

**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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

There is, by necessity, a tension between actual air quality—the quality of the air that the public breathes—and air quality modeling that permeates the air quality planning process. While modeling is a necessary part of any air quality planning, the fact is that Arizona’s track record on modeling is really quite poor. Every state implementation plan (“SIP”) that the State has submitted and EPA has approved over the years for the Maricopa County PM-10 Nonattainment Area (“Area”) has demonstrated “attainment” by the relevant deadline. And yet, the Area’s air quality monitors continue to exceed the NAAQS and in recent years, Phoenix area residents have seen a surge in massive dust storms.

In their briefs both EPA and the State defend EPA’s approval of the 2012 Five Percent Plan based on the fact that the State is able to demonstrate “attainment” by December 2012. But the reality is that the State’s “attainment” comes with an asterisk, because the State can only demonstrate attainment by excluding 135 exceedances that occurred over 25 days in 2011 and 2012. Moreover, the monitors have continued to record exceedances during 2013 and 2014, which once again the State claims are “exceptional events” and seeks to exclude from the data.

If only it was that easy for Area residents to exclude the dust from their lungs. Because they have to deal with the actual air quality, not what the State

demonstrates on paper, every year they are regularly subjected to the risk of Valley Fever¹, asthma attacks, and traffic accidents caused by the huge dust storms that descend on the Phoenix metropolitan area. Instead of ignoring this regular threat to public health by excluding the data, the State and proposed Respondent-Intervenor Maricopa Association of Governments (“MAG”) should be focused on addressing the problem so that the air that the public breathes is as clean as the “attainment” demonstration they submitted to EPA. And instead of concurring in the State’s efforts to ignore the exceedances caused by these high wind events and interpreting the Clean Air Act (“CAA”) to allow the State to avoid its obligation to implement best available control measures (“BACM”) and control out of area sources, EPA should be insisting that the State do everything it can to eliminate, or at least mitigate the impact of these massive dust storms.

In its Answering Brief, the State disparages the Petitioners’ long history of seeking recourse from the courts to ensure that the State and EPA comply with the requirements of the Clean Air Act (“CAA”). State Brief at 13-14. However, it is Petitioners’ diligence that is responsible for much of the progress that the Area has

¹ Valley Fever (coccidioidomycosis) is a disease caused by a fungus, *Coccidioides*, that lives in the soil in the Southwest. *See* Sprigg, W.A., et al. Regional dust storm modeling for health services: The case of valley fever. Aeolian Research (2014), <http://dx.doi.org/10.1016/j.aeolia.2014.03.001> (last accessed 2/12/2015).

demonstrated over the past two decades.² Since Arizona has historically resisted doing even the bare minimum required under the Act unless it is under threat of sanctions, citizen suits have been critical to ensuring compliance.

And that is exactly what Congress intended. The CAA specifically authorizes enforcement by citizens. “[T]he citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.” *Natural Resources Defense Council, Inc. v. Train*, 510 F. 2d 692, 700 (D.C. App. 1975). As the Senate Committee responsible for drafting the provision explained, “[t]he courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service. . . .” Senate Committee on Public Works, S. Rep. No. 91-116, 91st Cong., 2d Sess. at 37 (1990); *see also*, *Friends of the Earth v. Carey*, 535 F. 2d 165, 172 (2d. Cir. 1976)(“In enacting § 304 of the 1970 Amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.”). Thus, as the plain language of the statute and its legislative history make clear, Congress intended that where, as here, EPA

² Arizona citizens, represented by Petitioners’ counsel, have also had to bring district court actions against State officials to compel them to comply with SIP provisions. *See Paisley v. Darwin*, 2011 U.S. Dist. LEXIS 99571, 74 Env’t Rep. Cas. (BNA) 1717 (D. Ariz. 2011) and *Sweat v. Hull*, 200 F. Supp. 2d. 1162 (D. Ariz. 2001).

is failing to enforce the provisions of the CAA, Petitions like this one are not only allowed, they are encouraged.

ARGUMENT

I. EPA's Concurrence in the State's Request to Exclude 135 Exceedances that Occurred Over Twenty Five Days Within a Two-Year Period As "Exceptional Events" Was Contrary to the Plain Language of the Statute, the Exceptional Events Rule and EPA's Own Guidance.

In concurring in the state's request to exclude the 135 exceedances that occurred over 25 days in 2011 and 2012, EPA acted contrary to the clear intent of the CAA, as reflected in the language of the statute, the Exceptional Events Rule (EER) and EPA's own guidance. As set forth more fully below, the EPA disregarded the statute's admonition that consideration of the public health should be the highest priority and that the exception was only available if an event was not reasonably controllable or preventable.

A. In Their Attempts to Minimize the Significance of the 135 Exceedances, EPA and the State Ignore Congress' Admonition that Public Health is the Highest Priority.

In their attempts to minimize the significance of the 135 exceedances, EPA, the State, and MAG all ignore the significant health risks that these events represent. Congress made it clear that in exercising its authority under Section 319, EPA was to follow the principle that "*protection of public health is the highest priority.*" 42 U.S.C. § 7619(b)(3)(A)(i) (emphasis added). However, instead of acknowledging the significant health and safety risks that these recurring

dust storms pose to the Phoenix area residents, EPA attempts to minimize the events.

For example, EPA focuses on the fact that the 135 exceedances at issue in this Petition all occurred in 2011 and 2012 and that there was only one exceedance in 2010. EPA Brief at 31. However, EPA ignores the fact that similar high wind events have been occurring with regularity since at least 2006, and have continued to occur up to the present. The State has submitted EER demonstrations for 30 exceedances over 6 days in 2013, and during the pendency of this Petition, has submitted EER demonstrations for 24 exceedances over 6 days in 2014.³

Thus, when the 2011 & 2012 exceedances are considered in the appropriate historic context, it is apparent that 2010, with its single exceedance, is, in fact, the exceptional year.⁴

³ See <http://www.azdeq.gov/environ/air/plan/nec.html> (last accessed 2/7/2015). According to the Arizona Department of Environmental Quality's website, the state submitted EER demonstrations for May 11, 2014 (12 exceedances), July 3, 2014 (3 exceedances), July 8, 2014 (1 exceedance), and July 25, 2014 (6 exceedances) on October 8, 2014 and EER demonstrations for September 4, 2014 (1 exceedance) and September 6, 2014 (1 exceedance) on January 8, 2015.

⁴ The chart Petitioners included in their Opening Brief at p. 36 is reproduced at the bottom of the following page with the 2014 exceedances included.

Footnote continued on next page.

The State also attempts to downplay the significance of the exceedances by arguing that the 135 exceedances that occurred in 2011 and 2012 are only .86% of possible exceedances—that is an exceedance at every monitor every single day of the three year period. State’s Brief at 10. This attempt to place the 135 exceedances in the context of a highly improbable worst-case scenario is not only ridiculous, it is not particularly persuasive when one considers the fact that in order to violate the current NAAQS a single monitor need only record four exceedances over a three year period. Thus, a violation occurs with only .025% of all possible exceedances.

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
2014					12(1)		10(3)		2(2)			
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)	15(4)	36(6)	65(13)	53(16)	22(7)	12(7)	23(4)	

The fact that the 135 exceedances excluded by the State exceed that minimum by 131 only enforces how serious and significant these events are to the public health, and how irresponsible it is for both the State and EPA to agree to ignore them by excluding them from the data.

B. EPA’s Guidance Regarding Reasonable Controls and BACM is Clearly Derived from the “Not Reasonably Controllable or Preventable” Requirement Set Forth in Both the CAA and the EER.

EPA’s Interim Guidance sets forth a reasonable interpretation of both the exceptional events provision in the CAA and the EER promulgated pursuant to that provision. Unfortunately, in its effort to defend its decision to approve the 2012 Five Percent Plan, EPA seeks to distance itself from and undermine its own interpretation of the law.

In their Briefs, EPA and the State both assert that Petitioners’ arguments regarding the role that BACM plays in evaluating the State’s EER submissions are “without statutory basis.” EPA Brief at 42-43; State Brief at 21. This attempt to divorce the evaluation of exceptional events from BACM, however, ignores that the statute and rule both define an exceptional event as an event that is “not reasonably controllable or preventable.” *See* 42 U.S.C. § 7619(b)(1)(A) (“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.”)(emphasis added) and 40 C.F.R. § 50.1(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, . . .”)(emphasis added). Thus the statute itself raises the issue of “reasonable controls” in evaluating whether an event qualifies as an “exceptional event.”

However, because the statute does not define “not reasonably controllable or preventable,” the task to do so fell to EPA. The Agency first addressed the issue 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 where high wind events involved windblown dust from anthropogenic sources, the event would only be considered a “natural event” if the state demonstrated that those sources are “reasonably well-controlled at the time that the event occurred . . .” 72 Fed. Reg. at 13576.⁵

In the Interim Guidance, EPA further elaborated on what it considers “not reasonably controllable or preventable.” Interim Guidance at p.10 (“3.1 Not

⁵ In its Brief, MAG accuses Petitioners of reading “or preventable” out of the statute but claims that in its Interim Guidance EPA does not. MAG Brief, pp. 31-32, fn. 7. Inasmuch as Petitioners have accepted EPA’s interpretation of the CAA and EER in the guidance and base their challenge on EPA’s failure to comply with its own guidance, MAG’s assertion has no merit.

Reasonably Controllable or Preventable (nRCP)”), ER 121. It is in this section of the Interim Guidance that EPA discusses BACM, thus leaving no doubt that EPA’s consideration of BACM/RACM in evaluating EER submissions is, in fact, derived from the “not reasonably controllable or preventable” requirement in the statute. *See id* at p. 15, 3.1.2.3 (“Consideration of BACM/RACM”), ER 126. Thus there is clearly a “statutory basis” for the consideration of BACM in the context of an EER demonstration.

Next, both EPA and the State latch onto EPA’s statement in the guidance that in serious areas BACM is a “reference point,” and use that term to argue that BACM is not required in order for an event to qualify as an “exceptional event.” However, when read in context, it is clear that the import of EPA’s “reference point” statement” is that BACM “may be insufficient.” *Id.* Indeed, in that discussion EPA states that in some cases it may be reasonable to require controls more stringent than BACM. *Id.* Finally, EPA instructs that “[i]f an air agency believes that the EPA should not use RACM/BACM as the reference point for reasonable controls, the air agency should provide supporting rationale and an alternative reference point in the demonstration package.” *Id.* Neither the State nor MAG did this. Rather, in its submissions the State represented, inaccurately, that BACM were in place within the Area. As Petitioners explained in their Opening Brief, they were not. *See* Opening Brief at 37-44.

In light of this—the lengthy discussion in the guidance of the local list of BACM as a “reference point” for a state’s demonstration that an event is “not reasonably controllable or preventable,” and EPA’s statement that BACM may not be sufficient if the SIP has not been recently reviewed—EPA’s assertion in its brief that Petitioners have a “fundamental misconception” of the role of BACM in the context of exceptional event determinations is puzzling. EPA Brief at 42. For example, EPA takes issue with Petitioners’ argument that a request to exclude exceedances under EER should “trigger” an updated BACM demonstration.

Notably, Petitioners made this argument in the context of whether the State was obligated to include an updated BACM demonstration in its §189(d) submission. *See* Opening Brief at 53. However, the fundamental premise of Petitioners’ position with respect to BACM in the context of EER submissions is completely consistent with the guidance. Since it is the State’s responsibility to demonstrate that an event qualifies as an exceptional event, it follows that in the context of that demonstration, the State is obligated to address the reasonableness of its control measures. And where the event occurred in a serious area, that discussion—at least according to EPA’s guidance—should address BACM and whether such controls were applied to the contributing sources at the time of the event.

Petitioners' principal objection to the BACM discussion in the State's submission is that it is misleading and fails to address the inadequacy of the Agricultural BMP Rule, which EPA has expressly found no longer constitutes BACM. *See* Opening Brief at 39. The suggestion in EPA's brief that BACM is somehow not a relevant inquiry in evaluating an EER submission is completely inconsistent with its guidance and should be rejected by this Court.

In its brief MAG also takes issue with Petitioners' arguments regarding the frequency and severity of the exceedances that the State seeks to exclude, claiming that Petitioners seek to put a volume limit on exceptional events, and that severity of the exceedances actually supports a finding that they were the result of an "exceptional event." MAG Brief at 26-29. However, once again, it was EPA, not Petitioners, who identified these factors as relevant to the issue of whether an event was "not reasonably controllable or preventable" in the context of an exceptional event determination. Specifically, in the Interim Guidance, EPA stated "[m]ore stringent controls may be reasonable if an area experiences frequent and/or severe exceptional event exceedances due to high winds than if the area has experienced only non-recurring and/or mild isolated exceedances." Interim Guidance at 13, Table 2(2); ER 124.

This reasonable interpretation of what constitutes an event that is "not reasonably controllable or preventable" is entirely consistent with the CAA and the

EER and should be accorded deference by this Court. Unfortunately, as the following discussion establishes, in concurring in the State's request to exclude the 135 exceedances, EPA largely ignored and/or contradicted its own guidance.

C. EPA's Explanation for Departing from Its Guidance with Regard to the Absence of BACM on Agricultural Emissions is Contrary to the Guidance and Arbitrary and Capricious.

In their Opening Brief, Petitioners asserted that EPA abused its discretion when it departed from its guidance regarding BACM and EER demonstrations, and concurred in the State's request to exclude 135 exceedances even though the BACM demonstration for the Area was well outside the 3 year window described in the guidance, and EPA had advised the State, both in a proposed rulemaking and in correspondence, that the Agricultural BMP Rule was no longer BACM for agricultural emissions. Opening Brief at 37-44. In its Final Rulemaking and its Answering Brief, EPA attempts to justify this departure from its own guidance by claiming that emissions from agricultural sources are no longer a significant part of the emissions inventory in the Area, and it was reasonable for EPA to concur in the EER submissions since the State was able to demonstrate attainment without a reduction of agricultural emissions. EPA Brief at 48-49. Neither of these justifications, however, withstands scrutiny.

First, with respect to agricultural emissions, while it is true that the revised 2008 annual inventory cited by EPA does seem to indicate that agricultural

emissions make up a smaller percentage of the annual emissions, as Petitioners pointed out in their Opening Brief, this focus on the *annual* emissions inventory in the context of exceedances caused by high wind events is misguided. Opening Brief at 43. As Petitioners explained in their Brief, the Interim Guidance makes it clear that in the context of exceptional events, the control measures to be evaluated are determined by the sources of the actual exceedances. Interim Guidance 6.3.2.3 Basic Controls analysis, ER 153. EPA ignored this important distinction in its Answering Brief, as did the State and MAG.

However, even if it were appropriate to rely upon a modeled inventory, as opposed to identifying the sources that actually contributed to the event in question, when evaluating whether an event was “not reasonably controllable or preventable,” the emissions inventories for high wind and low wind conditions differ—as the Technical Support Document submitted with the 2012 Five Percent Plan acknowledges. *See* Appendix B, Exhibit 1: “Technical Document in Support of the MAG 2012 Five Percent Plan For PM-10 for the Maricopa County Nonattainment Area,” May 2012 (“TDS”), AR. B.1.c. at pp. V-61-v-78. In the high wind inventory included in that document, agricultural emissions are clearly a significant source. *See e.g. Id.*, Figure V-16, p. V-63. *See also*, Appendix A: “Exhibit 1: 2008 PM-10 Periodic Emissions Inventory for the Maricopa County, Arizona, Nonattainment Area. Maricopa County Air Quality Department. Revised

June 2011” AR B.1.b at Table A4-2 “Land use categories associated with the production of windblown dust” at p. A4-10; and Figure A4-3 “Distribution of land use categories capable of producing windblown dust emissions,” at p. A4-11.

As these technical documents demonstrate, agriculture is very much a significant source of windblown dust in the Area. Thus, it is no coincidence that monitors with some of the greatest number of exceedances sought to be excluded under the EER are located near agricultural lands. *See* TDS at p. V-59 (describing Salt River domain; active PM-10 monitors include W. 43rd and Durango Complex; surrounding sources include active agricultural land); p. V-63 Figure V-16 (showing sources for windblown dust for West 43rd Avenue monitor including agricultural lands); p. V-60 (describing predominant sources near Higley monitor as including active agricultural fields).

EPA asserts in its Answering Brief that “EPA’s reliance on the Agricultural BMP Rules was reasonable because implementation of additional controls on agricultural sources would still not have made the total emissions caused by the high wind speeds reasonably controllable and preventable given the small portion of such emissions coming from agricultural sources.” This statement, however, is a bald assertion that has no factual or technical support in the record. EPA Brief at 52. Nor was it offered by EPA as a justification for its concurrence in the Final Rulemaking. *See, e.g. Oregon Natural Desert Assoc. v. BLM*, 625 F. 3d 1092,

1120 (9th Cir. 2010)(rejecting position that BLM never advanced in the EIS itself as impermissible *post hoc* rationalization); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's actions must be upheld, if at all, on the basis articulated by the agency itself.").

Because EPA did not raise the issue with the State and just accepted at face value the State's assertion that "BACM-approved controls were in place," we have no way of knowing whether having actual BACM on agricultural sources would have made some or all of the exceedances reasonably controllable or preventable. Before it concurred in excluding the exceedances, EPA should have required the State to answer that question. Because it failed to do so, it cannot now use pure speculation to justify its action.

Finally, EPA's second justification for not requiring BACM on agricultural emissions—that because the State could demonstrate attainment with the existing agricultural controls, EPA's concurrence in excluding the 135 exceedances from the data was reasonable—is a classic demonstration of circular logic. *See* EPA Brief at 52, n. 10. The State can only demonstrate "attainment" if it is allowed to exclude the 135 exceedances from the data. If the exceedances are included in the

data, the Area continues to violate the NAAQS by a large margin.⁶ In this regard, EPA's logic is akin to a judge holding that evidence of a crime should be excluded because when it is excluded, there is no evidence that the defendant committed the crime. Because the State's attainment demonstration is dependent upon EPA's concurrence to exclude the 135 exceedances, it makes no sense whatsoever to justify the concurrence on the alleged "attainment" that is only achieved when the data is excluded.

In sum, both of the reasons offered by EPA as justification for its decision to concur in the exceptional event demonstrations without requiring the State to ensure that BACM level controls were in place in the Area for agricultural emissions are arbitrary and capricious—and as such they are contrary to law.

⁶ In fact, this is what happened in 2010 when EPA proposed to disapprove in part the 2007 Five Percent Plan. EPA declined to concur in the State's EER submission for four exceedances that occurred in 2008. EPA explained, "because there have been four exceedances in 2008 at the West 43rd Avenue monitor, the area cannot attain the standard by December 31, 2010 as projected in the 189(d) plan. Therefore, EPA is proposing to disapprove. . . the attainment demonstration in the plan as not meeting the requirements of sections 189(d) and 179(d)(3)." 75 Fed. Reg., 54806, 54814 (Sept. 9, 2010).

D. EPA's Position Regarding the Reasonableness of Control Measures on Sources Outside the Area is Contrary to the Interim Guidance and By Ignoring the Extreme Conditions in Pinal County, EPA is Abusing its Discretion to the Detriment of the Public's Health and Safety.

In their Opening Brief, Petitioners discuss in some detail the extraordinary conditions in Pinal County, and the relatively lax control measures in place in those portions of Pinal County that are outside the Area. Opening Brief at 46-48. In its Answering Brief, EPA does not even address the fact that western Pinal County has some of the highest monitor readings for PM-10 in the country and instead relies upon the fact that the area has only recently been redesignated moderate nonattainment. EPA Brief at 58 (“Bahr critiques the level of emission controls applicable in Pinal County outside the nonattainment area, but discounts the fact that Pinal County was only redesignated to nonattainment effective July 2, 2012.”)

While it is true that the redesignation was not finalized until 2012, EPA proposed to redesignate the area in October 2010. 75 Fed. Reg. 60680 (Oct. 1, 2010). And, in October 2009, EPA notified the Governor that it was initiating the redesignation process. As EPA advised the State at that time, “our decision to initiate the redesignation process stemmed from review of 2006-2008 ambient PM-10 monitoring data from PM-10 monitoring stations within the county that showed

widespread, frequent, and in some instances, severe violation of the PM-10 standard.” 77 Fed. Reg. 32024, 32025 (May 31, 2012).

Moreover, well before the formal notification in 2009, as early as April 2007, EPA wrote a letter to ADEQ expressing concern about, among other things, the exceedances occurring outside the Area in western Pinal County. *See Minutes of the Maricopa Association of Governments Air Quality Technical Advisory Committee Meeting, Thursday, April 26, 2007, pp. 9-10; available at http://www.azmag.gov/Documents/pdf/cms.agendas/AQTAC_2007_05-22_AGN33122.pdf.* In that letter, EPA noted that western Pinal County had several violations of the PM-10 standard and some of the highest readings in the country. *Id.* at 10. EPA set out several options for dealing with the situation including a possible nonattainment designation, extending the Area’s boundaries, issuing a SIP call, or working with the State and local agencies to bring the area back into attainment as expeditiously as possible, with the latter being the preferred approach. *Id.* at 10.

In other words, EPA has been aware of the problem in western Pinal County long before the 2012 redesignation and put the State on notice at least as early as 2007 that the situation needed to be addressed by State and local officials. Under these circumstances, EPA’s attempt to hide behind the designation status of the Pinal County nonattainment area to claim that the level of controls—which do not

include any agricultural control measures for high wind events—are reasonable is simply an abdication of its responsibility under the CAA to ensure that data is only excluded under the EER when the State has demonstrated that *reasonable* controls are in place.

II. Because the Area is a Serious Nonattainment Area that Obtained an Extension Under §188(e), It Continues to be Subject to the BACM and MSM Requirement and EPA Abused its Discretion When it Failed to Require the State to Demonstrate that the 2012 Five Percent Plan Satisfied Those Requirements.

A. Both EPA and the State Have Previously Acknowledged that BACM and MSM Continue to Be a Requirement For Any SIP Revision Submitted for the Area.

In both its Final Rulemaking and in its Answering Brief, EPA takes the position that in the 189(d) submission, although the State was required to satisfy numerous other CAA requirements for SIPs, it did not have to demonstrate that it continued to satisfy the BACM requirement for serious nonattainment area plans set forth in Section 189(b)(1)(B) or the MSM requirement that was imposed as a result of the extension granted the Area under 188(e) in 2001. In response to Petitioners' argument that an updated BACM and MSM demonstration was required, EPA has taken the position that "BACM and most stringent measure were obligations appropriately imposed at the time they were triggered, and the State added control measures implementing BACM and most stringent measures to the Maricopa Area's PM-10 nonattainment area plan at that time." EPA Brief at

61-62. According to EPA, a BACM determination is only required when “BACM is statutorily triggered, correlated to the ‘availability’ at the time BACM is triggered.” *Id.* at 62. It adopts the same approach for MSM, claiming that Section 188(e) requires “only those measures that are the most stringent when the requirement is triggered.” *Id.*

EPA claims that this interpretation regarding the BACM and MSM requirements, published for the first time in the Final Rulemaking for the 2012 Five Percent Plan, is not a departure from EPA’s earlier interpretations of the CAA. By way of example, EPA cites to its approval of revisions to Maricopa County Rule 310 and 310.1 into Arizona’s SIP because they “‘complied with relevant [Act] requirements.’” EPA Brief at 63 quoting 75 Fed. Reg. at 78,167. What EPA neglects to mention, however, is that in the *proposed* rulemaking for that SIP revision, the “relevant Act requirements” were described as including BACM. 75 Fed. Reg. 53907, 53908 (Sept. 2, 2010)(II. EPA’s Evaluation and Action). As EPA explained in its proposed rule, “[t]he MCAQD regulates a PM nonattainment area classified as serious (see 40 CFR part 81), so Rule 310 and Rule 310.01 must implement BACM.” *Id.*

The Notice of Proposed Rulemaking further states “[w]e believe these rules are consistent with the relevant policy and guidance. Our Technical Support Documents (TSD) on each rule has our detailed review and evaluation.” *Id.*

Significantly, included in the Docket are demonstrations that show that the adopted rule is at least as stringent as the SIP approved rule, and in many respects is more stringent.⁷ See Docket EPA-R09-OAR-2010-0521 Supporting and Related Material, Appendices 9 & 10 available at <http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0017> and <http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0018> (last accessed 2/11/2015).

In promulgating these Rule revisions at the State level, the Arizona Department of Environmental Quality (ADEQ) made the same representation that the revised rules must satisfy the BACM requirement of the CAA, as well as the MSM requirement. Specifically in its Notice of Proposed Rulemaking for Rules 310 and 310.01, ADEQ explained the Rule revisions in the context of the 189(d) plan:

On June 6, 2007, the U.S. Environmental Protection Agency (EPA) found that the Phoenix metropolitan area failed to attain the 24-hour PM₁₀ standard by the December 31, 2006, attainment deadline. This failure triggered a special requirement under Section 189(d) of

⁷ Prior to EPA's reference to the Final Rulemaking in its Answering Brief, Petitioners did not realize that the docket for the 2010 revisions included an updated BACM demonstration for the revised fugitive dust rules. Although this limited BACM demonstration is still outside the three year window identified in the Interim Guidance, Petitioners acknowledge that with respect to the fugitive dust rules, the State has demonstrated BACM more recently than 2002, as suggested in the Opening Brief at p. 42.

the Clean Air Act (CAA) to submit a state implementation plan (SIP) revision to EPA by December 31, 2007. Such SIP revision was required to provide for annual reductions of PM₁₀ or PM₁₀ precursors of not less than five percent of the most recent emissions inventory, until the PM₁₀ standard is attained. *In addition, such SIP revision was required to continue to demonstrate that the revisions would meet the best available control measures (BACM) test and the most stringent measures (MSM) test for significant sources and source categories in accordance with CAA § 189(b)(1)(B) and 188(e)(emphasis added).*

Docket EPA-R09-OAR-2010-0521 Supporting and Related Material, Appendix 1, NPR for Maricopa Rules 310 and 301.01[sic] available at

<http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0009>

(last accessed 2/11/2015). The State offered the exact same description of the CAA requirements in the Completeness Checklists it submitted to EPA along with the SIP Revision. *See e.g.* Docket EPA-R09-OAR-2010-0521 Supporting and Related Material, Maricopa County Rule 310 Completeness Checklist available at

<http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0005>

(last accessed 2/11/2015). Thus, the position adopted by EPA in the Final Rulemaking, and by EPA and the State in this proceeding is completely contrary to their earlier pronouncements regarding the State's continuing obligation to demonstrate BACM under the CAA.

Further, the State's reliance on this Court's holding in *Ass'n of Irrigated Residents v. U.S E.P.A.*, 423 F.3d 989 (9th Cir. 2005) as support for its newfound

position that its §189(d) plan does *not* have to “continue to demonstrate that the revisions would meet the best available control measures (BACM) test and the most stringent measures (MSM) test for significant sources and source categories in accordance with CAA § 189(b)(1)(B) and 188(e)” is misplaced. State Brief at 24. That case does not address the issue raised here, which is whether a serious area that fails to meet its attainment deadline continues to be subject to the BACM requirement of 189(b)(1)(B) in addition to the requirements of §189(d). The issue raised in *Ass’n of Irrigated Residents* was whether the State could use control measures implemented in response to the BACM requirement to also satisfy the emission reduction requirements of §189(d). 423 F. 3d at 995. Petitioners do not dispute that the State is free to use BACM to achieve the reductions required by Section 189(d). Rather, the Petitioners contend that the State cannot avoid its obligation to continue to implement BACM because it is able to achieve the 5% reduction using less stringent control measures (and, of course, by excluding 135 exceedances).

In this regard, it is worth noting that the State’s assertion that Petitioners’ arguments regarding an updated demonstration of BACM and MSM “fail in light of ...Arizona’s ability to achieve attainment with the PM-10 NAAQS without implementing updated BACM and/or MSM” suffers from the same flawed logic demonstrated by EPA when it used the State’s demonstrated “attainment” as

justification for its concurrence in excluding the 135 exceedances. State Brief at 26. The only reason the State is able to demonstrate attainment is because EPA has allowed it to exclude virtually all of its exceedances and thereby eliminate numerous violations of the NAAQS from the data. However, even if that were not true, it is well-established that the BACM requirement is to be independent from attainment. *Vigil v. Leavitt*, 381 F. 3d 826, 844 (9th Cir 2004)(rejecting EPA’s justification for not requiring CARB diesel as BACM because “EPA has stated that the BACM analysis should be conducted generally independent of attainment.”) Thus, demonstrated attainment is not a proper justification for not implementing BACM.

B. EPA’s Argument that the State Can Avoid the BACM Requirement Simply by Declining to Submit SIP Revisions Is Contrary to the Goal of the CAA.

In its effort to explain away its proposed partial disapproval of the 2007 Five Percent Plan because the Agricultural BMP Rule approved as BACM in 2002 no longer satisfied BACM in 2010 (See Opening Brief at 25), EPA adopts a curious interpretation of the CAA in its Answering Brief. According to EPA, it is only required to evaluate whether a SIP meets the BACM requirement when an area is first designated serious. EPA Brief at 62. Its position is that neither the State nor EPA have an obligation to ensure that the SIP continues to include control measures that represent BACM, even after the area fails to meet its attainment

deadline. *Id.* EPA claims that after it has approved the initial BACM demonstration, it will *only* revisit BACM if and when a state submits a SIP revision that affects a BACM-approved control measure. EPA Brief at 63-64

This interpretation offered by EPA is at odds with the CAA's overarching goal that areas achieve the NAAQS as expeditiously as possible. *See Ass'n of Irrigated Residents*, 423 F. 3d at 997 (citing 42 U.S.C. §§ 7502(c)(1); 7513(c)(2)). If, after the initial BACM demonstration, EPA is only required to consider whether a control measure continues to satisfy BACM at the initiative of the state, a state that wants to avoid the BACM requirement for a particular source can do so by excluding it from any future SIP revision. This is precisely what happened in the case of Arizona's revised agricultural BMP Rule. Because it had been advised by EPA that even the revised rule did not qualify as BACM, the State simply did not include the revised Rule in the 2012 Five Percent Plan. *See* Opening Brief at 51; EPA Brief at 64. Because the revised Rule was not included in the State's SIP submittal, EPA claims it was not an abuse of discretion on its part to ignore the fact that the State's control measures for agricultural sources were no longer BACM.

Thus, instead of encouraging states to continually strengthen their control measures to reflect the current BACM and, thereby, achieve the NAAQS as expeditiously as possible, EPA has adopted an interpretation of the BACM requirement that allows serious nonattainment areas that fail to meet their

attainment deadline to avoid implementing the strongest possible control measures.

This Court should reject EPA's interpretation as contrary to the Act.

III. EPA, the State, and MAG All Mischaracterize Petitioners' Objections to EPA's Policy of Allowing States to Satisfy the Requirement for Contingency Measures with Existing Control Measures.

In their Opening Brief, the Petitioners challenged EPA's policy of allowing states to satisfy the requirement to include contingency measures by designating already implemented control measures as "contingency measures" as long as they do not rely upon the emission reductions from those measures in the attainment demonstration. Opening Brief at 53-57. As Petitioners have explained, the problem with this approach is that it elevates the paper demonstration over actual experience so that the public is not protected if the attainment demonstration proves wrong and a milestone or deadline is missed.

In their Answering Briefs, EPA and the State rely upon *LEAN v. EPA*, 382 F. 3d 575 (5th Cir. 2004) to misconstrue the Petitioners' argument. EPA Brief at 72; State Brief at 26-28. Contrary to their arguments, the Petitioners are not suggesting that states be "penalized" for early implementation of control measures. We are asserting that CAA requires states to have meaningful contingency measures that are available as *additional* interim measures when the implemented measures fail to achieve the emission reductions predicted.

Both EPA and the State claim that EPA's policy is supported by the General Preamble. EPA Brief at 70; State Brief at 28. However, they are simply wrong. The General Preamble makes clear that contingency measures are measures that will be implemented in the event a milestone or deadline is missed—as an interim measure—to protect the public health while the state undertakes SIP revisions to address the inadequacy. 57 Fed. Reg. 13,498, 13,511 (Apr. 16, 1992)(“ The EPA believes that the contingency measures should, at a minimum, ensure that an appropriate level of emissions reduction progress continues to be made if attainment of RFP is not achieved and additional planning by the State is needed.”).

The discussion in the General Preamble about the early implementation of measures does not address the situation presented here, where measures are labeled “contingency” measures but in fact are implemented well in advance of any missed deadline. Rather, the General Preamble refers to the situation where to satisfy the requirement for contingency measures, the state identifies particular control measures that it will implement earlier than otherwise scheduled *if a deadline is missed*:

One way that contingency measures could meet this requirement is by requiring the early implementation of measures *scheduled for implementation at a later date in the SIP*. For example, a State could include as a contingency measure the requirements that measures which would take place in later years if the area met its

RFP target or attainment deadline, *would take effect earlier if the area did not meet its RFP target or attainment deadline.* Within 1 year of the triggering of a contingency requiring the early implementation of control measures, the State must submit a revision to the SIP containing whatever additional measures will be needed to backfill the SIP with replacement measures to cure any eventual shortfall that would occur as the result of the early use of the contingency measure.

Id. It is significant that if such early implementation occurs, the General Preamble then requires the state to “backfill” and identify new contingency measures. *Id.*

The General Preamble’s approach is entirely consistent with the purpose of contingency measures—the implementation of additional measures to continue to reduce emissions and protect the public health while the state engages in the SIP revision required by the failure to make RFP or meet its attainment deadline. It is the difference between true contingency measures, which are not implemented but are available to address an actual threat to public health, and measures which are labeled “contingency measures” based on modeling not their implementation status. The latter offers no interim protection to the public if the modeling proves flawed and the deadline is missed. Consequently, by allowing the State to rely solely upon already implemented control measures to satisfy the requirements of Section 172(c)(9), EPA has acted contrary to intent of the CAA and the interpretation articulated in the General Preamble,. As a result, it has abused its discretion.

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 13th day of February 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Reply Brief for Petitioners is proportionately spaced, has a typeface of 14 points, and contains 6241 words.

2/13/2015
Date

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

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015. I electronically transmitted the Petitioners' Reply 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