over the land surface.

Historical Note

Former Section R18-2-610 renumbered to R18-2-612; new Section R18-2-610 adopted by final rulemaking at 6 A.A.R. 2009, effective May 12, 2000 (Supp. 00-2).

Amended by exempt rulemaking at 13 A.A.R. 4326, effective November 14, 2007 (Supp. 07-4). Amended by exempt rulemaking at 18 A.A.R. 137, effective December 29, 2011 (Supp. 11-4). Subsection (A) corrected at the request of the Department, Office File No. M12-133, filed April 5, 2012 (Supp. 11-4).

R18-2-610.01. Agricultural PM₁₀ General Permit for Crop Operations; PM₁₀ Nonattainment Areas

- A. A commercial farmer shall comply with this Section by January 1, 2012. Until the end of the transition period on March 31, 2013, a commercial farmer shall maintain a record demonstrating compliance with this Section. The record shall be provided to the Director within two business days of notice to the commercial farmer. The record shall contain:
 1. The name of the commercial farmer;
 2. The mailing address or physical address of the commercial farm; and
 3. The best management practices selected for tillage and harvest, noncropland, and cropland.

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- B.** A commercial farmer, who begins a regulated agricultural activity after January 1, 2012, shall comply with this Section within three months of beginning the regulated agricultural activity.
- C.** A commercial farmer within a Serious PM₁₀ Nonattainment Area shall implement at least two best management practices from each category to reduce PM₁₀ emissions.
- D.** A commercial farmer within a Moderate PM₁₀ Nonattainment Area shall implement at least one best management practice from each category to reduce PM₁₀ emissions.
- E.** A commercial farmer shall implement from the following best management practices, as described in subsection (C) or (D), during harvest and tillage activities:
1. Chemical irrigation,
 2. Combining tractor operations,
 3. Equipment modification,
 4. Green Chop,
 5. Integrated Pest Management,
 6. Limited harvest activity during a high-wind event,
 7. Limited tillage activity during a high-wind event,
 8. Multi-year crop,
 9. Cessation of Night Tilling,
 10. Planting based on soil moisture,
 11. Precision Farming,
 12. Reduced harvest activity,
 13. Reduced tillage system,
 14. Tillage based on soil moisture,
 15. Timing of a tillage operation,
 16. Transgenic Crops,
 17. Transplanting, or
 18. Shuttle System/Larger Carrier.
- F.** A commercial farmer shall implement from the following best management practices, as described in subsection (C) or (D), to reduce PM₁₀ emissions from noncropland:
1. Access restriction,
 2. Aggregate cover,
 3. Wind barrier,
 4. Critical area planting,
 5. Organic material application,
 6. Reduce vehicle speed,
 7. Synthetic particulate suppressant,
 8. Track-out control system, or
 9. Watering.
- G.** A commercial farmer shall implement from the following best management practices, as described in subsection (C) or (D), to reduce PM₁₀ emissions from cropland:
1. Wind barrier,
 2. Cover crop,
 3. Cross-wind ridges,
 4. Cross-wind strip-cropping,
 5. Integrated Pest Management,
 6. Organic material application,
 7. Mulching,
 8. Multi-year crop,
 9. Permanent cover,
 10. Stabilization of soil prior to plant emergence,
 11. Precision Farming,
 12. Residue management,
 13. Sequential cropping, or
 14. Surface roughening.
- H.** A commercial farmer shall implement from the following best management practices, as described in subsection (C) or (D), when conducting Significant Agricultural Earth Moving Activities as defined in R18-2-610:
1. Apply water prior to conducting Significant Agricultural Earth Moving Activities and/or time Significant Agricultural Earth Moving Activities to coincide with precipitation;
2. Apply water during Significant Agricultural Earth Moving Activities;
 3. Limit activities during high wind events;
 4. Conduct Significant Agricultural Earth Moving Activities in a manner to minimize the number of passes by using equipment that is the most efficient means of moving the soil; or
 5. Conduct Significant Agricultural Earth Moving Activities as close to possible to planting or otherwise stabilize the soil, except for emergency maintenance purposes.
- I.** Beginning March 31, 2013, or within 90 days after the start of a new regulated agricultural activity, whichever is later, the commercial farmer shall complete and submit a Best Management Practices Program General Permit Record Form to the Arizona Department of Agriculture. Thereafter, the commercial farmer shall also complete and submit a Best Management Practices Program General Permit Record Form to the Arizona Department of Agriculture on March 31 of each calendar year. The Best Management Practice Program General Permit Record form shall include the following information:
1. At least the required number of best management practices as described in subsection (C) or (D) that the commercial farmer implemented during the previous calendar year;
 2. At least the required number of best management practices as described in subsection (C) or (D) that the commercial farmer intends to implement during the current calendar year;
 3. The name, business address, and phone number of the commercial farmer responsible for the preparation and implementation of the best management practices;
 4. The signature of the commercial farmer and the date the form was signed.
- J.** Beginning in Calendar Year 2014, and no more than once every subsequent three calendar years, the Director shall provide the commercial farmer with a Best Management Practices Program Periodic Survey. The commercial farmer may complete and submit the survey to the Arizona Department of Agriculture. The Periodic Survey shall include the following information:
1. The type and acreage of each crop type planted during the calendar year that the survey is conducted,
 2. The total miles of unpaved roads at the commercial farm, and
 3. The total acreage of the unpaved equipment and traffic areas at the commercial farm.
- K.** Records of any changes to the Best Management Practices identified in the most recently submitted Best Management Practices Program General Permit Record Form shall be kept by the commercial farmer onsite and made available for review within two business days of notice to the commercial farmer.
- L.** A person may petition the Committee to consider different practices to control PM₁₀ emissions not contained in either of the categories of subsection (E), (F), (G), or (H). The Committee may require on-farm demonstration trials to be conducted under the conditions established by the Committee. The proposed new practices shall not become effective unless approved by the Committee.
- M.** A commercial farmer shall maintain a record demonstrating compliance with this Section for three years. Records shall include a copy of the complete Best Management Practice Program General Permit Record Form to confirm implementation of each best management practice.

- N. The Director shall not assess a fee to a commercial farmer for coverage under the agricultural PM₁₀ general permit.
- O. A commercial farmer shall ensure that the implementation of all selected best management practices does not violate any other local, state, or federal law.
- P. The Director shall document noncompliance with this Section before issuing a compliance order.
- Q. A commercial farmer who is not in compliance with this Section is subject to the provisions in A.R.S. § 49-457(I), (J), and (K).

Historical Note

New Section made by exempt rulemaking at 18 A.A.R. 137, effective December 29, 2011 (Supp. 11-4).

R18-2-611. Definitions for R18-2-611.01

The definitions in R18-2-101 and the following definitions apply to R18-2-611.01:

1. The following definitions apply to a commercial dairy operation:
 - a. "Aggregate cover" means gravel, concrete, recycled road base, caliche, or other similar material applied to unpaved roads or feed lanes to a depth sufficient to reduce dust generated from vehicle movement, wind or other erosive forces.
 - b. "Apply a fibrous layer" means reducing PM₁₀ emissions by spreading shredded or deconstructed plant materials to cover loose soil in high animal traffic areas.
 - c. "Bunkers" means below ground level storage systems for storing large amount of silage, which is covered with a plastic tarp.
 - d. "Calves" means young dairy stock under two months of age.
 - e. "Cement cattle walkways to milk barn" means reducing PM₁₀ emissions by fencing pathways from the corrals to the milking barn, which are surfaces with concrete floors.
 - f. "Commercial animal operator" means an individual, entity, or joint operation in general control of an animal operation.
 - g. "Commercial dairy operation" means a dairy operation with more than 150 dairy cattle within the boundary of the Maricopa PM₁₀ nonattainment area and Maricopa County portion of Area A or a PM₁₀ nonattainment area designated after June 1, 2009 as stated in A.R.S. § 49-457(P)(1)(f).
 - h. "Cover manure hauling trucks" means reducing PM₁₀ emissions by completely covering the top of the loaded area.
 - i. "Covers for silage" means reducing PM₁₀ emissions and wind erosion by using large plastic tarps to completely cover silage.
 - j. "Do not run cattle" means reducing PM₁₀ emissions by walking dairy cattle to the milking barn.
 - k. "Feed higher moisture feed to dairy cattle" means reducing PM₁₀ emissions by feeding dairy cattle one or a combination of the following:
 - i. Add water to ration mix to achieve a 20% minimum moisture level,
 - ii. Add molasses or tallow to ration mix at a minimum of 1%,
 - iii. Add silage, or
 - iv. Add Green Chop.
 - l. "Feed green chop" means feeding high moisture feed that contains at least 30% moisture directly to dairy cattle.
 - m. "Groom manure surface" means reducing PM₁₀ emissions and wind erosion by:
 - i. Flushing or vacuuming lanes daily,
 - ii. Scraping and harrowing pens on a weekly basis, and
 - iii. Removing manure every four months with equipment that leaves an even corral surface of compacted manure on top of the soil.
 - n. "Hutches" means raised, roofed enclosures that protect the calves from the elements.
 - o. "Pile manure between cleanings" means reducing PM₁₀ emissions by collecting loose surface materials within the confines of the surface area of the occupied feed pen to contain the loose manure materials.
 - p. "Provide cooling in corral" means reducing PM₁₀ emissions by using evaporative coolers under the corral shades to reduce the ambient air temperature, thereby increasing stocking density in the cool areas of the corrals.
 - q. "Provide shade in corral" means reducing PM₁₀ emissions by increasing stocking density and reducing animal movement by using a permanent structure, which provides at least 16 square feet per animal of shaded pen surface.
 - r. "Push equipment" means manure harvesting equipment pushed in front of a tractor.
 - s. "Regulated agricultural activity" means a regulated agricultural activity as defined in A.R.S. § 49-457(P)(5).
 - t. "Regulated area" means a regulated area as defined in A.R.S. § 49-457(P)(6).
 - u. "Silage" means fermented, high-moisture fodder that can be fed to ruminants, such as cattle and sheep; usually made from grass crops including corn, sorghum or other cereals, by using the entire green plant.
 - v. "Store and maintain feed stock" means reducing PM₁₀ emissions and wind erosion by storing feed stock in a covered area where the commodity is surrounded on at least three sides by a structure so that the feed stock is adequately contained.
 - w. "Synthetic particulate suppressant" as defined in R18-2-610.
 - x. "Use drag equipment to maintain pens" means reducing PM₁₀ emissions by using manure harvesting equipment pulled behind a tractor instead of using push equipment.
 - y. "Use free stall housing" means reducing PM₁₀ emissions by enclosing one cow per stall, which are outfitted with concrete floors.
 - z. "Water misting systems" means reducing PM₁₀ emissions from dry manure by using systems that project a cloud of very small water particles onto the manure surface.
 - aa. "Wind barrier" means reducing PM₁₀ emissions and wind erosion by constructing a fence or structure, or providing a woody vegetative barrier by planting a row of trees or shrubs, perpendicular or across the prevailing wind direction to reduce wind speed by changing the pattern of air flow over the land surface.
2. The following definitions apply to a commercial beef cattle feedlot:
 - a. "Add moisture to pen surface" means reducing PM₁₀ emissions and wind erosion by applying at

ARTICLE 2. FUGITIVE DUST

4-2-020. General

The purpose of this article is to reasonably regulate operations which periodically may cause fugitive dust emissions into the atmosphere.

[Adopted effective June 29, 1993. Revised 12/4/2002.]

4-2-030. Definitions

For the purpose of this article, the following definitions shall apply:

1. MOTOR VEHICLE - A self-propelled vehicle weighing less than six thousand pounds that is designed for carrying persons or property on a street or highway.
2. REASONABLE PRECAUTION - Measures taken to prevent fugitive dust from becoming airborne which result in the lowest emission limitation by the application of control technology that is reasonably available considering technological and economic feasibility.
3. URBAN or SUBURBAN OPEN AREA - An unsubdivided tract of land surrounding a substantial urban development of a residential, industrial, or commercial nature and which, though near or within the limits of some city or town, may be used for agriculture, be uncultivated, or lie fallow.
4. VACANT LOT - A subdivided residential or commercial lot which contains no buildings or structures of a temporary or permanent nature.

[Adopted effective June 29, 1993. Revised 12/4/2002.]

4-2-040. Standards

- A. No person shall cause, suffer, allow, or permit a building or its appurtenances, subdivision site, driveway, parking area, vacant lot or sales lot, or an urban or suburban open area to be constructed, used, altered, repaired, demolished, cleared, or leveled, or the earth to be moved or excavated, or fill dirt to be deposited, without taking reasonable precautions to effectively prevent fugitive dust from becoming airborne.
- B. No person shall cause, suffer, allow, or permit a vacant lot, or an urban or suburban open area, to be driven over or used by motor vehicles, such as but not limited to all-terrain vehicles, trucks, cars, cycles, bikes, or buggies, without taking reasonable precautions to effectively prevent fugitive dust from becoming airborne.
- C. No person shall cause, suffer, allow or permit the performance of agricultural practices including but not limited to tilling of land and application of fertilizers without taking reasonable precautions to prevent particulate matter from becoming airborne.
- D. No person shall disturb or remove soil or natural cover from any area without taking reasonable precautions to effectively prevent fugitive dust from becoming airborne.
- E. No person shall crush, screen, handle or convey materials or cause, suffer, allow or permit material to be stacked, piled or otherwise stored without taking reasonable precautions to effectively prevent fugitive dust from becoming airborne.
- F. Stacking and reclaiming machinery utilized at storage piles shall be operated at all times with a minimum fall of material and in such manner, or with the use of spray bars and wetting agents, as to prevent excessive amounts of particulate matter from becoming airborne. Other reasonable precautions shall be taken, as necessary, to effectively prevent fugitive dust from becoming airborne.
- G. No person shall cause, suffer, allow or permit transportation of materials likely to give rise to fugitive dust without taking reasonable precautions to prevent fugitive dust from becoming airborne. Earth and other material that is tracked out or transported by trucking and earth moving equipment on paved streets shall be removed by the party or person responsible for such deposits. Removal of earth from paved streets shall not violate the visibility standard in Chapter 2.
- H. No person shall operate, maintain, use or permit the use of any commercial feedlot or commercial livestock area for purposes of feeding or displaying animals, or engage in other activity such as racing and exercising, without taking reasonable precautions to effectively prevent fugitive dust from becoming airborne.
- I. No person shall cause, suffer, allow, or permit the use, repair, construction or reconstruction of any road or alley without taking every reasonable precaution to effectively prevent fugitive dust from becoming airborne.
- J. No person shall operate a motor vehicle for recreational purposes in a dry wash, riverbed or open area in such a way as to cause or contribute to visible dust emissions which then cross property lines into a residential, recreational, institutional, educational, retail sales, hotel or business premises. For purposes

of this subsection "motor vehicles" shall include, but not be limited to trucks, cars, cycles, bikes, buggies and 3-wheelers. Any person who violates the provisions of this subsection shall be subject to prosecution under A.R. S. §49-513.

- K. No person shall cause, suffer, allow, or permit construction of mineral tailing piles without taking reasonable precautions to prevent excessive amounts of particulate matter from becoming airborne. For purposes of controlling emissions from mineral tailings piles, reasonable precautions shall mean wetting, chemical stabilization, revegetation or such other measures as may be approved by the Control Officer.

[Adopted effective June 29, 1993. Amended October 27, 2004.]

4-2-050. Monitoring and records

- A. Sources subject to §4-2-040. shall also be subject to the visible opacity limitations in Chapter 2, Article 8.
- B. Opacity observations for visible emissions of fugitive dust shall be conducted in accordance with techniques specified in Reference Method 9 in the Arizona Testing Manual for Air Pollutant Emissions.

[Adopted effective June 29, 1993. Revised May 14, 1997. Amended October 27, 2004.]

Construction Sites - Fugitive Dust rules begin below

ARTICLE 3. CONSTRUCTION SITES - FUGITIVE DUST

4-3-060. General Provisions

A. Intent; Applicability; Exceptions

1. Intent

The intent of this section is to improve the control of excessive fugitive dust emissions that have been traditionally associated with construction, earthwork and land development, and thereby minimize nuisance impacts.

2. Effective Date

Except for the registration requirements noted in A. 6(e), the approval date of the regulations and prohibitions set forth in this section is the date the Board of Supervisors adopts the final rule, unless the board of Supervisors specifies a later

date. The rules will become effective 60 days after the final publication in the Arizona Administrative Register.

3. Geographic Scope
These rules shall be effective throughout Pinal County.
4. Affected Activities
Within the meaning of this section, land stripping, earthmoving, blasting, trenching, road construction, grading, landscaping, stockpiling excavated materials, storing excavated materials, loading excavated materials, or any other activity associated with land development which results in a disturbed surface area or dust generating operations, shall all constitute "affected activities" if the disturbed surface area is greater than 0.1 acre.
5. Affected Parties
The requirements and prohibitions of this rule shall independently apply to the land owner, and to any contractor or subcontractor operating on the job site, provided that full compliance with this rule by one of those parties shall operate to the benefit of each.
6. Exceptions
Subject to the exceptions below, the prohibitions, registration requirements and performance standards of this section shall apply to all affected activities. Specific exceptions include:
 - a. The registration requirements of this section shall not apply to any facility operating under authority of a permit issued pursuant to ARS §§49-426 or 49-480.
 - b. In the case of an emergency, action may be taken to stabilize the situation before submitting an air quality earthmoving activity registration form. Upon stabilizing the emergency situation, an air quality earthmoving activity registration form shall be submitted.
 - c. In the case of legitimate vehicle test and development facilities and operations conducted by or for an equipment manufacturer, where dust is required to test and validate the design integrity, product quality and/or commercial acceptance, those activities shall be exempt from the registration requirements under this rule.
 - d. The registration requirements of this section shall not apply to road maintenance activities. However, road maintenance activities must include control measures and work practices to reduce dust generation. A dust control plan must be prepared and available upon request, which shall contain an explanation of the control measures and work practices to be utilized on the project or site.
 - e. The registration requirements of this section shall apply to public contracts, for work located outside of "Area A," bid on or after December 30, 2002, and private contracts bids on the date the contract is signed.
 - f. The registration requirements shall not apply with respect to affected activities associated with the emergency repair of utilities.

B. General Prohibition

Subject to the exemptions set forth in this section, it constitutes a violation of this rule for any person to cause or permit the use of any powered equipment for the purpose of conducting any affected activity, without:

1. Providing an earthmoving registration form to the control officer, obtaining a written acknowledgement from the control officer, and complying with the provisions of the registration notice; and
2. Complying with the universal performance standard defined in this rule (see 4-3-090).

[Adopted December 13, 2000, and effective March 1, 2001. Revised 12/4/2002.]

4-3-070. Definitions

See Article 3 (General Provisions and Definitions) of this code for definitions of terms that are used but not specifically defined in this rule.

1. "Affected Area" as used in this rule, means a job or construction site which is greater than 0.1 acres and where affected activities associated with land development disturb the surface of the earth in Pinal County.
2. "Bulk material" as used in this rule, means any material including but not limited to earth, rock, silt, sediment, sand, gravel, soil, fill, aggregate less than 2 inches in length or diameter, dirt, mud, demolition debris, trash, cinders, pumice, saw dust, and dry concrete, which are capable of producing fugitive dust at an industrial, institutional, commercial, governmental, construction and/or demolition site.
3. "Bulk material handling, storage and/or transporting operation" as used in this rule, means the use of equipment, haul trucks, and/or motor vehicles, such as but not limited to, the loading, unloading, conveying, transporting, piling, stacking, screening, grading, or moving of bulk materials, which are capable of producing fugitive dust at an industrial, institutional, commercial, governmental, construction, and/or demolition site.
4. "Carry-out/ trackout" as used in this rule means, any and all bulk materials that adhere to and agglomerate on the exterior surface of motor vehicles, haul trucks, and/or equipment (including tires) and that have fallen onto a paved roadway.
5. "Control measure" as used in this rule means, a preemptive or concurrent technique, practice, or procedure used to minimize the generation, emission, entrainment, suspension, and/or airborne transport of fugitive dust. Control measures include the following:

Control Measure	Description
a. Watering (pre-wetting)	Application of water by means of trucks, hoses, and/or sprinklers prior to conducting any land clearing. This will increase the moisture content of the soils and increase stability of the soil.
b. Watering (operational control)	In active earth-moving areas water should be applied at sufficient intervals and quantity to prevent visible emissions from extending more than 100 feet from the site's boundaries, as noted on the plot plan.
c. Watering (site stabilization)	Wind erosion control for inactive sites where there is no activity for seven (7) days or more.
d. Chemical stabilizers/dust suppressants	Effective in areas which are not subject to daily disturbances. Vendors can supply information on application methods and concentrations.

e. Wind barriers	Three to five-foot barriers (with 50% or less porosity), berms or equipment located adjacent to roadways or urban areas to reduce the amount of windblown material that leaves the site. Wind barriers must be implemented with watering or dust suppressants.
f. Cover haul vehicles	Entire surface area of hauled bulk materials should be covered with an anchored tarp, plastic or other material when the cargo container is empty or full.
g. Reduce speed limits	15 miles per hour maximum.
h. Gravel pad	A layer of washed gravel, rock, or crushed rock which is at least one inch or larger in diameter, maintained at the point of the intersection of a paved public roadway and a work site entrance to dislodge mud, dirt, and/or debris from the tires of motor vehicles, and/or haul trucks, prior to leaving the work site.
i. Grizzly	A device (i.e. rails, pipes, or grates) used to dislodge mud, dirt, and/or debris from the tires and undercarriage of motor vehicles and/or haul trucks prior to leaving the work site.
j. Wind sheltering	Enclose storage piles in silos or protected three sided barriers equal to bulk material height; line work site boundaries adjacent to roadways or urban areas with wind barriers.
k. Altering load-in/load-out procedures	Confine load-in-load out procedures to downwind side of the material and mist material with water prior to loading. Empty loader slowly and keep bucket close to the truck while dumping.
l. Other measures as proposed by registrant	Specific measures that are adequate to address nuisance issues at the earth moving activity site.

6. "Disturbed Surface Area" as used in this rule, means any portion of the earth's surface that has been physically moved, uncovered, destabilized, or otherwise modified from its undisturbed natural condition, thereby increasing the potential for emission of fugitive dust.
 - a. For trenches that are less than four feet in depth, it is assumed that a six (6) foot wide path of surface material will be disturbed as the trench is dug. Once the trench exceeds a length of 726 feet, 0.1 acres of surface area has been disturbed. For trenches that are four feet or greater in depth, it is assumed that a twelve (12) foot wide path of surface material will be disturbed as the trench is dug. Once the trench exceeds a length of 363 feet, 0.1 acres of surface area has been disturbed. If the registrant identifies situations in which the amount of surface area should be calculated differently, a case-by-case determination would be made.

- b. For calculations of disturbed surface areas for land clearing or earthmoving activities, 25 feet will be added to each dimension of all structures, driveways, concrete pads, and other construction projects being built on the site to allow for an equipment utilization zone. If this final figures exceeds 4,356 square feet, a dust registration is required for the site.
7. "Dust generating operation" as used in this rule, means any activity capable of generating fugitive dust, including but not limited to, land clearing, earthmoving, weed abatement by discing or blading, excavating, construction, demolition, material handling, storage and/or transporting operations, vehicle use and movement, the operation of any outdoor equipment, or unpaved parking lots. For the purpose of this rule, landscape maintenance and/or playing on a ballfield shall not be considered a dust generating operation. However, landscape maintenance shall not include grading, trenching, nor any other mechanized surface disturbing activities performed to establish initial landscapes or to redesign existing landscapes.
8. "Dust suppressant" as used in this rule, means water, hygroscopic material, solution of water and chemical surfactant foam, non-toxic chemical stabilizer or any other dust palliative, which is not prohibited by the U. S. Environmental Protection Agency (EPA) or the Arizona Department of Environmental Quality (ADEQ), or any applicable law, rule, or regulation, as a treatment material for reducing fugitive dust emissions.
9. "Earthmoving activity" as used in this rule, means any land stripping, earthmoving, blasting, trenching, road construction, grading, landscaping, stockpiling excavated materials, storing excavated materials, loading excavated materials, or any other activity associated with land development where the objective is to disturb the surface of the earth, which shall all constitute "affected activities" if the job site is greater than 0.1 acre. (See 4.3.600.A.4 - General Provisions)
10. "Earthmoving operation" as used in this rule, means the use of any equipment for an activity which may generate fugitive dust, such as but not limited to cutting and filling, grading, leveling, excavating, trenching, loading or unloading bulk material, demolishing, blasting, drilling, adding to or removing bulk materials from open storage piles, back filling, soil mulching, landfill operations, or weed abatement by discing or blading.
11. "Freeboard" as used in this rule, means the vertical distance between the top edge of a cargo container and the highest point at which the bulk material contacts the sides, front, and back of the container.
12. "Fugitive dust" as used in this rule, means the regulated particulate matter, which is not collected by a capture system, which is entrained in the ambient air, and which is caused from human and/or natural activities, such as but not limited to, movement of soils, vehicles, equipment, blasting, and wind. For the purpose of this rule, fugitive dust does not include particulate matter emitted directly from the exhaust of motor vehicles and other internal combustion engines, from portable brazing, soldering, or welding equipment, and from piledrivers.
13. "Gravel pad" as used in this rule, means a layer of washed gravel, rock, or crushed rock which is at least one inch or larger in diameter, maintained at the point of intersection of a paved public roadway and a work site or source entrance to dislodge mud, dirt, and/or debris from the tire of the motor vehicles or haul trucks prior to leaving the work site.
14. "Grizzly" as used in this rule, means a device maintained at the point of intersection of a paved public roadway and a work site or source entrance to dislodge mud, dirt and/or debris from the tires of the motor vehicles or haul trucks prior to leaving the work site.
15. "Haul truck" as used in this rule, is any fully or partially open-bodied self-propelled vehicle including any non-motorized attachments, such as but not limited to, trailers or other

- conveyances, which are connected to or propelled by the actual motorized portion of the vehicle used for transporting bulk materials.
16. "Motor vehicle" as used in this rule, is a self-propelled vehicle for use on the public roads and highways of the State of Arizona and required to be registered under the Arizona State Uniform Motor Vehicle Act, including any non-motorized attachments, such as but not limited to, trailers and other conveyances which are connected to or propelled by the actual motorized portion of the vehicle.
 17. "Nuisance" as used in this rule, means to discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are to may tend to be injurious or to adversely affect human health or welfare, animal life, vegetables, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.
 18. "Off-road vehicle" as used in this rule, is any self-propelled conveyance specifically designed for off-road use, including but not limited to, off-road or all-terrain equipment, trucks, cars, motorcycles, motorbikes, or motorbuggies.
 19. "Opacity" as used in this rule, means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.
 20. "Owner, general contractor, and/or subcontractor" as used in this rule, is any person who owns, leases, operates, controls, or supervises a dust generating operation subject to the requirements of this rule.
 21. "Public roadway" as used in this rule, means any roadways that are open to public travel.
 22. "Road Construction" as used in this rule, means the use of any equipment for the paving or new construction of a road surface, street or highway.
 23. "Road Maintenance" as used in this rule, means the use of any equipment for the repair and preservation of an old road surface, street or highway.
 24. " Sensitive area" as used in this rule, means a neighborhood with man-made structures utilized for human residence or business.
 25. "Source" as used in this rule, mans the construction site which is under common control or ownership, and all fixed or moveable objects on such site, which is a potential point of origin of fugitive dust.
 26. " Stockpile" as used in this rule, is an open accumulation of bulk material with a 5% or greater silt content which in any one point attains a quantity greater than 10 cubic yards and is located on a disturbed surface area that is greater than 0.1 acres. Silt content shall be assumed to be 5% or greater unless the affected party can show, by testing in accordance with ASTM method C136-96a or other equivalent method approved in writing by the Control Officer and the EPA Administrator, that the silt content is less than 5%.
 27. "Trackout control device" as used in this rule, means a gravel pad, grizzly, wheel wash system, or a paved area, located at the point of intersection of an unpaved area and a paved roadway, that controls or prevents vehicular trackout.
 28. "Traffic hazard" as used in this rule, means a discharge from any source whatsoever such quantities of air contaminants, uncombined water, or other materials, which cause or have a tendency to cause interference with normal road use.
 29. "Trench" as used in this rule, mans a long, narrow excavation dug in the earth (as for drainage).
 30. "Unpaved haul/access road" as used in this rule, means any on-site unpaved road used by commercial, industrial, institutional, and/or governmental traffic.
 31. "Unpaved parking lot" as used in this rule, means any area larger than 5,000 square feet that is not paved and that is used for parking, maneuvering, or storing motor vehicles.

32. "Unpaved road" as used in this rule, means any road or equipment path that is not paved. For the purpose of this rule, an unpaved road is not a horse trail, hiking path, bicycle path, or other similar path used exclusively for purposes other than travel by motor vehicles.
33. "Visible emissions" as used in this rule, means any emissions which are visually detectable without the aid of instruments and which contain particulate matter.
34. "Visibility impairment" as used in this rule, means any humanly perceptible change in visibility from that which would have existed under natural conditions.
35. "Wind barrier" as used in this rule, means any structure put up along a source's boundaries to reduce the amount of wind blown dust leaving the site. Creating a wind barrier includes but is not limited to installing wind fencing, construction of berms, or parking on-site equipment so that it blocks the wind.
36. "Wind-blown dust" as used in this rule, means visible emissions from any disturbed surface area, which are generated by wind action alone.
37. "Wind event" as used in this rule, means when the 60-minute average time and wind speed is greater or equal to 20 miles per hour, or such other wind speed/duration exemption threshold as may apply under Pinal County' s Natural Events Action Plan (NEAP) dated November 25, 1997:
 1. An 8-hour average wind speed in excess of 20 miles per hour (m. p. h.)
 2. A 1-1/2 hour average wind speed in excess of 22 m. p. h.
 3. A 1-hour average wind speed in excess of 25 m. p. h.
 4. A 15 minute average wind speed in excess of 30 m. p. h.
38. "Wind fencing" as used in this rule, means a 3 to 5 foot barrier with 50% or less porosity located adjacent to roadways or urban areas.
39. "Work site" as used in this rule, means any property upon which dust generating operations and/or earthmoving operations occur.
40. "Work practices" as used in this rule, means a technique or operational procedure used to minimize the generation, emission, entrainment, suspension, and/or airborne transport of fugitive dust. Work practices include the following:

Specific Activity	Work Practice
Bulk Material Hauling off-site onto paved public roadway	1. Load all trucks such that the freeboard is not less than three inches; and prevent spillage or loss of bulk material from holes or other openings in the conveyance; cover all haul trucks (empty or full) with a tarp or other suitable anchored material.
Bulk material hauling on-site (within work site)	2. Limit the vehicle speed to less than 15 mph; or apply water to the top of the load; or cover the hauled material.
Spillage, carry-out, erosion, and/or trackout	3. Install a suitable trackout control device from all work sites with a disturbed area of 5 acres or more and from all work sites where 100 cubic yards of bulk materials are hauled on/off site per day.

Cleanup spillage, carry-out, erosion and/or trackout on the following schedule:	4. Immediately, when spillage, carry-out, and/or trackout extend a cumulative distance of 50 linear feet ore more; or at the end of the work day.
Unpaved easements, right-of-way, and access roads	5. Inside PM ₁₀ nonattainment area, restrict vehicular speeds to 15 miles per hour.
Open storage piles	6. During stacking, loading and unloading operations, apply water as necessary and/or construct and maintain wind barriers, storage silos, or a three-sided enclosure to surround pile and whose height is equal to the pile.
Weed abatement by discing or blading	7. Apply water before and during weed abatement.
Other work activities as provided by the registrant	8. Specific work practices that are adequate to address nuisance issues at the earth moving activity site.

[Adopted December 13, 2000, and effective March 1, 2001. Renumbered and revised 12/4/2002. Amended October 27, 2004.]

4-3-080. Registration Requirements

Prior to engaging in affected activities on a job site, at least one affected party shall file a registration form with the Control Officer, pay the appropriate fee in Appendix C, and receive a registration notice from the Control Officer.

1. Registration Form:

- a. The applicant shall present a registration on a form approved by the Control Officer, and shall include all essential identification information as specified on that form. A separate registration form is required for each site location not contiguous to the location on the original registration form, unless an annual block registration is approved.
- b. Each registration shall also include a plot plan with linear dimensions in feet. The plot plan must be on 8-1/2 by 11 inch paper, and may be on one or more sheets. The plan should identify the parcel, the street address, the direction north, the total area to be disturbed and indicates the sources of fugitive dust emission on the plot plan (delivery, transport and storage areas).
- c. Using the options on the registration form or in the applicant' s own words, each registration application shall contain an explanation of how the applicant will demonstrate compliance with this rule, by demonstrating after-the-fact that the control measures and work practices proposed in the registration were in fact utilized on the project. A demonstration of compliance would typically include a daily written log at the work site, or the maintenance of invoices and/or payments reflecting the cost of control measures.
- d. Annual Block Registration: The land owner, contractor, or subcontractor operating on the job site may submit to the Control Officer one Earthmoving Registration application for more than one earthmoving operation at which construction will commence within 12 months of registration issuance. The earthmoving operations must consist of routine operations: the expansion or extension of utilities, paved roads, unpaved roads, road shoulders, and/or alleys, and public right-of-ways at non-contiguous sites.

- i. An annual block registration must include all the requirements listed above in this subsection (1 a. through 1 c.) and a description of each site and type of earthmoving activity to be conducted.
 - ii. For any project not listed in the Earthmoving Annual Block Registration Application, the applicant must notify the Control Officer in writing at least three working days prior to commencing the earthmoving activity. Such notification must include the site location, size, and type of earthmoving activity, and start date.
 - e. Registration Renewal: The first registration obtained for an affected project must cover a contiguous area (unless it is an " annual block registration") and it is valid for one year from the date of issue. If the project has not been completed at the end of the one-year period, the dust registration must be renewed. Upon renewal, the total acreage covered by the dust registration does not have to be contiguous, although all acreage covered by the renewed dust registration must have been included in the original dust registration.
2. Registration acknowledgment:
- a. The registration acknowledgment from the control officer will contain the universal performance standard and conditions regarding the necessary control measures and work practices specific to the applicable project as proposed by the registrant.
 - b. The registration acknowledgment shall contain a provision that all registrants keep records documenting the actual application or implementation of the control measures delineated in the registration application for at least 30 days following the termination of the registration acknowledgment.
 - c. The registration acknowledgment shall be valid for a period of not more than one year from the date of issue, and may be renewed by providing the Control Officer a new registration application and payment of the appropriate fee.
 - d. Registrants shall notify the Control Officer within five working days of the start and completion of the project.
 - e. At all sites that are five acres or larger, registrants shall erect a project information sign at the main entrance that is visible to the public or at each end of the road construction project site. The sign shall be a minimum of 24 inches tall by 30 inches wide, have a white background, and have the words "DUST CONTROL" shown in black block lettering which is at least four inches high, and shall contain the following information in legible fashion"
 - i. Project Name
 - ii. Name and phone number of person(s) responsible for conducting project
 - iii. Text stating: " Dust Complaints? Call Pinal County Air Quality Control District at (520) 866-6929. "

[Adopted December 13, 2000, and effective March 1, 2001. Renumbered and revised 12/4/2002. Amended December 3, 2003. Amended October 27, 2004. Amended December 21, 2005.]

4-3-090. Universal Performance Standards

- 1. Within the affected area, a landowner or contractor shall not conduct or allow dust generating operations:
 - a. in a manner such that an unreasonable amount of dust is blown into sensitive areas so as to create a public nuisance;
 - b. in a manner such that opacity of the dust leaving the property exceeds twenty percent (20%) or greater as measured using Test Method 9 (40 CFR 60,

- Appendix A) or an equivalent test method approved by the Control Officer and the EPA Administrator;
- c. in a manner that will produce visibility impairment that could threaten public safety.
2. Failure to comply with these requirements shall presumptively constitute cause for the Control Officer or his authorized representative to order a halt to the offending activity. Failure by an owner, contractor or facility operator to respond to such an order from the Control Officer shall constitute a violation of this rule.
 3. Violations: Generally any land owner, contractor, or subcontractor operating on the job site, who violates any Pinal County Air Quality Control District rule may be subject to an order of abatement, a civil action for injunctive relief or civil penalties, or may be found guilty of a Class I Misdemeanor.
 4. Violation Exemptions:
 - a. Wind Event: exceedances of the opacity limit that occur due to a wind event shall be exempted from enforcement action if the owner/general contractor demonstrates all of the following conditions:
 - i. All control measures required in the registration acknowledgment were followed and one or more of the work practices were applied and maintained;
 - ii. The 20% opacity exceedance could not have been prevented by better application, implementation, operation or maintenance of the control measures;
 - iii. The occurrence of a wind event on the day(s) in question is documented by records of the Pinal County Air Quality Control District monitoring station in the affected area, from any other certified meteorological station, or by a wind instrument that is calibrated to the manufacturer' s standards and that is located at the site being investigated.
 - b. No opacity violation shall apply to emergency maintenance of flood control channels and water retention basins, provided that control measures were being implemented.
 5. Limited scope of rule
Nothing in this rule shall authorize or permit any practice which is in violation of any statute, ordinance, rule or regulation.

[Adopted December 13, 2000, and effective March 1, 2001. Amended December 4, 2002. Amended October 27, 2004.]

Agenda Item #7

2014 Exceedances of the 8-Hour Ozone Standard of .075 ppm by Date
(Based on Preliminary Data)

Date	Monitor	Max 8-Hour (ppm)	Additional Information
May 28, 2014	Cave Creek	0.076	
June 5, 2014	Falcon Field	0.078	
	Humboldt Mountain	0.080	
	Mesa	0.078	
	Pinnacle Peak	0.081	
	Rio Verde	0.077	
	South Phoenix	0.076	
June 6, 2014	Blue Point	0.088	
	Cave Creek	0.081	
	Central Phoenix	0.077	
	Falcon Field	0.088	
	Glendale	0.078	
	Humboldt Mountain	0.082	
	Mesa	0.086	
	North Phoenix	0.081	
	Phoenix Supersite	0.081	
	Pinnacle Peak	0.088	
	Rio Verde	0.085	
	South Phoenix	0.080	
	South Scottsdale	0.078	
	Tempe	0.077	
	Tonto Nat'l Mon.+	0.085	
West Phoenix	0.078		
June 7, 2014	Falcon Field	0.076	
	Humboldt Mountain	0.077	
	Mesa	0.077	
	Pinnacle Peak	0.081	
June 9, 2014	Blue Point	0.076	
	Falcon Field	0.078	
	Mesa	0.078	
	Pinnacle Peak	0.080	
July 7, 2014	North Phoenix	0.078	
July 14, 2014	North Phoenix	0.077	
July 28, 2014	North Phoenix	0.078	
	Phoenix Supersite	0.077	
	Pinnacle Peak	0.078	
	West Phoenix	0.076	
September 11, 2014	Glendale	0.079	
	Mesa	0.076	
	North Phoenix	0.082	
	Phoenix Supersite	0.084	
	West Phoenix	0.079	
September 12, 2014	Mesa	0.079	
	Phoenix Supersite	0.078	
	West Phoenix	0.078	
September 25, 2014	North Phoenix	0.076	
	Pinnacle Peak	0.080	

+ The Tonto National Monument monitor is located outside the Eight-Hour Ozone Nonattainment Area.

**2014 Exceedances of the 8-Hour Ozone Standard of .075 ppm by Monitor
(Based on Preliminary Data)**

Monitor	Date	Max 8-Hour (ppm)	Additional Information
Blue Point	June 6, 2014	0.088	
	June 9, 2014	0.076	
Cave Creek	May 28, 2014	0.076	
	June 6, 2014	0.081	
Central Phoenix	June 6, 2014	0.077	
Falcon Field	June 5, 2014	0.078	
	June 6, 2014	0.088	
	June 7, 2014	0.076	
	June 9, 2014	0.078	
Glendale	June 6, 2014	0.078	
	September 11, 2014	0.079	
Humboldt Mountain	June 5, 2014	0.080	
	June 6, 2014	0.082	
	June 7, 2014	0.077	
Mesa	June 5, 2014	0.078	
	June 6, 2014	0.086	
	June 7, 2014	0.077	
	June 9, 2014	0.078	
	September 11, 2014	0.076	
	September 12, 2014	0.079	
North Phoenix	June 6, 2014	0.081	
	July 7, 2014	0.078	
	July 14, 2014	0.077	
	July 28, 2014	0.078	
	September 11, 2014	0.082	
	September 25, 2014	0.076	
Phoenix Supersite	June 6, 2014	0.081	
	July 28, 2014	0.077	
	September 11, 2014	0.084	
	September 12, 2014	0.078	
Pinnacle Peak	June 5, 2014	0.081	
	June 6, 2014	0.088	
	June 7, 2014	0.081	
	June 9, 2014	0.080	
	July 28, 2014	0.078	
	September 25, 2014	0.080	
Rio Verde	June 5, 2014	0.077	
	June 6, 2014	0.085	
South Phoenix	June 5, 2014	0.076	
	June 6, 2014	0.080	
South Scottsdale	June 6, 2014	0.078	
Tempe	June 6, 2014	0.077	
Tonto Nat'l Mon.+	June 6, 2014	0.085	
West Phoenix	June 6, 2014	0.078	
	July 28, 2014	0.076	
	September 11, 2014	0.079	
	September 12, 2014	0.078	

+ The Tonto National Monument monitor is located outside the Eight-Hour Ozone Nonattainment Area.

Eight-Hour Ozone Monitoring Data for 2012-2014 (in ppm)*

	<u>2012</u>				<u>2013</u>				<u>2014*</u>				<u>3-Year</u>
	<u>Max</u>	<u>2nd High</u>	<u>3rd High</u>	<u>4th High</u>	<u>Max</u>	<u>2nd High</u>	<u>3rd High</u>	<u>4th High</u>	<u>Max</u>	<u>2nd High</u>	<u>3rd High</u>	<u>4th High</u>	<u>Average</u>
													<u>4th High*</u>
Apache Junction	0.080	0.078	0.077	0.076	0.074	0.073	0.069	0.069	0.074	0.069	0.069	0.066	0.070
Blue Point Bridge	0.079	0.079	0.078	0.077	0.077	0.077	0.076	0.075	0.088	0.076	0.075	0.074	0.075
Buckeye	0.078	0.070	0.069	0.068	0.062	0.061	0.060	0.060	0.068	0.065	0.061	0.060	0.062
Cave Creek	0.081	0.080	0.078	0.078	0.076	0.074	0.072	0.072	0.081	0.076	0.074	0.074	0.074
Central Phoenix	0.084	0.082	0.081	0.077	0.079	0.079	0.077	0.075	0.077	0.071	0.071	0.071	0.074
Dysart	0.079	0.078	0.074	0.073	0.075	0.075	0.074	0.074	0.075	0.074	0.072	0.070	0.072
Falcon Field	0.075	0.071	0.069	0.069	0.082	0.080	0.079	0.077	0.088	0.078	0.078	0.076	0.074
Fountain Hills	0.083	0.081	0.079	0.077	0.072	0.072	0.070	0.070	0.075	0.070	0.069	0.068	0.071
Glendale	0.088	0.084	0.079	0.078	0.077	0.076	0.075	0.074	0.079	0.078	0.075	0.071	0.074
Humboldt Mountain	0.082	0.082	0.080	0.079	0.078	0.074	0.073	0.073	0.082	0.080	0.077	0.074	0.075
Mesa	N/A	N/A	N/A	N/A	0.086	0.079	0.079	0.079	0.086	0.079	0.078	0.078	N/A
North Phoenix	0.091	0.089	0.087	0.083	0.080	0.080	0.080	0.079	0.082	0.081	0.078	0.078	0.080
Phoenix Supersite	0.084	0.083	0.080	0.076	0.084	0.081	0.080	0.079	0.084	0.081	0.078	0.077	0.077
Pinnacle Peak	0.082	0.082	0.080	0.079	0.080	0.078	0.077	0.077	0.088	0.081	0.081	0.080	0.078
Rio Verde	0.076	0.076	0.075	0.072	0.074	0.073	0.073	0.073	0.085	0.077	0.074	0.073	0.072
South Phoenix	0.087	0.081	0.078	0.078	0.081	0.080	0.076	0.075	0.080	0.076	0.075	0.073	0.075
South Scottsdale	0.086	0.083	0.081	0.080	0.079	0.077	0.075	0.074	0.078	0.073	0.072	0.072	0.075
Tempe	0.078	0.075	0.073	0.073	0.077	0.073	0.072	0.071	0.077	0.073	0.071	0.071	0.071
Tonto National Mon.+	0.080	0.079	0.079	0.078	0.082	0.074	0.072	0.072	0.085	0.074	0.073	0.072	0.074
West Chandler	0.082	0.079	0.075	0.074	0.081	0.074	0.072	0.070	0.074	0.074	0.071	0.070	0.071
West Phoenix	0.087	0.087	0.084	0.083	0.083	0.082	0.077	0.076	0.079	0.078	0.078	0.076	0.078

* Based on preliminary data for 2014.

+ The Tonto National Monument Monitor is located outside the eight-hour ozone nonattainment area.

Note: Sites violating the .075 ppm standard are shown in bold.

Sources: EPA Air Quality System; Maricopa County; Pinal County; Arizona Department of Environmental Quality.