

No. 14-72327

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

SANDRA L. BAHR, and DAVID
MATUSOW,

Petitioners,

v.

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

Respondents,

STATE OF ARIZONA, ex rel. Henry R.
Darwin, Director, Arizona Department of
Environmental Quality,

Intervenor-Respondent.

On Petition for Review of final
action, published at 79 Fed. Reg.
33107-33116

STATE OF ARIZONA'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

The State of Arizona agrees with Respondents' statement of jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Did the United States Environmental Protection Agency ("EPA") correctly apply Section 319(b) of the Clean Air Act ("CAA")¹ and 40 C.F.R. § 50.14 (the "Exceptional Events Rule") in approving the high wind dust event demonstrations that Arizona submitted to establish that twenty-five separate days over a three-year time period constituted exceptional events?
2. Did the EPA correctly determine that CAA Section 189(d) does not require that a five percent plan include specific PM-10 control measures?
3. Did the EPA correctly determine that CAA Section 172(c)(9) does not preclude a State from voluntarily implementing one or more contingency measures before they are triggered under the CAA?

ADDENDUM TO BRIEF

The full texts of significant statutory and regulatory provisions are provided in Addenda to Petitioners' and Respondents' Briefs. Arizona is not attaching a separate Addendum.

¹ The CAA, comprised of Sections 101-618, is codified at 42 U.S.C. §§ 7401-7671q. A side-by-side comparison of the CAA to the U.S. Code, with a link to each section, can be found at <http://www.epa.gov/air/caa/title1.html>.

STATEMENT OF THE CASE

The Clean Air Act (“CAA”) is designed to improve air quality nationwide through the ongoing efforts of EPA and the States. 42 U.S.C. §§ 7401–7671. Among other things, Congress assigned responsibility to EPA for establishing National Ambient Air Quality Standards (“NAAQS”) for six criteria pollutants, one of which is PM-10.² 42 U.S.C. §§ 7408–7409. EPA adopted a 24-hour standard of 150 micrograms per cubic meter as the current PM-10 NAAQS. 40 C.F.R. § 50.6(a). States demonstrate attainment with the PM-10 NAAQS by operating monitors which measure the 24-hour average of PM-10 in the ambient air. In simplest terms, to attain the PM-10 NAAQs, a State must record the number of exceedances per monitor per year and then average them over the past three calendar years. 40 C.F.R. § 50.6, Appendix K. Attainment is achieved when this number is less than or equal to one for each of the monitors in a nonattainment area over a rolling three-calendar-year period. *Id.*

Congress revised the CAA in 2005 to include a provision regarding air quality monitoring data that has been influenced by exceptional events. 42 U.S.C. § 7619(b). The CAA defines an “exceptional event” as an event that “(i) affects air quality; (ii) is not reasonably controllable or preventable; (iii) is an event caused by

² “PM-10” means particulate matter 10 micrometers or smaller in diameter. 40 CFR § 50.6(c).

human activity that is unlikely to recur at a particular location or a natural event; and (iv) is determined by [EPA] through the process established in [its] regulations to be an exceptional event.” 42 U.S.C. § 7619(b)(1)(A). The EPA promulgated the Exceptional Events Rule in 2007. 40 C.F.R. §§ 50.1(j)(k)(1); 50.14, and § 51.930. If EPA concurs with a State’s demonstration that an exceptional event has occurred, then the monitored exceedances are excluded from the calculations used to determine whether an area has achieved attainment of the PM-10 NAAQS. 40 C.F.R. § 50.14.

As to the role of the States, Congress determined that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3). To comply with the NAAQS, the CAA requires that States adopt and administer State Implementation Plans (“SIPs”) and SIP revisions that meet certain substantive criteria. 42 U.S.C. § 7410. The EPA reviews each SIP and approves or disapproves it. If a SIP meets the applicable requirements, EPA is required to approve the SIP in its entirety. 42 U.S.C. § 7410(k)(3). Alternately, EPA may approve a SIP in part and disapprove a SIP in part if only a portion of the SIP meets the applicable requirements. *Id.* If approved in whole or in part, the approved provisions become federally enforceable. 42 U.S.C. § 7413. If disapproved, the state is subject to sanctions and

the control measures of the Federal Implementation Plan. 42 U.S.C. §§ 7410(c), 7509.

For States with areas that have failed to attain the PM-10 NAAQS by specified deadlines, the CAA provides a statutory scheme whereby the required levels of controls that a state must implement are designed to be incremental in nature, with each additional level aimed at further reduction of PM-10 emissions in a nonattainment area. 42 U.S.C. §§ 7513, 7513a, 7513b. A state is required to implement the first level of control, “reasonably available control measures” (“RACM”), once EPA designates an area as moderate non-attainment. 42 U.S.C. § 7513a(a)(1)(C). Should an area fail to achieve attainment with the PM-10 NAAQS by the applicable deadline, then EPA downgrades that area to a serious nonattainment status. 42 U.S.C. § 7513(b). A state is then required to implement measures to meet the next, more stringent level of control, identified as “best available control measures” (“BACM”). 42 U.S.C. § 7513a(b)(1)(B). Should the PM-10 NAAQS not be attained by the new deadline, the state must implement further measures to reduce PM-10 emissions by no less than five percent each year, based on the prior year’s emissions inventory, until the NAAQS is attained. 42 U.S.C. § 7513a(d). The SIP revision that a State submits to EPA describing the measures it will take to achieve the five percent reduction requirement is often referred to as a “five percent plan.”

Another, separate level of control, “most stringent measures” (“MSM”) is required if a state requests an extension of the attainment date for a serious PM-10 nonattainment area and meets the applicable requirements for requesting such an extension. 42 U.S.C. § 7513(e).

In 2002, EPA approved Arizona’s SIP revision for Maricopa County PM-10 Serious Nonattainment Area (“Nonattainment Area”) which included MSM (Arizona had previously implemented RACM and BACM in the Nonattainment Area). 67 Fed. Reg. 48718 (July 25, 2002). EPA also approved Arizona’s request to extend its deadline to attain the PM-10 NAAQS to December 31, 2006. *Id.* The Nonattainment Area failed to attain the PM-10 NAAQS by the extended deadline, thus requiring a SIP revision providing for annual reductions of PM-10 of not less than five percent of the most recent emissions inventory until the NAAQS is attained. 42 U.S.C. § 7513a(d).

On May 25, 2012, Arizona³ submitted a SIP revision⁴ (“Five Percent Plan”) to EPA for the PM-10 Nonattainment Area. On February 6, 2014, EPA proposed

³ Numerous agencies developed the Five Percent Plan, including the Maricopa Association of Governments, its member governments and agencies, the Arizona Department of Environmental Quality, and the Pinal County Air Quality Control District.

⁴ The 2012 Five Percent Plan consists of the *Maricopa County Association of Governments 2012 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area* and the *2012 Five Percent Plan for PM-10 for the Pinal County Township 1 North, Range 8 East Nonattainment Area*.

approval of the Five Percent Plan as meeting all relevant statutory and regulatory requirements. 79 Fed. Reg. 7118-7126 (“Proposed Rule”) (Petitioners’ Excerpts of Record (“ER”) 211-219). Specifically, EPA proposed to approve: (A) the 2008 baseline emissions inventory and the 2007, 2009, 2010, 2011 and 2012 projected emission inventories as meeting the requirements of CAA Section 172(c)(3); (B) the attainment demonstration as meeting the requirements of CAA Sections 189(d) and 179(d)(3); (C) the five percent demonstration as meeting the requirements of CAA Section 189(d); (D) the reasonable further progress and quantitative milestone demonstrations as meeting the requirements of CAA Sections 172(c)(2) and 189(c); (E) the contingency measures as meeting the requirements of CAA Section 172(c)(9); and, (F) the Motor Vehicle Emissions Budget as compliant with the budget adequacy requirements of 40 CFR 93.118(e). 79 Fed. Reg. 7118 (ER 218). During the thirty day public comment period that ensued, EPA received twelve public comment letters on the Proposed Rule, including two submitted on behalf of Sandra L. Bahr and David Matusow (“Petitioners”). ER 2, 356-71.

The EPA published a final rule approving the Five Percent Plan on June 10, 2014, with no substantive changes from the Proposed Rule. 79 Fed. Reg. 33107-33116 (“Final Rule”) (ER 1-10). Under CAA Section 307(b), Petitioners filed a Petition for Review on July 29, 2014, challenging the following portions of EPA’s

approval of the Five Percent Plan: (1) the attainment demonstration as meeting the requirements of CAA Sections 189(d) and 179(d)(3) (vis-à-vis EPA's approval of Arizona's exceptional events demonstrations for calendar years 2010-2012); (2) the five percent demonstration as meeting the requirements of CAA Section 189(d); and, (3) the contingency measures as meeting the requirements of CAA Section 172(c)(9). Petitioners' Brief at 2-3, 26-57.

The State of Arizona ("Arizona"), ex rel. Henry R. Darwin, Director, on behalf of the Arizona Department of Environmental Quality ("ADEQ"), filed a Motion to Intervene on August 28, 2014, which this Court approved on September 24, 2014.

STATEMENT OF FACTS

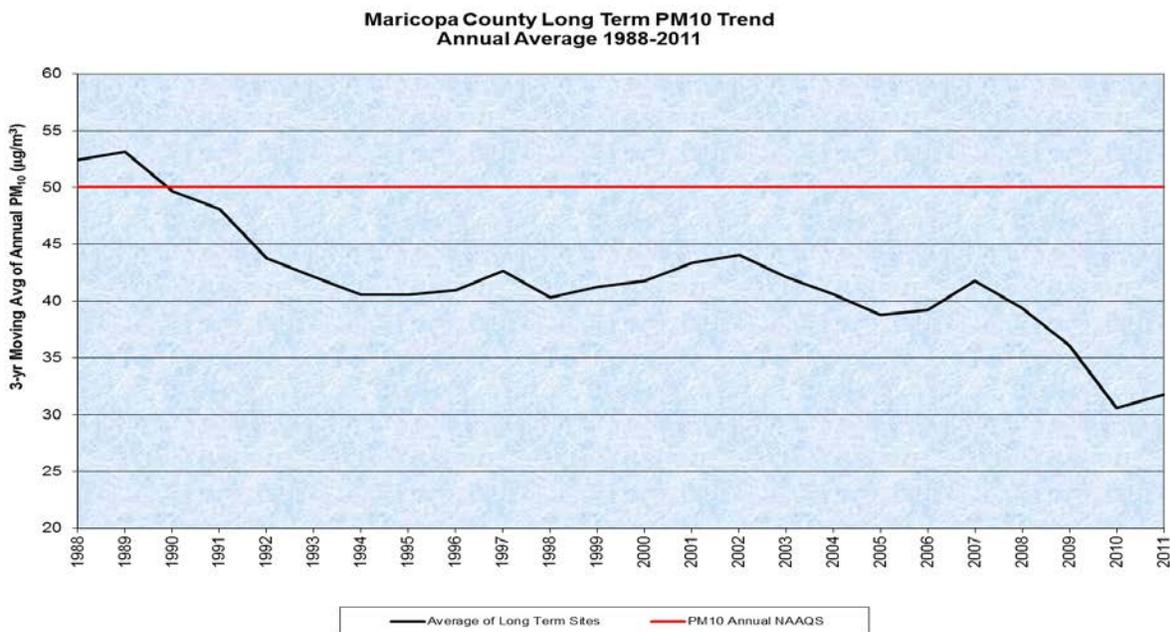
I. History of PM-10 Air Quality Improvement Efforts and Results in the Maricopa County Nonattainment Area.

The history of Arizona's efforts to control PM-10 in the Nonattainment Area is expansive and long, spanning over forty years. Arizona submitted its first state implementation plan, "The State of Arizona Air Pollution Control Implementation Plan," to EPA on January 28, 1972, and on January 28, 1974, Arizona submitted the Maricopa County Air Pollution Control District Regulation III, Rule 31 (Particulate Matter Emissions)." 40 C.F.R. § 52.120.

In the ensuing forty years, EPA has approved a number of implementation plans detailing numerous PM-10 control measures that Arizona has implemented

in the Nonattainment Area. *See, e.g.*, 67 Fed. Reg. 48718 (July 25, 2002) (approving approximately seventy-seven control measures). The Five Percent Plan that is the subject of this action includes over fifty additional control measures to reduce PM-10 emissions. ER 288-98.

As the following chart demonstrates, as a result of these control measures, Arizona reduced the annual average concentration of PM-10 pollution in the Nonattainment Area by approximately forty percent from 1988 to 2011.



http://www.azdeq.gov/function/about/download/25th_anniversary_book-web.pdf⁵

⁵ The Court may take judicial notice of public records. Fed. R. Evid. 201; *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001).

II. Summary of High Wind Dust Events Between 2010 and 2012.

The following table illustrates the twenty-five days between 2010 and 2012 that Arizona flagged as exceptional events and submitted high wind dust event demonstrations to EPA. ER 14, 24, 25, 72. EPA concurred with ADEQ's demonstrations that these twenty-five days qualified as exceptional events pursuant to the Exceptional Events Rule found at 40 C.F.R. § 50.14. ER 11, 20, 68.

PM-10 Exceedance Days	Date	Apache Junction	Buckeye	Central Phoenix	Durango Complex	Dysart	Glendale	Greenwood	Higley	JLG Supersite (BAM)	JLG Supersite (TEOM)	North Phoenix POC-1	North Phoenix POC-2	South Phoenix	Tempe	West Chandler	West 43rd	West Phoenix	Zuni Hills	Cumulative Monitor Exceedances
1	2/19/2011															x				1
2	7/3/2011		x	x	x	x	x	x	x	x	x			x		x	x	x	x	14
3	7/4/2011								x											1
4	7/5/2011		x	x	x	x	x	x	x		x			x		x		x		11
5	7/7/2011								x							x				2
6	7/8/2011	x																		1
7	7/18/2011		x	x	x	x		x						x			x	x		8
8	8/3/2011															x				1
9	8/18/2011		x	x										x		x				4
10	8/25/2011		x	x	x	x	x	x		x	x			x		x	x	x	x	13
11	8/26/2011	x																		1
12	8/27/2011		x	x	x		x	x						x		x	x	x		9
13	8/28/2011	x							x											2
14	9/2/2011	x	x	x	x			x	x		x			x		x	x			10
15	9/11/2011									x	x	x	x					x		5
16	9/12/2011				x												x	x		3
17	10/4/2011								x							x				2
18	11/4/2011	x	x	x	x	x	x	x	x	x	x	x	x	x		x	x	x	x	17
19	2/27/2012																x			1
20	6/16/2012		x		x	x			x					x			x	x		7
21	6/27/2012			x	x		x	x	x	x	x	x		x	x	x	x		x	13
22	7/11/2012				x			x						x			x			4
23	8/11/2012								x							x				2
24	8/14/2012				x												x			2
25	9/6/2012															x				1
Total Monitor Exceedances		5	9	9	12	6	6	9	11	5	7	3	2	11	1	14	12	9	4	135
Total Monitoring Days		179	1094	1088	1076	1094	1082	1089	1089	1092	546	577	120	1081	306	1086	1080	1076	1090	15725
Percentage of Monitoring Days Exceeding (%)		2.79	0.82	0.83	1.12	0.55	0.55	0.83	1.01	0.46	1.28	0.52	1.67	1.02	0.33	1.29	1.11	0.84	0.37	0.86

On each of these twenty-five days, one or more of the eighteen monitors in the Nonattainment Area exceeded the PM-10 NAAQS. ER 14, 24, 25, 72. On several of these days, more than ten of the monitors recorded exceedances. *Id.* For

example, on November 4, 2011, seventeen monitors recorded exceedances; on July 3, 2011, fourteen monitors recorded exceedances; and on both August 25, 2011 and June 27, 2012, thirteen monitors recorded exceedances. *Id.* A total of 135 exceedances of the PM-10 NAAQS were recorded between the eighteen monitors over the twenty-five separate days of exceptional events. *Id.*

For the entire calendar year of 2010, only one monitor in the Nonattainment Area recorded a PM-10 NAAQS exceedance. ER 108. Arizona did not submit that event to EPA for consideration as an exceptional event. *Id.* Compare 2010 with calendar years 2011 and 2012, where 135 exceedances were recorded over 25 separate days. ER 14, 24, 25, 72.

The table above also includes data on the total number of monitoring days per monitor that occurred during calendar years 2010, 2011 and 2012. This number represents the number of days each of the eighteen monitors physically operated during this three year time period. The sum of the total monitoring days for the eighteen monitors in the Nonattainment Area over this three year time period is 15,725 monitoring days, of which the 135 exceptional event exceedances represents only 0.86%. On an individual monitor basis, the same calculation also shows that a majority of the monitors saw less than one percent of their total possible monitoring days recording exceedances.

To put the exceptional events into context, an example of a multiday high wind dust event that occurred during the monsoon season is the July 3-8, 2011 series of storm. ADEQ's exceptional event demonstrations showed that wind speeds associated with the thunderstorms and thunderstorm outflows were generally above twenty-five miles per hour ("mph"). ER 15. For example, maximum sustained wind speeds of twenty-six to thirty-one mph were measured on July 3, 2011; twenty-eight to thirty-four mph winds on July 4th; and twenty-five to forty-seven mph winds were measured on July 5th with wind gusts of thirty-five to fifty-six mph. *Id.* Wind speeds on July 7th were more moderate in nature, but due to the events of the previous three days, large amounts of already loose dust had been deposited in the area and wind speeds up to eighteen mph were sufficient to re-suspend that dust into the air on July 7-8, 2011. *Id.* Using a combination of technical analyses, a description of existing PM-10 controls, and a conceptual model that included time-lapse videos, ADEQ's demonstration explained that high wind conditions associated with the July 3-8, 2011, thunderstorms brought high concentrations of PM-10 emissions into the Nonattainment Area, overwhelming the comprehensive control measures and sophisticated response programs in place. ER 14-17. Fourteen exceedances alone were recorded on July 3, 2011, with twenty-nine exceedances over the course of the five day active thunderstorm period. ER 14.

An example of a high wind dust event associated with a frontal system dust storm is the November 4, 2011, exceptional event that led to seventeen exceedances in just one day. ER 58. The documentation provided to EPA by ADEQ for its exceptional events demonstration showed that sustained winds above twenty-five mph had occurred. ER 37. Maximum sustained winds of thirty-four mph with gusts of forty mph were measured on the east side of the Phoenix metropolitan area at Chandler Municipal Airport, while sustained winds of thirty-one mph with gusts of thirty-seven mph were measured on the west side of the Phoenix metropolitan area at Luke Air Force Base. *Id.* Additionally, widespread areas of Maricopa and Pinal Counties also measured sustained wind speeds of greater than twenty mph with gusts over thirty mph. *Id.* These widespread high winds overwhelmed the comprehensive control measures that were in place. *Id.*

To put the magnitude of these high wind dust exceptional events into perspective, a map showing the location of the PM-10 monitoring sites in the Nonattainment Area, ER 281, is reproduced as Exhibit A. The monitors recording exceedances during the November 4, 2011, high wind dust event spanned from the Dysart and Zuni Hills monitors on the northwest side of the Nonattainment Area, to the West Chandler monitor on the south side, all the way to the Apache Junction monitor on the east side, which is equivalent to an area of approximately fifteen miles by thirty miles. ER 25, 281.

III. History of Litigation Regarding PM-10 State Implementation Plans.

Petitioners and their predecessors have long used the Petition for Review process to argue that EPA has inappropriately approved PM-10 SIPs that Arizona has submitted. This is the sixth Petition for Review filed with this Court. Of the five prior cases, none rose to the level of a complete granting of the petition. One petition was denied in its entirety, two were partially denied and partially granted, one was dismissed as moot, and one was resolved through a voluntary remand. *See Ober v. Whitman*, 243 F.3d 1190 (9th Cir. 2001) (holding that EPA did not act arbitrarily or capriciously when exempting sources of PM-10 pollution that it considered “de minimis” from control measures); *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996) (holding that EPA did not abuse its discretion by determining that transportation control measures were not presumptively “reasonably available control measures” and that adequate state assurances were provided for the plan’s implementation and remanding to EPA for the State to address the twenty-four hour PM-10 standard); *Vigil v. Leavitt*, 366 F.3d 1025, *amended by* 381 F.3d 826 (9th Cir. 2004) (holding that EPA did not act arbitrarily or capriciously when approving Arizona’s general permit rule for controlling agricultural emissions, approving the extension of the attainment date under Section 188(e) and remanding to EPA the issue of whether CARB diesel must be included in the serious area plan); *Ober v. Browner*, No. 99–71107 (9th Cir. 2001) (granting Respondent's

motion to dismiss the appeal as moot); *Silver v. Johnson*, No. 06-74701(9th Cir. 2007) (granting Respondent's unopposed motion for voluntary remand).

In regards to the four prior lawsuits⁶ that Petitioners reference which were filed against EPA in the District Court for the District of Arizona, Petitioners' Brief at 10, 18, 21, 24, the basis of each action was EPA's failure to meet one or more nondiscretionary deadlines under the CAA. These types of lawsuits are commonly known as "sue and settle" cases, which end in consent decrees setting new deadlines for EPA and with EPA agreeing to pay Plaintiff's attorneys' fees. That was the outcome of these four cases. These "sue and settle" cases do not reflect upon the contents of Arizona's prior PM-10 Plans, nor are they relevant to the merits of the Five Percent Plan at issue now.

SUMMARY OF THE ARGUMENT

The EPA is required to approve a SIP submission that complies with all applicable CAA requirements: "the Administrator *shall* approve such submittal as a whole if it meets all of the applicable requirements." 42 U.S.C. § 7410(k)(3) (emphasis added). Petitioners advance three arguments, none of which rises to the level of demonstrating that Arizona's Five Percent Plan fails to meet any applicable requirement.

⁶ *Ober v. Browner*, No. CIV 94-1318 PHX PGR (D. Ariz.); *Bahr v. Whitman*, CIV 01-0835 PHX ROS (D. Ariz.); *Bahr v. Jackson*, CV09-2511-PHX MHM (D. Ariz.); *Bahr v. McCarthy*, 2:13-cv-00872 SMM (D. Ariz.).

Petitioners' first argument focuses on EPA's concurrence with Arizona's demonstrations that the twenty-five separate high wind dust events that yielded 135 exceedances of the PM-10 NAAQS from eighteen monitors in the Nonattainment Area between 2010 and 2012 qualify as exceptional events. Rather than identifying one or more of the exceptional events with which they take exception, Petitioners attack the sheer number of exceedances, criticizing EPA's interpretation of its own rules and reading language into the CAA and EPA's rules that simply does not exist. Petitioners appear to be making a collateral attack on EPA's rule, which is time-barred because the deadline to file a petition for judicial review has long since passed.

As to the merits of Petitioners' first argument, Petitioners fail to demonstrate that EPA's actions are inconsistent with the CAA. Deference to EPA's technical analysis and informed discretion is due. *See Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003).

In their second argument, Petitioners again read language into the CAA that does not exist. Although Petitioners believe that EPA should not have approved Arizona's Five Percent Plan without including an updated analysis of "best available control measures" ("BACM") and "most stringent measures" ("MSM"), the CAA's plain language does not contain such a requirement. In *Association of Irrigated Residents*, this Court ruled on the very provision at issue in a similar

matter, holding that the CAA does not specifically require an area to use any particular method to achieve reductions under a five percent plan. *Ass'n of Irrigated Residents v. U.S. E.P.A.*, 423 F.3d 989, 994-96 (9th Cir. 2005).

As opposed to their second argument, in which Petitioners criticize EPA for not requiring additional control measures before approving the Five Percent Plan, in their third argument, Petitioners criticize EPA for approving the contingency measures that Arizona voluntarily implemented before any CAA deadlines. The Fifth Circuit Court of Appeals has already answered this exact question, holding that “early activation of continuing contingency measures is consistent with the purpose and requirements of the CAA statute.” *Lo. Env'tl. Action Network v. U.S. E.P.A.*, 382 F.3d 575, 584 (5th Cir. 2004).

None of Petitioners' arguments establish that EPA's approval of the Five Percent Plan was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. This Court should therefore deny the Petition for Review.

ARGUMENT

I. Standard of Review.

This Court reviews the EPA's final administrative actions under the general standards that the Administrative Procedures Act (“APA”) establishes because the CAA does not specify a standard of review. *See* 42 U.S.C. § 7607(b)(1); *Latino Issues Forum v. U.S. E.P.A.*, 558 F.3d 936, 941 (9th Cir. 2009). Under the APA, a

court may reverse the EPA's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Latino Issues Forum*, 558 F.3d at 941. This standard requires that the EPA "articulate[] a rational connection between the facts found and the choice made." *Id.* The court's "proper role is simply to ensure that the [agency] made no 'clear error of judgment' that would render its action 'arbitrary and capricious.'" *Id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). In particular, "where, as here, a court reviews an agency action 'involv[ing] primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' [a court] must 'defer to the informed discretion of the responsible federal agencies.'" *Id.* (alteration in original) (quoting *Marsh*, 490 U.S. at 377). A court may reverse under the arbitrary and capricious standard only if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010). Review under the standard is narrow and a reviewing court may not substitute its judgment for that of the agency. *See Marsh*, 490 U.S. at 378; *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011).

II. The EPA Correctly Applied the Clean Air Act and the Exceptional Events Rule in Approving Arizona's High Wind Dust Event Demonstrations for Twenty-Five Days as Exceptional Events.

Petitioners argue that EPA's approval of Arizona's exceptional event demonstrations for twenty-five separate high wind dust events that occurred over the course of three calendar years is an abuse of discretion and contrary to law. Petitioners' Brief at 28-49. Arizona complied with EPA's Exceptional Events Rule when submitting demonstrations of exceptional events which occurred on twenty-five separate days during calendar years 2010 through 2012. The EPA complied with the same rule when concurring with Arizona's demonstrations. By arguing that EPA's compliance with its own rule is an abuse of discretion or unlawful, Petitioners are in essence launching a time-barred collateral attack on the rule itself. Moreover, Petitioners' factual argument lacks merit.

Congress revised the CAA in 2005 to include a provision regarding air quality monitoring data that has been influenced by exceptional events. 42 U.S.C. § 7619(b). The CAA defines an "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 [EPA] through the process established in [its] regulations to be an exceptional event." 42 U.S.C. § 7619(b)(1)(A). In addition to defining the term "exceptional event," Congress directed EPA to publish in the Federal

Register “proposed regulations governing the review and handling of air quality monitoring data influenced by exceptional events” after “consultation with Federal land managers and State air pollution control agencies.” 42 U.S.C. §

7619(b)(2)(A). Congress further directed that after “providing an opportunity for interested persons to make oral presentations of views, data, and arguments regarding the proposed regulations, the [EPA] shall promulgate final regulations.”

42 U.S.C. § 7619(b)(2)(B).

Congress provided numerous principles and requirements for EPA to follow when promulgating exceptional events regulations, including the following requirements:

- (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.

42 U.S.C. § 7619(b)(3)(B).

The EPA published the proposed rule for exceptional events on March 10, 2006, and the final rule on March 22, 2007. 71 Fed. Reg. 12592; 72 Fed. Reg. 13560 (codified at 40 C.F.R. § 50.1(j)(k)(l); 50.14, and § 51.930). Pursuant to CAA Section 307(b)(1), the deadline to file a petition for judicial review of the final rule was sixty days from promulgation of the final rule, i.e., May 21, 2007. 42 U.S.C. § 7607(b)(1). This Court therefore lacks jurisdiction over a collateral attack on the Exceptional Events Rule.

Petitioners' argument that EPA abused its discretion appears to be based on the sheer number of exceptional events approved. The 135 exceptional events approved for the Nonattainment Area occurred over twenty-five separate days over the course of three calendar years. ER 14, 24, 25, 72. Of the eighteen PM-10 monitors in the Nonattainment Area, each monitor operates a substantial number of days each year. *Id.* When accounting for the number of monitors and the number of monitoring days that occurred during the three-year period of 2010-2102, the 135 exceedances factually account for 0.86% of the total number of possible monitoring day exceedances.

Arizona submitted over 1750 pages of documentation to EPA to demonstrate that the twenty-five high wind dust events each qualified as an exceptional event pursuant to the CAA and the Exceptional Events Rule. 79 Fed. Reg. 33107, 33111 (June 10, 2014). The EPA issued concurrence letters and Technical Support

Documents dated September 6, 2012, May 6, 2013, and July 1, 2013, stating that in the submitted demonstrations, “EPA concurs based on the weight of the evidence that ADEQ has successfully made the demonstrations referred to in 40 CFR § 50.14 to EPA’s satisfaction.” ER 11, 20, 68.

Petitioners argue that EPA’s concurrence with Arizona’s demonstrations was contrary to law because “best available control measures” (“BACM”) were not in place. Petitioners’ Brief at 37-44. However, as EPA points out in its brief, this argument lacks a statutory basis. Respondents’ Brief at 62. Congress did not require EPA to include updated BACM in its Exceptional Events Rule, nor did EPA include such measures.

Petitioners specifically focus on agricultural activities, opining that EPA should have required Arizona to update its agricultural best management practices rules before concurring with Arizona’s exceptional events demonstrations. However, agricultural sources are not a major source of PM-10 emissions in the Nonattainment Area, contributing only approximately 2.7% of the annual PM-10 emissions, with other agricultural sources, such as tilling and harvesting, contributing an additional 1.8%. ER 301 (2012 data).

This Court generally defers to an agency’s interpretation of its own regulations. *See Pub. Util. Dist. No. 1 v. Fed. Emergency Mgmt. Agency*, 371 F.3d 701, 706 (9th Cir. 2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089,

1097 (9th Cir. 2003) (noting the “substantial deference” that is due). Deference is owed unless the interpretation is plainly erroneous or inconsistent with the regulation. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).

Petitioners have failed to demonstrate that EPA’s interpretation of its Exceptional Events Rule is plainly erroneous or inconsistent with the CAA. This Court should therefore deny the Petition for Review.

III. The EPA Correctly Determined that the Clean Air Act Does Not Require that a Five Percent Plan Include any Particular PM-10 Control Measures.

Petitioners argue that EPA’s approval of the Five Percent Plan without inclusion of an updated analysis of “best available control measures” (“BACM”) and “most stringent measures” (“MSM”) is an abuse of discretion and contrary to law. Petitioners’ Brief at 49-52. Petitioners are reading language into the CAA that simply does not exist.

The CAA provides a statutory scheme for States to attain the PM-10 NAAQS whereby the levels of controls are designed to be incremental in nature. 42 U.S.C. §§ 7513, 7513a, 7513b. A State is required to implement the first level of control, “reasonably available control measures” (“RACM”), once EPA designates an area as being a moderate nonattainment area. 42 U.S.C. § 7513a(a)(1)(C). If an area fails to achieve attainment with the PM-10 NAAQS by

the applicable deadline, EPA downgrades that area's designation from a moderate nonattainment area to a serious nonattainment area. 42 U.S.C. § 7513(b). A State is then required to implement measures to meet the next, more stringent level of control, BACM. 42 U.S.C § 7513a(b)(1)(B). If a State does not attain the PM-10 NAAQS by the new deadline, the State must implement further measures to reduce PM-10 emissions by no less than five percent each year, based on the prior year's emissions inventory. 42 U.S.C. § 7513a(d). Another separate level of control, MSM, is required if a State requests an extension of the attainment date for a serious PM-10 nonattainment area and meets the requirements for requesting such an extension. 42 U.S.C. § 7513(e).

The CAA's plain language does not require a State to update its previous BACM or MSM analysis to achieve the required five percent annual reductions in PM-10 levels:

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.

42 U.S.C. § 7513a(d).

This Court has previously ruled on a similar issue, concluding that the CAA does not require a State to implement specific control measures under the five percent plan requirement. *Ass'n of Irrigated Residents v. U.S. E.P.A.*, 423 F.3d 989, 994-96 (9th Cir. 2005). In *Association of Irrigated Residents*, the petitioners argued that the CAA does not allow an area to use reductions from previously required or implemented emissions control measures to meet the five percent reductions required under CAA Section 189(d), codified at 42 U.S.C. § 7513a(d). Specifically, the San Joaquin Valley had failed to implement BACM when required and included BACM measures in its five percent plan, which EPA approved as meeting all applicable requirements. *Ass'n of Irrigated Residents*, 423 F.3d at 995. This Court held that “[t]he language of § 189(d) . . . does not specifically require that an area use any particular method to achieve reductions,” and that “the Act does not in any way prohibit or limit the use of particular emissions-reducing measures, including BACM, in calculating whether the additional reductions have been achieved.” *Id.*

In a broader context, case law regarding state implementation plans in general provides support for the proposition that States have discretion to determine how to reduce PM-10 pollution by five percent annually. The States have “wide discretion in formulating [their] plan[s].” *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). “[S]o long as the ultimate effect of a State’s choice of

emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.” *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

With respect to the present case, the Nonattainment Area failed to attain the PM-10 NAAQS by the extended deadline of December 31, 2006. 79 Fed. Reg. 33107, 33108 (ER 2). Therefore, Arizona was required to submit a SIP revision that included new PM-10 control measures to provide for annual reductions of PM-10 or PM-10 precursors of not less than five percent of the most recent emissions inventory each year until the NAAQS is attained. 42 U.S.C. § 7513a(d).

The Five Percent Plan includes over fifty measures, including a revised emission inventory, a revised Motor Vehicle Emissions Budget, a revised control strategy focusing on high wind days, five-day advance air quality dust forecasts to identify High Risk Days for dust generation, best practices for unpermitted sources including Off Highway Vehicles, and a Dust Action General Permit to require best management practices from unpermitted sources to prevent exceedances on High Risk Days. ER 288-98. Arizona has already implemented these measures, which have proven to be successful. In the Final Rule, EPA approved Arizona’s demonstration that the Nonattainment Area attained the PM-10 NAAQS by the extended deadline of December 31, 2012. 79 Fed. Reg. 33107, 33115 (ER 9).

In conclusion, although a State *may* implement updated BACM and/or MSM to meet the five percent reduction obligation, the CAA does not require States to do so. The bottom line is that a State is free to use any measures it deems appropriate to reach its five percent reduction goals and to ultimately attain compliance with the PM-10 NAAQS. Petitioners' arguments fail in light of the CAA's plain language, case law, and Arizona's ability to achieve attainment with the PM-10 NAAQS without implementing updated BACM and/or MSM. This Court should therefore deny the Petition for Review.

IV. The EPA Correctly Determined that the Clean Air Act Does Not Preclude a State from Implementing One or More Contingency Measures Before They Are Triggered.

Petitioners challenge EPA's interpretation of the CAA regarding early implementation of contingency measures by arguing that EPA acted unlawfully when approving the Five Percent Plan because it includes contingency measures that Arizona has already implemented. Petitioners' Brief at 53-57.

The Fifth Circuit Court of Appeals previously analyzed this exact matter, finding that "early activation of continuing contingency measures is consistent with the purpose and requirements of the CAA statute." *Lo. Envtl. Action Network v. U.S. E.P.A.*, 382 F.3d 575, 584 (5th Cir. 2004) ("*LEAN*"). The court also concluded that "it seems illogical to penalize nonattainment areas that are taking extra steps, such as implementing contingency measures prior to a deadline, to

comport with the CAA's mandate that such States achieve NAAQS compliance as 'expeditiously as practicable.'" *Id.* (quoting CAA Section 172(c)(1) [42 U.S.C. § 7502(c)(1)]).

This Court should also conclude that EPA's approval of Arizona's voluntary early implementation of contingency measures is neither an abuse of discretion nor unlawful. When a statute is silent or ambiguous on a particular point, courts determine whether the agency's conclusion is based on a permissible construction of the statute. *See Chevron*, 467 U.S. at 843; *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1213 (9th Cir. 2008). A court may defer to a federal agency's reasonable interpretation of a statutory provision that it is charged with administering. *See Chevron*, 467 U.S. at 843; *Putnam Family P'ship v. City of Yucaipa, Cal.*, 673 F.3d 920, 928 (9th Cir. 2012).

The CAA includes the following requirement for a plan submitted for a nonattainment area:

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

42 U.S.C. § 7502(c)(9).

In *LEAN*, the Fifth Circuit found that nearly identical language under CAA Section 182(c)(9) for serious ozone nonattainment area plans was both silent on early implemented control measures and ambiguous on how prospective control measures supported the CAA Section 172(c)(1) mandate that States achieve NAAQS compliance as “expeditiously as practicable.” *LEAN*, 382 F.3d at 584.

The EPA addresses early implemented contingency measures in its guidance document, *General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990*, 57 Fed. Reg. 13498, 13511 (Apr. 16, 1992) (“General Preamble”), taking the position that nonattainment areas may implement their contingency measures early, as long as such measures are continuing in nature. *Id.*; see also *LEAN*, 382 F.3d at 583.

Although the General Preamble is not entitled to full *Chevron* deference, it is “entitled to so-called *Skidmore* deference insofar as [it] ‘constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” *Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The *LEAN* opinion and the General Preamble both weigh heavily in favor of EPA’s interpretation that contingency measures may be voluntarily implemented early. Moreover, Petitioners fail to cite to any case law or guidance in support of their contrary view. This Court should therefore deny the Petition for Review.

CONCLUSION

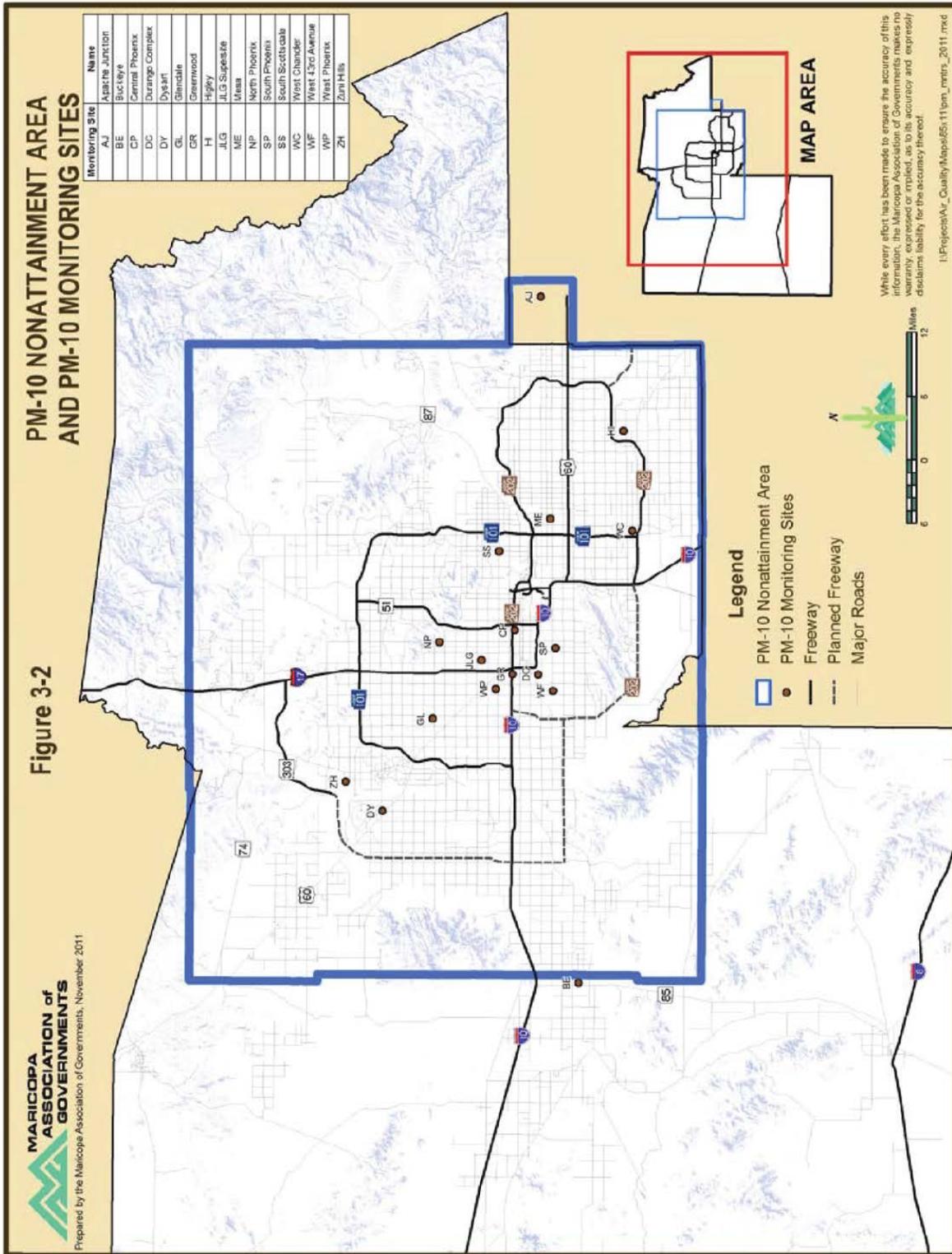
For the foregoing reasons, this Court should deny the Petition for Review.

Respectfully submitted this 31st day of December, 2014.

Thomas C. Horne
Arizona Attorney General

s/ Monique Coady
Monique Coady
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Exhibit “A”



STATEMENT OF RELATED CASES

Arizona is not aware of any related cases.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,298 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

Dated this 31st day of December, 2014.

s/ Monique Coady
Monique Coady

CERTIFICATE OF SERVICE

I, Monique Coady, hereby certify that I electronically filed the foregoing State of Arizona's Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 31, 2014.

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/ Monique Coady
Monique Coady