ATTACHMENT EIGHT

Agenda Item #11

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

1110 West Washington Street • Phoenix, Arizona 85007
(602) 771-2300 • www.azdeq.gov

Janice K. Brewer
Governor

Henry R. Darwin
Acting Director

VIA: FEDERAL EXPRESS

January 25, 2011

Mr. Jared Blumenfeld, Regional Administrator
U.S. Environmental Protection Agency, Region IX
Mail Code: ORA-1
75 Hawthorne Street
San Francisco, Ca 94105

RE: Withdrawal of the MAG 2007 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area

Dear Administrator Blumenfeld:

Despite our contention that the *MAG 2007 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area* ("5% Plan") has been effective and is approvable, the Arizona Department of Environmental Quality (ADEQ) hereby withdraws the 5% Plan from any further action or consideration by the United State Environmental Protection Agency (EPA).

As noted in our October 20, 2011, joint comment letter, ADEQ, the Maricopa Association of Governments (MAG) and the Maricopa County Air Quality Department (MCAQD) maintain that the 5% Plan, along with other previous plans, have been effective in improving air quality throughout the region. As a direct result of the plans that have been submitted, the annual average concentration of PM_{10} within the Phoenix area between 1990 and 2009 has declined approximately 25%. During this same time, Maricopa County experienced unprecedented growth, nearly doubling in population during that same time period. This is a testament to Arizona's commitment to cleaner air.

Although we maintain that the 5% Plan is approvable in its existing form, we recognize that there are always opportunities to build upon our existing plans. Despite withdrawal of the Plan from EPA's consideration, the air quality rules and statutes that are part of the 5% Plan remain in effect. This ensures that Arizona continues to benefit from cleaner air while ADEQ, MAG and MCAQD work with EPA to modify the plan before re-submitting for EPA's consideration and action. We look forward to a cooperative and collaborative effort to resolve these issues over the coming months so that EPA can fully approve an updated 5% Plan.

If you have any questions, please contact Eric Massey, the Director of ADEQ's Air Quality Division, at (602) 771-2308.

Sincerely,

Henry R. Darwin
Acting Director

cc: Deborah Jordan, U.S. EPA Region IX
Colleen McKaughan, U.S. EPA Region IX
William Wiley, Maricopa County Air Quality Department
Dennis Smith, Maricopa Association of Governments
Don Gabrielson, Pinal County Air Quality Control District

MARICOPA ASSOCIATION of GOVERNMENTS

NEWS RELEASE

www.mag.maricopa.gov

FOR IMMEDIATE RELEASE

CONTACT: Kelly Taft
MAG Communications Manager
(602) 452-5020

EPA Approves New Dust Factors
State Withdraws Plan to Incorporate Information

PHOENIX (January 25, 2011) – The Maricopa Association of Governments (MAG) is supporting a decision announced today by the Arizona Department of Environmental Quality (ADEQ) to voluntarily withdraw a dust control plan known as the MAG Five Percent Plan for PM-10. The move allows for the use of new paved road dust factors provided by the Environmental Protection Agency (EPA) to improve the plan.

"We want to assure the public that the stringent measures contained in the plan will continue to be implemented and public health will not be affected by the plan's withdrawal," said MAG Chair Thomas Schoaf, mayor of Litchfield Park. "In fact, under this plan, we have had no violations of the coarse particulate standard at the monitors at all in 2010," he said.

The MAG Five Percent Plan for PM-10 (particulate matter 10 microns in diameter or less) was submitted to the EPA in 2007. The new dust factor is more accurate and addresses concerns that have prevented the plan's approval. The plan was facing a partial disapproval action by the EPA.

"With the new information provided by the EPA, MAG can proceed with the revisions that are necessary for the plan. We will work as diligently as possible to improve the plan for the residents of this region," said MAG Chair Thomas Schoaf, mayor of Litchfield Park.

The new dust factors will also be used in testing transportation projects to ensure they do not contribute to air quality violations, a process known as "conformity." Once the plan is withdrawn, EPA will issue a finding of "Failure to Submit a Plan" and the region will enter a conformity "freeze," meaning the region will not be able to add new transportation projects to its plan until it can demonstrate conformity.

"We believe that we will be able to use the new EPA guidance to demonstrate conformity in the near future, to reduce the impact to our transportation plan," said Mayor Schoaf. "The new factor will assist us in developing a plan that satisfies EPA and meets the requirements of the Clean Air Act. We are comfortable with ADEQ withdrawing the plan and a new plan being developed."

For more detailed information regarding the plan's withdrawal, visit the MAG website at www.azmag.gov.

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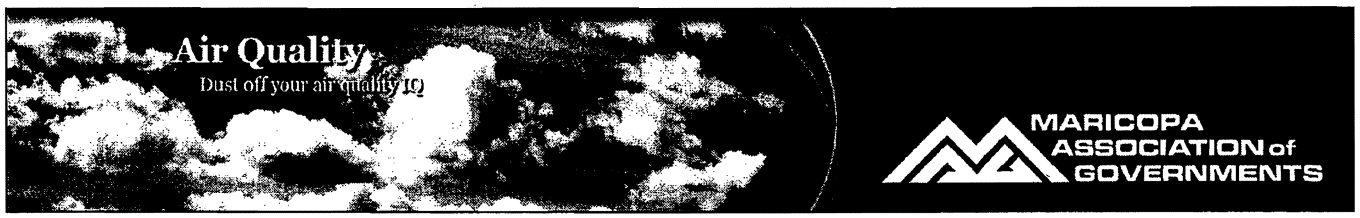


Withdrawal of the MAG Five Percent Plan for PM-10

- The Arizona Department of Environmental Quality (ADEQ) is voluntarily withdrawing a dust control plan in order to use new paved road dust factors provided by the Environmental Protection Agency (EPA) to improve the plan.

- The new dust factor is more accurate and addresses concerns that have prevented the plan's approval. The plan was facing a partial disapproval action by the EPA in late January.

- The move gives the region additional time to make changes to the MAG Five Percent Plan for PM-10, while at the same time incorporating the new dust factors provided to us by the EPA that will help improve the plan and address the technical concerns EPA had with the plan.

- The stringent measures contained in the plan will continue to be implemented and public health will not be affected by the plan's withdrawal. It is important to note that under this plan, we have had no violations of the coarse particulate standard at the monitors at all in 2010.

- Withdrawal of the plan resulted in a "Finding of Failure to Submit a Plan" by the EPA. The finding of "Failure to Submit a Plan" started two "sanctions clocks" *(see box, right)*. The clocks will stop once the revised plan is submitted and the EPA determines that it is complete.

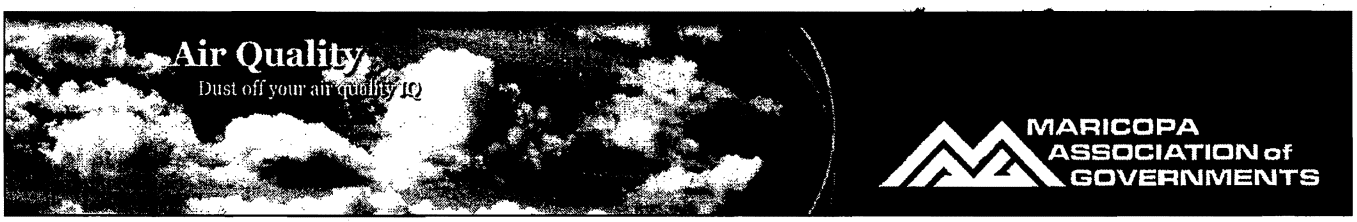
- The new formulas for paved road dust will help us meet air quality conformity requirements while a revised plan is being prepared.

- Withdrawal of the plan also gives EPA additional time to fix the many problems that exist with the agency's flawed "Exceptional Events Rule," which has been at the heart of the dispute with the EPA over the MAG plan. The Clean Air Act allows regions to be excused from penalties for exceptional events *(see additional background, next page)*.

- This solution allows the region to improve the plan while providing the least harm to our region and our economy. Under a disapproval, the sanctions clocks would not stop until EPA approved a new plan, which could have been months after sanctions were imposed.

Sanctions Clocks

A finding of failure to submit a plan will start the sanctions clocks, with the first sanction (tighter controls on major industries) imposed within 18 months. Highway sanctions (loss of federal highway funding) would follow if a new plan is not submitted within 24 months. The clocks will stop when a new plan is submitted and the EPA determines it is complete. In addition, if EPA does not take final action to approve the plan within two years of the EPA finding of failure to submit, a federal implementation plan would be imposed.



Additional Background

- The plan was first submitted to the EPA in 2007 and outlined how the region would reduce coarse particulate matter 10 microns in diameter or less (PM-10) by five percent each year until the federal standards are met. The Plan contained 53 aggressive measures designed to reduce PM-10 emissions by five percent per year and attain the standard by 2010.

- When EPA did not take action on the plan under the timeline set forth in the Clean Air Act, a public interest group filed a lawsuit against the EPA. In settling the suit, EPA announced it would take action in January 2011, and that the action would include partial disapproval of the plan.

- A key factor in the disapproval was an EPA decision to deny a request by the Arizona Department of Environmental Quality (ADEQ) to treat four high wind exceedances of the PM-10 standard in 2008 at a monitor at West 43rd Avenue as due to exceptional events, despite evidence submitted by ADEQ and MAG that high winds were to blame. The decision meant that the region could not demonstrate attainment of the PM-10 standard by 2010 as shown in the plan. Because of failure to attain the standard, the EPA published a notice in September 2010 that disapproval of the plan would be forthcoming in January 2011.

- EPA cited several additional issues with the plan, primarily concerns regarding the accuracy of the 2005 emissions inventory used to develop the plan. The new dust factors recently issued by the EPA will help address the emissions inventory issues.

- The EPA has admitted that the Exceptional Events Rule is flawed, and many states are concerned about inconsistencies in how it is administered. The rule is being questioned not only by Arizona, but also by 14 other western states that must frequently contend with dust storms, wildfires and forest fires.

- If the issues with the rule are not resolved, our region will find itself in the same situation time and time again—there is no plan that can control high winds.

- In a recent executive order, President Obama, seeking to improve the regulatory process, stated that federal agencies must find the "least burdensome tools for regulatory ends," and take into account benefits and costs. This Executive Order, which also requires federal agencies to review existing rules that may be "outmoded, ineffective, insufficient or excessively burdensome" may prove helpful as EPA continues its review of the Exceptional Events Rule.

MAG Commitment to Air Quality

MAG, Maricopa County, and ADEQ have an impressive record in improving the quality of our air. Below are just a few of the region's air quality achievements.

- The MAG region was one of the first areas in country to implement an alternative fuels program to help resolve the carbon monoxide issue.

- The region has one of the most stringent vehicle emissions inspection maintenance programs in the country.

- MAG is currently a cosponsor of a pilot project to implement electric vehicle charging stations in the region.

- The region has met the federal air quality standard for carbon monoxide. The nonattainment area is now a maintenance area.

- There have been no violations of the one-hour ozone standard since 1996. The region was also redesignated as a maintenance area for that pollutant. There have been no violations of the .08 parts per million eight-hour ozone standard since 2004.

- The region also meets the fine particulate standard (PM-2.5).

- In the area of PM-10, the MAG Revised 1999 Serious Area Plan contained 77 aggressive measures to reduce dust. This Plan was one of the first in the nation and was heralded by the EPA as one of the most comprehensive plans in the country.

- The PM-10 Plan submitted by MAG in 2007 contained another 53 aggressive measures that are in addition to the Serious Area Plan Measures. In fact, every city and town within the nonattainment area, and Maricopa County, have implemented dust control measures to address dust pollution. A tracking report indicates the cities and towns have gone above and beyond their commitments.

- In addition, the MAG Regional Council has allocated a total of $23.2 million in CMAQ funds over the last 10 years to purchase clean, dust-reducing street sweepers. It has allocated $28.4 million for paving unpaved roads from fiscal 2007 to 2013.

- Since the MAG Five Percent Plan was submitted in 2007, there have been no exceedances at monitors during stagnant conditions. There have been no violations of the standard at any monitor in 2010.

of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 15, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action to approve Virginia's revision to the definition of "Volatile organic compound" may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 1, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority for citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by adding a seventh entry under 5–10–20 to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
9 VAC 5 Chapter 10		**General Definitions [Part I]**		
* *	*	*	*	* *
5–10–20	Terms Defined	2/18/10	2/14/11 [*Insert page number where the document begins*].	Revised definition of "Volatile organic compound."
* *	*	*	*	* *

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[FR Doc. 2011–3096 Filed 2–11–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0041; FRL–9264–1]

Finding of Failure To Submit State Implementation Plan Revisions for Particulate Matter, PM–10, Maricopa County (Phoenix) PM–10 Nonattainment Area, AZ

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to find that Arizona failed to make a state implementation plan (SIP) submittal required under the Clean Air Act (CAA or Act) for the Maricopa County (Phoenix) nonattainment area (Maricopa area) for particulate matter of 10 microns or less (PM–10). The Maricopa area is a serious PM–10 nonattainment area which, having failed to attain the PM–10 National Ambient Air Quality Standards (NAAQS) by its required statutory attainment deadline, is subject to section 189(d) of the CAA. For such areas, section 189(d) requires that states submit within 12 months after the applicable attainment date, plan revisions which provide for attainment of the PM–10 NAAQS, and from the date of such submission until attainment, for an annual reduction of 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 the area.

Arizona submitted a section 189(d) plan for the Maricopa area on December 21, 2007, and EPA proposed action on this plan on September 9, 2010. On January 25, 2011, prior to final action on the plan by EPA, Arizona withdrew the submitted plan from the Agency's consideration. As a result of the withdrawal, EPA is today finding that Arizona failed to make the submittal required for the Maricopa area under section 189(d) of the Act.

This action triggers the 18-month clock for mandatory application of sanctions and 2-year clock for a federal implementation plan (FIP) under the Act. This action is consistent with the CAA mechanism for assuring SIP submissions.

DATES: *Effective Date:* This action was effective as of February 14, 2011.

FOR FURTHER INFORMATION CONTACT: Gregory Nudd, U.S. Environmental Protection Agency, Region 9, Air Division (AIR–2), 75 Hawthorne Street, San Francisco, CA 94105–3901, Telephone: (415) 947–4107; *nudd.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The NAAQS are standards for certain ambient air pollutants set by EPA to protect public health and welfare. PM–10 is among the ambient air pollutants for which EPA has established health-based standards. PM–10 causes adverse health effects by penetrating deep in the lungs, aggravating the cardiopulmonary system. Children, the elderly, and people with asthma and heart conditions are the most vulnerable.

On July 1, 1987 EPA revised the health-based NAAQS (52 FR 24672), replacing the standards for total suspended particulates with new standards applying only to particulate matter up to ten microns in diameter (PM–10). At that time, EPA established two PM–10 standards, annual standards and 24-hour standards. Effective December 18, 2006, EPA revoked the annual PM–10 standards but retained the 24-hour PM–10 standards. 71 FR 61144 (October 17, 2006). The 24-hour PM–10 standards of 150 micrograms per cubic meter (μg/m³) are attained when the expected number of days per calendar year with a 24-hour average concentration above 150 μg/m³, as determined in accordance with appendix K to 40 CFR part 50, is equal to or less than one. 40 CFR 50.6 and 40 CFR part 50, appendix K.

On the date of enactment of the 1990 Clean Air Act Amendments (CAA or the Act), many areas, including the Maricopa area, meeting the qualifications of section 107(d)(4)(B) of the amended Act were designated nonattainment by operation of law. 56 FR 11101 (March 15, 1991). The Maricopa area is located in the eastern portion of Maricopa County and encompasses the cities of Phoenix, Mesa, Scottsdale, Tempe, Chandler, Glendale, as well as 17 other jurisdictions and unincorporated County lands. The nonattainment area also includes the town of Apache Junction in Pinal County. EPA codified the boundaries of the Maricopa area at 40 CFR 81.303.

Once an area is designated nonattainment for PM–10, section 188 of the CAA outlines the process for classifying the area as moderate or serious and establishes the area's attainment deadline. In accordance with section 188(a), at the time of designation, all PM–10 nonattainment areas, including the Maricopa area, were initially classified as moderate.

A moderate PM–10 nonattainment area must be reclassified to serious PM–10 nonattainment by operation of law if EPA determines after the applicable attainment date that, based on air quality, the area failed to attain by that date. CAA sections 179(c) and 188(b)(2). On May 10, 1996, EPA reclassified the Maricopa area as a serious PM–10 nonattainment area. 61 FR 21372.

As a serious PM–10 nonattainment area, the Maricopa area acquired a new attainment deadline of no later than December 31, 2001. CAA section 188(c)(2). However CAA section 188(e) allows states to apply for up to a 5-year extension of that deadline if certain conditions are met. Arizona requested an attainment date extension under CAA section 188(e) from December 31, 2001 to December 31, 2006. On July 25, 2002, EPA approved the serious area PM–10 plan for the Maricopa area and granted Arizona's request to extend the attainment date for the area to December 31, 2006. 67 FR 48718. This final action, as well as the two proposals preceding it, provide a more detailed discussion of the history of PM–10 planning in the Maricopa area. See 65 FR 19964 (April 13, 2000) and 66 FR 50252 (October 2, 2001).

On June 6, 2007, EPA found that the Maricopa area failed to attain the 24-hour PM–10 NAAQS by December 31, 2006 (72 FR 31183) and required the submittal of a new plan meeting the requirements of section 189(d) by December 31, 2007.

On December 19, 2007, the Maricopa Association of Governments (MAG) adopted the "MAG 2007 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area" (189(d) plan). On December 21, 2007 the Arizona Department of Environmental Quality (ADEQ) submitted the 189(d) plan. MAG adopted and ADEQ submitted this SIP revision in order to address the CAA requirements in section 189(d).

CAA section 110(k)(1) requires EPA to determine whether a SIP submission is complete within 60 days of receipt. This section also provides that any plan that has not been affirmatively determined to be complete or incomplete shall become complete within 6 months by operation of law. EPA's completeness criteria are found in 40 CFR part 51, appendix V. The 189(d) plan submittal became complete by operation of law on June 21, 2008.

EPA proposed to partially approve and partially disapprove the 189(d) plan on September 9, 2010 (75 FR 54806). On January 25, 2011, prior to any final EPA action, Arizona withdrew the 189(d) plan from the Agency's consideration.

II. Final Action

A. Finding of Failure To Submit Required SIP Revisions

If Arizona does not submit the required plan revisions within 18 months of the effective date of today's rulemaking, pursuant to CAA section 179(a) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b) will be applied in the affected area. If the State has still not made a complete submittal 6 months after the offset sanction is imposed, then the highway funding sanction will apply in the affected area, in accordance with 40 CFR 52.31.[1] The 18-month clock will stop and the sanctions will not take effect if, within 18 months after the date of the finding, EPA finds that the State has made a complete submittal addressing the 189(d) PM–10 requirements for the Maricopa area. In addition, CAA section 110(c)(1) provides that EPA must promulgate a federal implementation plan (FIP) no later than 2 years after a finding under section 179(a) unless EPA takes final action to approve the submittal within 2 years of EPA's finding.

B. Effective Date Under the Administrative Procedures Act

This final action is effective on February 14, 2011.

Under the Administrative Procedures Act (APA), 5 U.S.C. 553(d)(3), an agency rulemaking may take effect before 30 days after the date of publication in the **Federal Register** if an agency has good cause to mandate an earlier effective date. Today's action concerns SIP revisions that are already overdue and the State has been aware of applicable provisions of the CAA relating to overdue SIPs. In addition, today's action simply starts a "clock" that will not result in sanctions for 18 months, and that the State may "turn off" by a complete SIP submittal addressing the 189(d) PM–10 requirements for the Maricopa area. These reasons support an effective date prior to 30 days after the date of publication.

C. Notice-and-Comment Under the Administrative Procedures Act

This final agency action is not subject to the notice-and-comment requirements of the APA, 5 U.S.C. 533(b). EPA believes that because of the limited time provided to make findings of failure to submit regarding SIP submissions, Congress did not intend such findings to be subject to notice-and-comment rulemaking. However, to the extent such findings are subject to notice-and-comment rulemaking, EPA invokes the good cause exception pursuant to the APA, 5 U.S.C. 553(d)(3). Notice and comment are unnecessary because no EPA judgment is involved in making a nonsubstantive finding of failure to submit SIPs required by the

[1] In a 1994 rulemaking, EPA established the Agency's selection of the sequence of these two sanctions: The offset sanction under section 179(b)(2) shall apply at 18 months, followed 6 months later by the highway sanction under section 179(b)(1) of the Act. EPA does not choose to deviate from this presumptive sequence in this instance. For more details on the timing and implementation of the sanctions, see 59 FR 39832 (August 4, 1994), promulgating 40 CFR 52.31, "Selection of sequence of mandatory sanctions for findings made pursuant to section 179 of the Clean Air Act."

CAA. Furthermore, providing notice and comment would be impracticable because of the limited time provided under the statute for making such determinations. Finally, notice and comment would be contrary to the public interest because it would divert Agency resources from the critical substantive review of submitted SIPs. See 58 FR 51270, 51272, note 17 (October 1, 1993); 59 FR 39832, 39853 (August 4, 1994).

III. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This final rule will not have a significant impact on a substantial number of small entities because findings of failure to submit required SIP revisions do not by themselves create any new requirements. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that today's action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. The CAA provision discussed in this rule requires states to submit SIPs. This rule merely finds that Arizona has not met that requirement. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it merely finds that Arizona has failed to make a submission that is required under the Clean Air Act.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to

perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this rulemaking.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2). This rule will be effective February 14, 2011.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 15, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 3, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2011–3027 Filed 2–11–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216 and 252

RIN 0750–AF51

Defense Federal Acquisition Regulation Supplement; Award-Fee Contracts (DFARS Case 2006–D021)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address award-fee contracts, including eliminating the use of provisional award-fee payments.

DATES: *Effective Date:* February 14, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060. Telephone 703–602–0302; facsimile 703–602–0350. Please cite DFARS Case 2006–D021.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** (75 FR 22728) on April 30, 2010, to revise guidance for award-fee evaluations and payments, eliminate the use of provisional award-fee payments, and incorporate DoD policy guidance on the use of objective criteria. A new clause entitled Award Fee sets forth the use of award fees in DoD contracts.

II. Discussion and Analysis

A. Analysis of Public Comments

In response to the proposed rule, DoD received comments from three respondents. A discussion of the comments is provided below:

1. Making 40 Percent of the Award-Fee Pool Available for the Final Evaluation

a. *Comment:* The respondents considered the language aligning fee distributions with contract performance and cost schedules. One respondent stated that holding 40 percent of the award fee until the final evaluation does not consider the completion of individual contract line items or undefinitized work.

DoD Response: The purpose of making 40 percent of the award-fee pool available under the final evaluation period is to set aside a sufficient amount to protect the taxpayer's interest in the event a contractor fails to meet contractual obligations. Assuming the contract is properly structured, there is nothing in the rule that prohibits contractors from being paid for completed contract line items or work performed under undefinitized contracts.

b. *Comment:* The respondents expressed concern that holding 40 percent award fee until the final evaluation does not reward contract performance, particularly if a contract is terminated before the final evaluation. One respondent was concerned that by making a specified percentage of the award fee available for the final evaluation period, in the event of a termination for convenience, the contractor may not have the ability to earn that final award–fee percentage.

DoD response: The rule does not change the current procedures for terminations for convenience. In the event of a termination for convenience prior to the final evaluation period, contractors will be eligible to earn award fee available up to the point of the termination.

c. *Comment:* One respondent was concerned that holding of 40 percent of the award fee until final evaluation will negatively affect cash flow. The respondents were also concerned that the proposed rule will increase financial risk to Government contractors and result in an imbalance in the risk/reward relationship. One respondent was concerned, therefore, that the rule will unfavorably impact DoD's supplier base by adversely impacting suppliers' ability to attract debt and equity investment.

DoD Response: Contractors will continue to be paid incurred costs on cost-type contracts, completed work under fixed-price contracts with progress payments, or milestones achieved under fixed-price contracts with performance-based payments. Accordingly, a contractor's cash flow should not be significantly impacted. Since contractors who consistently meet contractual performance requirements will maximize the amount of award fee earned, there is no imbalance in the risk/reward relationship. There should be little, if any, impact on a superior