No. _____

In the Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,
v.
SANDRA L. BAHR AND DAVID MATUSOW,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As required by the Clean Air Act, the State of Arizona submitted an implementation plan to bring Maricopa County into attainment with the National Ambient Air Quality Standard for particulate matter. Because the area had previously struggled to come into attainment, the Act required Arizona's plan to include "contingency measures" beyond what was necessary to achieve the standard. 42 U.S.C. § 7502(c)(9). To hasten the improvement of its air, Arizona immediately implemented those measures. The Environmental Protection Agency then approved the plan's already-implemented contingency measures, as had been its nationwide practice since 1992. The Ninth Circuit disagreed, finding that the Clean Air Act unambiguously barred early implementation.

The question presented is whether the Ninth Circuit erred in holding, in conflict with the Fifth Circuit, that EPA's interpretation of the Clean Air Act's contingency measures provision, 42 U.S.C. § 7502(c)(9), was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona, which was Respondent-Intervenor below.

Respondents are Sandra Bahr and David Matusow.

The United States Environmental Protection Agency, former EPA Administrator Gina McCarthy, and Jared Blumenfeld, Administrator of EPA Region IX, were Respondents below. Scott Pruitt is currently the EPA Administrator.

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PETITION FOR WRIT OF CERTIORARI

The Clean Air Act requires that States implement pollution control measures "as expeditiously as practicable." 42 U.S.C. § 7502(c)(1). Yet when the State of Arizona took extra steps to improve air quality and the Environmental Protection Agency (EPA) approved them, the Ninth Circuit held that the Act mandated slower progress. While the provisions of the Clean Air Act are notoriously complex, the issue in this case is simple and has produced an acknowledged circuit split.

Among the pollutants the Clean Air Act targets are small airborne particles less than ten micrometers in diameter (known as PM-10), such as dust and soot. The Phoenix metropolitan area has had difficulty achieving the PM-10 standard due to a combination of the area's fine, highly erosive soils that generate dust when disturbed, the relatively large amounts of dust generated from traveling on paved and unpaved roads, a substantial level of construction activities, and weather conditions as diverse as stagnant air masses and high wind events. ER 251–52. EPA and Arizona have worked together for years to achieve the PM-10 standard.

At issue here is whether EPA lawfully approved the State's 2012 plan for reducing PM-10 concentrations. Specifically, the plan included "contingency measures" that Arizona implemented before implementation became mandatory. This early implementation was not, however, necessary for demonstrating that the plan would successfully achieve the national ambient air quality standard. Moreover, because the actions in question entailed significant capital improvements

(*e.g.,* paving dirt roads), delaying implementation until the State missed another pollution control target made little sense. Finally, each of the actions in question will continue to contribute to improved air quality on an ongoing basis.

EPA has long interpreted the Act to permit early adoption of contingency measures. Over the past two decades, EPA has approved 26 plans that contain already-implemented contingency measures, affecting 15 States and the District of Columbia. App. 94–98. On the one occasion that environmentalists challenged this interpretation in court, the Fifth Circuit upheld EPA's actions as consistent with the text and purpose of the Act. *La. Envtl. Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004) ("*LEAN*"). The Ninth Circuit has now disturbed this judicial peace. Its opinion expressly rejects "the Fifth Circuit's interpretative approach" and the latter's reliance on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). App. 36. This acknowledged circuit split on an important statutory provision and growing uncertainty over application of *Chevron* deference warrant this Court's review.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 836 F.3d 1218. App. 1–43. The Ninth Circuit's order of November 8, 2016, denying Respondents' motion for rehearing is not published but is reproduced at App. 86. The Ninth Circuit's order of January 9, 2017, denying EPA's and Arizona's petitions for rehearing en banc is not published but is reproduced at App 84–85. The EPA's Final Rule

approving Arizona's implementation plan is reported at 79 Fed. Reg. 33,107 (June 10, 2014). App. 44–83.

JURISDICTION

The court of appeals entered judgment on September 12, 2016. The court denied Petitioner's timely petition for rehearing en banc on January 9, 2017. On March 10, 2017, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including May 10, 2017. *See* No. 16A885. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Air Act's contingency measures provision requires that a State Implementation 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); App. 92.

The standard of review for a lawsuit challenging EPA's approval of a State Implementation Plan is whether that approval was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); App. 21.

STATEMENT OF THE CASE

A. The Clean Air Act Requires States to Attain National Ambient Air Quality Standards.

Under the Clean Air Act, EPA establishes national ambient air quality standards (NAAQS) for widely-dispersed pollutants affecting public health. 42 U.S.C. §§ 7408, 7409. Each State has "primary responsibility" for developing an implementation plan to assure that the NAAQS "will be achieved and maintained" throughout the State. 42 U.S.C. § 7407(a). To that end, the State Implementation Plan (SIP) must provide for the implementation, maintenance, and enforcement of the NAAQS in each "air quality control region within a State," and must be presented to EPA for approval. 42 U.S.C. § 7410(a)(1).

With the Clean Air Act amendments of 1990, Congress created a NAAQS for PM-10, which Maricopa County did not satisfy at that time. 42 U.S.C. § 7407(d)(4)(B); 56 Fed. Reg. 11,101 (Mar. 15, 1991) (designating Maricopa County as a nonattainment area). Although all PM-10 nonattainment areas were initially classified as moderate, 42 U.S.C. § 7513(a), EPA reclassified the Maricopa County Area as a serious nonattainment area after concluding that it could not attain the PM-10 NAAQS by the original date applicable to moderate areas. 61 Fed. Reg. 21,372 (May 10, 1996).

Designation as a serious nonattainment area carries several implications. Relevant to the current case, it allows additional time for compliance if attainment by the deadline would be "impracticable" and the SIP includes the most stringent measures that are included

in the implementation plan of any other State. 42 U.S.C. § 7513(e). The EPA may grant each area one extension of no more than five years. *Id.* If a nonattainment area does not attain the PM-10 NAAQS by its "applicable attainment date" under the five-year plan, the State must submit a SIP revision that provides for at least a five percent annual reduction of PM-10 emissions until attainment. 42 U.S.C. § 7513a(d).

Additionally, the Act's contingency measures provision requires that the SIP for a nonattainment area contain 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." 42 U.S.C. § 7502(c)(9). These measures must "take effect . . . without further action by the State or the Administrator." *Id*. Contingency measures are in addition to the control measures proposed to attain compliance with the NAAQS. App. 77.

B. Regulation of PM-10 in Maricopa County

The Maricopa County PM-10 nonattainment area is located in the eastern portion of Maricopa County and encompasses tribal land, unincorporated county land, and 21 cities, including Phoenix, Mesa, Scottsdale, Tempe, Chandler, and Glendale. 79 Fed. Reg. 7118 (Feb. 6, 2014). When EPA reclassified Maricopa County as a serious PM-10 nonattainment area, it set an attainment deadline of December 31, 2001. 61 Fed. Reg. 21,372, 21,373 (May 10, 1996).

In 2000, Arizona submitted a SIP revision to EPA to show that it would adopt over 70 best available control

measures to minimize dust generated from paved and unpaved roads, alleys, and parking lots as well as from construction and motor vehicle exhaust. *See* 65 Fed. Reg. 19,963, 19,972–83 (Apr. 13, 2000); *see also* ER 268 (noting approximately 77 control measures). Arizona also requested a five-year attainment date extension under 42 U.S.C. § 7513(c)(2), asserting that it met the requirements for the extension because its plan included the most stringent measures that are included in any State's implementation plan. 65 Fed. Reg. at 19,984–88. In 2002, EPA approved the PM-10 revision for the Maricopa County Area and granted Arizona's request for a five-year extension until December 31, 2006. 67 Fed. Reg. 48,718 (July 25, 2002).

In 2007, EPA found that the Maricopa County Area failed to attain the PM-10 NAAQS by December 31, 2006. 72 Fed. Reg. 31,183 (June 6, 2007). In December 2007, Arizona submitted a five-percent plan for PM-10 for the Maricopa County Area. 75 Fed. Reg. 54,806, 54,807 (Sept. 9, 2010). That plan languished for years without EPA taking any action on it. Arizona withdrew the 2007 plan in 2011 and submitted a new SIP revision with a new five-percent plan the following year. *See* 79 Fed. Reg. at 7119.

The 2012 five-percent plan predicted attainment of the PM-10 NAAQS by December 31, 2012. ER 305–37. EPA found that the 2012 plan complied with the requirements of the Clean Air Act and proposed to approve the plan. 79 Fed. Reg. at 7122–23. After obtaining and reviewing public comments, the Agency offered its formal approval in a final rule. App. 44–83.

During the prolonged process of obtaining EPA approval, Arizona implemented the contingency

measures identified in its five-percent plan. These measures fall into two general categories, both of which impart air-quality benefits on a continuing basis. First, the State paved and stabilized existing dirt roads, alleys, and unpaved shoulders; repaved or overlaid paved roads with rubberized asphalt; and lowered speed limits on dirt roads and alleys. Second, Arizona purchased street sweepers certified to curtail production of PM-10 particulates and maintains an ongoing practice of sweeping ramps, freeways, and frontage roads. App. 16, 33–34.

EPA approved these already-implemented projects as contingency measures under 42 U.S.C. § 7502(c)(9), explaining that Arizona did not rely on them to make its attainment demonstration or to show reasonable further progress toward attainment, and that nothing in Section 7502(c)(9) precluded a State from implementing such contingency measures before they become mandatory. App. 34. This reasoning was consistent with the Agency's practice for over 20 years. *See* App. 94–98 (listing other approvals of plans containing already-implemented contingency measures).

C. The Ninth Circuit's Decision

Respondents Bahr and Matusow (collectively "Bahr") challenged EPA's approval of the five-percent plan on a variety of grounds, including that EPA erred by allowing Arizona to satisfy the contingency measure requirement with previously-implemented measures. App. 24.

The Ninth Circuit panel accepted Bahr's argument and created an acknowledged split with the Fifth

Circuit over the acceptability of a plan including already-implemented contingency measures. App. 35–37. The panel majority held that Section 7502(c)(9) "'directly spoke[] to the precise question at issue.'" App. 34–35 (quoting *Chevron*, 467 U.S. at 842–43). It reasoned that the Clean Air Act forecloses consideration of already-implemented measures because it "requires the SIP to provide for the implementation of measures 'to be undertaken' in the future." *Id*. (quoting 42 U.S.C. § 7502(c)(9)). In interpreting the Act this way, the panel acknowledged that it created a direct conflict with the Fifth Circuit's decision in *LEAN*. App. 36 ("We cannot agree with the Fifth Circuit's interpretative approach.").

Judge Clifton dissented, reasoning that early implementation of contingency measures "is consistent with the language of § 7502(c)(9)" and the purposes of the Clean Air Act. App. 39–40 (Clifton, J., concurring in part and dissenting in part). Specifically, Arizona's infrastructure improvements and investment in specialized street sweepers will result in additional and continuing emissions reductions that were "not relied upon to obtain anticipated compliance." App. 39. The dissent also explained how EPA's interpretation "comports well with the purpose" of the Act, including Section 7502(c)(1)'s direction that emission control measures be "implemented as expeditiously as practicable." App. 41. Judge Clifton explained that, given the Act's purpose, "'it seems illogical to penalize nonattainment areas that are taking extra steps, such as implementing contingency measures prior to a deadline' as a cushion to ensure NAAQS compliance and prevent the need for the contingency measures

requirement to be triggered in the first place." *Id.* (quoting *LEAN*, 382 F.3d at 584).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision creates a direct conflict with the Fifth Circuit over a statutory provision at the center of the Clean Air Act. This split did not arise accidentally. In overturning EPA's approval of the Arizona SIP, the Ninth Circuit panel considered and expressly rejected the Fifth Circuit's holding in *LEAN*. App. 35–37. By forbidding EPA from approving a SIP that lists as contingency measures any action that a State has already implemented, the Ninth Circuit's decision creates a perverse incentive in the nation's largest jurisdiction: States must forebear implementing any pollution control measures beyond those necessary to demonstrate attainment. If they make the mistake of acting to improve their air quality more proactively, as States in the Fifth Circuit may freely do, Ninth Circuit States will face denial of their SIPs. This legal variance is untenable, especially for a statute like the Clean Air Act that is aimed at a national problem. *See generally EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014) ("Air pollution is . . . heedless of state boundaries.").

By reading Section 7502(c)(9) in isolation and holding that it does not permit States to implement contingency measures until a nonattainment area misses an additional target, the Ninth Circuit frustrated the Act's stated goal of implementing pollution control measures "as expeditiously as practicable." 42 U.S.C. § 7502(c)(1). EPA, on the other hand, interpreted the contingency measures provision in context. Because it is more faithful to the statute,

EPA's interpretation does not require *Chevron* deference. At the very least, however, congressional silence on whether contingency measures could be implemented early triggers deference to EPA's reasonable conclusion that States can implement contingency measures before failing to attain the NAAQS. This was the approach of the Fifth Circuit.

Read in context, the contingency measures provision allows EPA to approve plans including already-implemented measures. If any ambiguity exists, that fact only triggers additional deference to the Agency. Either way, the Ninth Circuit's holding is incorrect and expressly departs from the Fifth Circuit and implicitly departs from other circuits' approach to ambiguities created by statutory context.

I. The Ninth Circuit's Holding that EPA Misinterpreted 42 U.S.C. § 7502(c)(9) Is Incorrect and Conflicts with the Fifth Circuit.

A. The Clean Air Act Does Not Punish States for Early Implementation of Contingency Measures.

The Ninth Circuit created a circuit split by failing to heed this Court's instruction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Read in this way, the contingency measures provision requires pollution control measures that are not necessary to achieve the NAAQS and that take effect "without further action by the State." 42 U.S.C. § 7502(c)(9). The provision does not impose any other conditions, including a ban on early implementation.

The Ninth Circuit panel majority held that the language of 42 U.S.C. § 7502(c)(9) was unambiguous and prohibited EPA from approving contingency measures that the State implemented before first failing to meet its pollution reduction deadline. The key to this holding is the panel's conviction that the statutory language carried a timing requirement. Relying on the phrase "to be undertaken" and the word "contingency," the panel majority concluded that "Congress was clear that 'contingency measures' are control measures that will be implemented in the future." App. 35.

The Fifth Circuit reached the contrary conclusion, rejecting the idea that Section 7502 has an implicit timing requirement. In *LEAN*, EPA approved as a contingency measure an emissions reduction at a compressor station that was implemented a year before the area missed its attainment deadline. 382 F.3d at 582. Like many pollution reduction measures that involve capital improvements, the modifications in *LEAN* would continue to reduce emissions even after the deadline was missed. *Id*. The Fifth Circuit found that although the Act "uses the present tense"—that is, "'to take effect' and 'to be undertaken'"—it does not prohibit a *continuing* emissions reductions measure "from being utilized as a contingency measure." *Id.* at 583 (quoting 42 U.S.C. § 7502(c)(9)). Instead, the only timing requirement the Fifth Circuit identified was the statutory goal of implementing "'all reasonably available control measures as expeditiously as practicable.'" *Id.* (quoting 42 U.S.C. § 7502(c)(1)). That

timing objective is better served by permitting early adoption of contingency measures.[1]

Not only is the Ninth Circuit mistaken in finding a requirement of delay in the terms of the Clean Air Act, but the two features of contingency measures that are evident from surrounding statutory language support early implementation.

First, the term "contingency measures" appears in the context of a statutory scheme that requires States to adopt a SIP that will achieve NAAQS compliance even without those measures. As Judge Clifton explained, "[t]he language of the statute prohibits states from labeling as 'contingency measures' the same proposed reductions relied upon to achieve NAAQS compliance." App. 39; see also 59 Fed. Reg. 41,998, 42,015 (Aug. 16, 1994) ("Contingency measures should consist of other available control measures not contained in the applicable core control strategy."). Read in context, the Act's purpose in requiring "contingency" measures was not to dictate their timing but to distinguish them from other pollution control strategies that are necessary to obtain compliance with the NAAQS. And in the current case there is no question that "Arizona's SIP identified additional measures that were *not* relied upon to obtain the anticipated compliance." App. 39 (emphasis added).

Second, contingency measures must "take effect . . . without further action by the State." 42 U.S.C.

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[1] The Fifth Circuit ultimately remanded for additional factual development regarding the contingency measure's impact on air quality within the nonattainment area. *Id.* at 585–87.

§ 7502(c)(9). Nothing requires less "further action by the State" than a measure that is already in effect. As for the meaning of "take effect," the dissent correctly explained that "early implementation of infrastructure improvements that are expected to result in additional and continuing emissions reductions is consistent with the language of § 7502(c)(9)" because "they 'take effect' and are 'undertaken' not only at the time they are first implemented but also thereafter, including at the time they might formally be required due to nonattainment." App. 39. At least in the case of pollution control measures that have ongoing effects, surrounding language confirms that the "contingency measures" may be implemented before nonattainment occurs.

At a more general level, the Clean Air Act states that its purpose is to "encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." 42 U.S.C. § 7401(c). Likewise, nonattainment plans are required to "provide for the implementation of all reasonably available control measures as expeditiously as practicable." 42 U.S.C. § 7502(c)(1). Here again, the purpose of the Clean Air Act—not inferred from legislative history, but expressed in the text of the statute itself—confirms that early adoption of pollution control measures is a reasonable reading of Section 7502(c)(9). In fact, it is the *only* reasonable reading because it alone "produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). Requiring delay, as Respondents would do, provides no environmental benefit and certainly would not increase the speed with which an area achieves attainment. "It

does not benefit ordinary citizens to read the [Act] to incentivize states to hold off from purchasing new street sweepers or repaving their roads until the contingency measures requirement is triggered." App. 41 (Clifton, J., concurring in part and dissenting in part). And if a State fails to reach attainment even with early implementation of the contingency measures, then the State would be required to develop additional control measures anyway.

In sum, the dissent below and the Fifth Circuit's decision in *LEAN* persuasively answer any concern about when measures "take effect" while also accounting for contextual indications about the purpose of "contingency measures," as distinguished from other pollution control measures that are necessary to achieve the NAAQS. The Fifth Circuit's only error was concluding than an ambiguity nevertheless persists and therefore retreating to the safety of *Chevron* deference. To the contrary, the best reading of the Clean Air Act is the one endorsed by Arizona and the EPA for over 20 years. This Court should grant certiorari to affirm the Fifth Circuit's holding and validate the work of statutory interpretation.

B. The Ninth Circuit's Decision Also Departs from Other Circuits by Shrinking the Applicability of *Chevron* Deference.

As demonstrated above, Arizona and EPA have the better reading of Section 7502(c)(9). Without the benefit of any interpretative deference, that contextual reading should prevail. When the additional doctrine of *Chevron* deference comes to bear, the Ninth Circuit's error assumes a second dimension, and its departure from other circuits applying the same doctrine provides

an additional reason for this Court to grant the Petition.

Presented with the same interpretative question, the Fifth Circuit in *LEAN* applied *Chevron* deference to uphold EPA's interpretation. Other circuits have afforded similar deference on interpretative questions far closer than the one in this case. The District of Columbia Circuit and the Federal Circuit, for example, have followed the Fifth Circuit's approach in considering "the governing statutory context" to recognize ambiguity where the dictionary meaning of a term might suggest definitional certitude. *Am. Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 796 F.3d 18, 25 (D.C. Cir. 2015); *see also Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338, 1346 (Fed. Cir. 2015) (en banc) (using the broader scheme of the Patent Act to find ambiguity). On the other hand, the Eleventh Circuit refused to consider the "basic objective of the statute" to identify an ambiguity warranting agency deference. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969–70 (11th Cir. 2016) (en banc). Like the Eleventh Circuit in *Villarreal*, the Ninth Circuit here rejected the existence of an ambiguity created by statutory context. App. 37. Had the Ninth Circuit followed the approach of the Fifth, D.C., and Federal Circuits, it would have reached a different conclusion on at least the first step of the *Chevron* analysis.

While this Court has limited *Chevron*'s applicability in recent years, none of those exceptions apply to the current case. For example, the permissibility of implementing pollution control measures before they (might) become mandatory is important, but it does not

reach the level of "deep 'economic and political significance'" embodied in the Affordable Care Act. *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Likewise, EPA has not construed the relevant statute in a manner that is outside "'the bounds of reasonable interpretation.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quoting *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014)); *see also supra* Part I.A. For cases like the present one, *Chevron* remains in full effect. If this Court is unconvinced by the interpretative argument in Part I.A *supra*, it should nevertheless grant certiorari to confirm that ambiguities based on a combination of statutory silence and an apparent conflict between the dictionary meaning of a term and its meaning in context trigger deference to an agency's reasonable interpretation.

* * *

This Court should grant certiorari to affirm EPA's interpretation of the statute and thereby demonstrate that the tools of statutory construction obviate the need for *Chevron* deference in most cases. Alternatively, if *Chevron* is to play a role, then the divergence between the present case and *LEAN* as well as the variation in other circuits struggling to apply *Chevron* presents another reason to grant the Petition.

II. The Ninth Circuit Incorrectly Decided an Important Issue of Environmental Law that Will Result in Increased Air Pollution Throughout the Country.

Because of the decision below, States in the Ninth Circuit will generate increased air pollution. That pollution will impact the quality of life for Americans living in other States, including those in which EPA remains free to continue using the Fifth Circuit's approach to early-adopted contingency measures.

The decision below creates an incentive for States not to implement pollution control measures identified in their SIPs for purposes of 42 U.S.C. § 7502(c)(9). Even if those measures would reduce pollution on an ongoing basis, States have an immediate interest in avoiding a SIP denial, which carries heavy consequences. Among those is the possible imposition of a Federal Implementation Plan, 42 U.S.C. § 7410(c)(1), as well as sanctions that can be as draconian as lost federal highway funds, 42 U.S.C. §§ 7410(m), 7509(b).

Here, Arizona's contingency measures included paving and stabilizing dirt roads, repaving other roads with rubberized asphalt, lowering speed limits on dirt roads, purchasing PM-10 certified sweepers, and establishing a program of ongoing highway sweeping. App. 33. Arizona's contingency measures required significant expenditure of public funds and, in the case of lower speed limits, the imposition and enforcement of regulatory restrictions on its citizens' activities. Because of the financial and logistical burdens of creating and adopting contingency measures and the burdens imposed on citizens by their implementation,

States already have reasons not to undertake projects beyond those necessary to meet the Act's requirements. Adding an additional reason only further discourages proactive pollution control. *See* Brief of Amici Curiae South Coast Air Quality Management District and San Joaquin Valley Unified Air Pollution Control District in Support of Respondents' Petition for Rehearing or Rehearing En Banc, No. 14-72327 (Nov. 3, 2016) at 3 (noting that the panel decision "will have the perverse result that California air districts must withhold implementing feasible control measures in order to hold some measures 'in reserve' as contingency measures").

There is no pollution-reduction or public health argument *against* approving already-implemented controls as contingency measures if their pollution-reduction effects are ongoing and are not necessary for the SIP's attainment showing. Given the purpose of the Act, there is no reason to hold such measures in reserve as the Ninth Circuit would require. Congress clearly intended to reduce air pollution expeditiously by cooperating with States. 42 U.S.C. §§ 7401(a), 7410. It certainly did not intend the Act to encourage delay where States would prefer to take action sooner.

In the interest of public health, this Court should resolve the conflict between the Fifth and Ninth Circuits by adopting the Fifth Circuit's construction of 42 U.S.C. § 7502(c)(9), so that persons in every corner of the country can benefit from EPA's approval of already-implemented contingency measures that reduce air pollution on an ongoing basis.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-72327

[Filed September 12, 2016]

SANDRA L. BAHR; DAVID MATUSOW, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; GINA MCCARTHY, Administrator, United States Environmental Protection Agency; JARED BLUMENFELD, Regional Administrator, EPA Region IX, *Respondents*, STATE OF ARIZONA, *Respondent-Intervenor*.	)

On Petition for Review of an Order of the
Environmental Protection Agency

Argued and Submitted June 17, 2016
San Francisco, California

Filed September 12, 2016

OPINION

Before: Richard R. Clifton and Sandra S. Ikuta, Circuit Judges, and William Q. Hayes,[*] District Judge.

Opinion by Judge Ikuta;
Partial Concurrence and Partial Dissent
by Judge Clifton

SUMMARY[**]

Environmental Law

The panel granted in part and denied in part a petition for review of an order of the United States Environmental Protection Agency approving Arizona's Five Percent Plan for airborne particulate matter around Maricopa County, promulgated under the Clean Air Act.

Arizona submitted a new State Implementation Plan revision on May 25, 2012 – the Five Percent Plan – to achieve a five percent annual reduction in PM-10, a harmful air pollutant.

Petitioners alleged that the EPA acted contrary to law by failing to require that Arizona include an updated analysis of best available control measures and most stringent measures in the Five Percent Plan, excluding135 exceedances from the monitoring data as

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[*] The Honorable William Q. Hayes, United States District Judge for the Southern District of California, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

"exceptional events," and allowing Arizona to satisfy the "contingency measures" requirement with previously implemented control measures.

The panel held that it would apply *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference to the EPA's interpretation of the Clean Air Act issued in connection with a State Implementation Plan approval.

The panel upheld the EPA's determination that the control measures in Arizona's Five Percent Plan did not need to be updated, and that the 135 exceedances were exceptional events that were excluded from consideration under the EPA's regulation and guidance documents.

The panel did not defer to the EPA's interpretation of the contingency measures requirement, however, because under the plain language of 42 U.S.C. § 7502(c)(9) contingency measures are measures that will be taken in the future, not measures that have already been implemented. The panel remanded to the EPA for further consideration of this portion of the State Implementation Plan, but otherwise denied the petition.

Judge Clifton concurred in sections I-IV of the majority opinion, and dissented from the majority's conclusion in section V that EPA's approval of the contingency measures in Arizona's State Implementation Plan was contrary to the clear language of the Clean Air Act. In his view, the scope of the Clean Air Act's contingency measures requirement was ambiguous and EPA's reasonable interpretation of that requirement was entitled to deference.

COUNSEL

Joy E. Herr-Cardillo (argued) and Timothy M. Hogan, Arizona Center for Law in the Public Interest, Tucson, Arizona, for Petitioners.

Alan D. Greenberg (argued), Attorney; Sam Hirsch, Acting Assistant Attorney General; Environment & Natural Resources Division, United States Department of Justice, Denver, Colorado; Geoffrey Wilcox, Office of General Counsel; Kara Christenson, Office of Regional Counsel, Region 9; United States Environmental Protection Agency, San Francisco, California; for Respondents.

Monique Coady, Assistant Attorney General, Office of the Attorney General, Phoenix, Arizona, for Respondent-Intervenor.

OPINION

IKUTA, Circuit Judge:

Sandra Bahr and David Matusow petition for review of a final rule issued by the Environmental Protection Agency (EPA) approving Arizona's Five Percent Plan for airborne particulate matter around Maricopa County. They argue that the EPA erred in approving this plan because it did not include best available control measures (BACM) and most stringent control measures (MSM) as of 2012. The petitioners also argue that the EPA failed to follow its own published guidance in approving Arizona's claim that 135 exceedances of the air emission standard could be excluded from consideration. *See* 42 U.S.C. §7619(b)(1)(A). Finally, the petitioners argue that the EPA's approval of the contingency measures included

in Arizona's Five Percent Plan was contrary to 42 U.S.C. § 7502(c)(9) because the measures had already been implemented. We uphold the EPA's determination that the control measures in Arizona's Five Percent Plan did not need to be updated, and that the 135 exceedances were exceptional events that are excluded from consideration under the EPA's regulation and guidance documents. We do not defer to the EPA's interpretation of the contingency measures requirement, however, because under the plain language of § 7502(c)(9) contingency measures are measures that will be taken in the future, not measures that have already been implemented.

I

We begin by briefly describing the statutory framework. The Clean Air Act (CAA), 42 U.S.C. § 7401 et seq., establishes "cooperative Federal, State, regional, and local programs to prevent and control air pollution," *id*. § 7401(a)(4). Under the CAA, the EPA is required to "publish . . . a list which includes each air pollutant . . . emissions of which, in [the EPA's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." *Id*. § 7408(a)(1). The EPA is then required to "prescrib[e] a national primary ambient air quality standard" (NAAQS) for that pollutant. *Id*. § 7409(a).

One such harmful air pollutant is "PM-10," defined as "particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers." *Id*. § 7602(t). According to the EPA, "PM-10 causes adverse health effects by penetrating deep into the lungs, aggravating the cardiopulmonary system." Approval

and Promulgation of Implementation Plans—Maricopa County PM-10 Nonattainment Area, 79 Fed. Reg. 7118, 7118 (Feb. 6, 2014). The EPA established a NAAQS for PM-10 of 150 micrograms per cubic meter, averaged over a 24-hour period. 40 C.F.R. § 50.6(a). This standard, which is sometimes referred to as the "24-hour PM-10 standard," is "attained when the expected number of days per calendar year with a 24-hour average concentration above 150 $\mu g/m^3$ . . . is equal to or less than one." *Id*.

The CAA provides that "[e]ach State shall have the primary responsibility for assuring air quality" within the state "by submitting an implementation plan" explaining how the state will meet and maintain the NAAQS and other standards. 42 U.S.C. § 7407(a). An area within a state that does not meet a NAAQS is designated as a "nonattainment" area, *id*. § 7407(d). Each state's implementation plan (called a State Implementation Plan or SIP) must provide for the "implementation, maintenance, and enforcement" of the NAAQS. *Id*. § 7410(a)(1). The CAA requires each SIP for a nonattainment area to contain specified information, including a requirement for reasonable further progress, *id.* § 7502(c)(2), an emissions inventory, *id.* § 7502(c)(3), and a list of "contingency 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," *id*. § 7502(c)(9).[1]

The CAA sets out a series of deadlines for states to meet the NAAQS for PM-10, with increasingly stringent requirements if a state misses a deadline. *Id*. §§ 7513–7513b. The sequence is as follows:

A nonattainment area is initially designated as a "moderate" area. *Id*. § 7513(a). A SIP for a "moderate" PM-10 nonattainment area must explain how that area will meet the PM-10 NAAQS by the "attainment date," which for nonattainment areas designated by Congress was no later than December 31, 1994. *Id*. § 7513(c)(1). The SIP must "assure that reasonably available control measures for the control of PM-10" are implemented. *Id*. § 7513a(a).

If a moderate nonattainment area fails to meet the PM-10 NAAQS bythe attainment date, the EPA must reclassifyit as a "Serious PM-10 nonattainment area." *Id*. § 7513(b). After redesignation, the state must submit a SIP that demonstrates how the area will meet the PM-10 NAAQS within 10 years of the original

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[1] 42 U.S.C. § 7502(c)(9) states:

> (9) Contingency measures
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> 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.

nonattainment designation, or, for areas originally designated as nonattainment by Congress, no later than December 31, 2001. *Id*. § 7513(c)(2). A SIP for a serious nonattainment area must also "assure that the best available control measures [BACM] for the control of PM-10 shall be implemented." *Id*. § 7513a(b).[2]

If a state fails to meet the deadline for bringing a Serious Area into compliance, the EPA may grant the state a single five-year extension of the deadline to meet the NAAQS for PM-10, but only if the state submits a SIP that "includes the most stringent measures [MSM] that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area." *Id*. § 7513(e).[3]

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[2] 42 U.S.C. § 7513a(b) provides:

> (b) Serious Areas
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> (1) Plan provisions. In addition to the provisions submitted to meet the requirements of paragraph [1] (a)(1) (relating to Moderate Areas), each State in which all or part of a Serious Area is located shall submit an implementation plan for such area that includes each of the following: . . .
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> (B) Provisions to assure that the best available control measures for the control of PM-10 shall be implemented no later than4years after the date the area is classified (or reclassified) as a Serious Area.

[3] 42 U.S.C. § 7513(e) provides in pertinent part:

> (e) Extension of attainment date for Serious Areas
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> Upon application by any State, the Administrator may extend the attainment date for a Serious Area beyond the date specified under subsection (c) of this section, if

If a Serious Area fails to achieve compliance by the attainment date after receiving the one-time five-year extension under § 7513(e), the CAA requires the state to "submit within 12 months after the applicable attainment date, plan revisions which provide for attainment of the PM-10 air quality standard." *Id.* § 7513a(d).[4] The SIP revisions must provide for an annual five percent reduction in PM-10 within the

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> attainment by the date established under subsection (c) of this section would be impracticable, the State has complied with all requirements and commitments pertaining to that area in the implementation plan, and the State demonstrates to the satisfaction of the Administrator that the plan for that area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area. . . . The Administrator may not approve an extension until the State submits an attainment demonstration for the area. The Administrator may grant at most one such extension for an area, of no more than 5 years.

[4] 42 U.S.C. § 7513a(d) states:

> (d) Failure to attain
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> 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.

Serious Area from the date the SIP revision was submitted to the EPA until the state attains the NAAQS in that area. *Id*.

States are required to conduct ambient air quality monitoring to determine whether a geographical region or area in the state is meeting the NAAQS for PM-10. *Id*. § 7410(a)(2)(B)(i). State air quality monitoring systems must use the criteria and methodology established by the EPA. *Id*. § 7619(a). Congress recognized that air quality monitoring data could be affected by exceptional events that could not reasonably be controlled by the states, and directed the EPA to promulgate regulations "governing the review and handling of air quality monitoring data influenced by exceptional events." *Id.* § 7619(b)(2)(A). The statute 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 the Administrator through the process established in the regulations promulgated under paragraph (2) to be an exceptional event." *Id.* § 7619(b)(1)(A).

Pursuant to this direction, the EPA promulgated the "Exceptional Events Rule," 40 C.F.R. § 50.14. The rule repeats the statute's definition of "exceptional event," *id*. § 50.1(j),[5] and allows a state to "request EPA

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[5] 40 C.F.R. § 50.1(j) provides:

> (j) *Exceptional event* means an event that affects air quality, is not reasonably controllable or preventable, is an event caused by human activity that is unlikely to recur at a particular location or a natural event, and is determined

to exclude data showing exceedances or violations of the national ambient air quality standard that are directly due to an exceptional event," *id*. § 50.14(a)(1). In order to obtain EPA approval to exclude exceptional event data, a state must provide evidence that "[t]he event satisfies the criteria set forth in 40 C.F.R 50.1(j)" and meets other criteria. *Id*. § 50.14(c)(3)(iv). If a state makes the required showing, the "EPA shall exclude [the exceptional event] data from use in determinations of exceedances and NAAQS violations." *Id*. § 50.14(b)(1).

The EPA has recognized that PM-10 levels can be affected by natural events such as dust storms, *see id*. § 50.1(j)–(k), and has therefore developed guidance for applying the Exceptional Events Rule to high wind events. *See* Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13560 (Mar. 22, 2007) (Treatment of Data Guidance). The Treatment of Data Guidance states that increased particulate matter concentrations "raised by unusually high winds will be treated as due to uncontrollable natural events where (1) the dust originated from nonanthropogenic sources, or (2) the dust originated from anthropogenic sources within the State, that are determined to have been *reasonably well-controlled* at the time that the event occurred, or from anthropogenic sources outside the State." *Id*. at 13576 (emphasis added).

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by the Administrator in accordance with 40 CFR 50.14 to be an exceptional event. It does not include stagnation of air masses or meteorological inversions, a meteorological event involving high temperatures or lack of precipitation, or air pollution relating to source noncompliance.

In May 2013, the EPA published additional "guidance and interpretation" explaining how the Exceptional Events Rule and the Treatment of Data Guidance applies to high wind events. *See* EPA, Interim Guidance on the Preparation of Demonstrations in Support of Requests to Exclude Ambient Air Quality Data Affected by High Winds Under the Exceptional Events Rule (May 2013) (Interim Guidance).[6] The Interim Guidance addresses when an anthropogenic source within the State is "reasonably well-controlled at the time that the event occurred," 72 Fed. Reg. at 13576, as required by the Treatment of Data Guidance.

II

We now provide the background of this case. Congress designated Maricopa County, Arizona, as a "moderate" PM-10 nonattainment area in 1990. 42 U.S.C. § 7407(d)(4)(B); PM10 Group I and Group II Areas, 52 Fed. Reg. 29383, 29384 (Aug. 7, 1987). The designated nonattainment area, termed the "Maricopa County PM-10 Nonattainment Area" (Maricopa Area), covers the eastern portion of Maricopa County, including the cities of Phoenix, Mesa, Scottsdale, Tempe, Chandler, and Glendale. 79 Fed. Reg. at 7118. It also covers unincorporated parts of Maricopa County and portions of Pinal County. *Id*.

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[6] The Interim Guidance is available at: https://www.epa.gov/sites/production/files/2015-09/documents/exceptevents_highwinds_guide_130510.pdf; *see also* Draft Guidance To Implement Requirements for the Treatment of Air Quality Monitoring Data Influenced by Exceptional Events, 77 Fed. Reg. 39959, 39960 (July 6, 2012) (announcing the availability of a draft version of the Interim Guidance on the EPA's website).

Because the Maricopa Area was designated as a nonattainment area by Congress, Arizona's first deadline for meeting the NAAQS for PM-10 was December 31, 1994. 42 U.S.C. § 7513(c). The Maricopa Area was not in attainment by 1994, so the EPA reclassified the Maricopa Area as a Serious PM-10 nonattainment area. 42 U.S.C. § 7513(b)(2); Clean Air Act Reclassification; Arizona-Phoenix Nonattainment Area; PM-10, 61 Fed. Reg. 21372, 21373 (May 10, 1996). This required Arizona to submit a SIP that would demonstrate how the Maricopa Area would meet the NAAQS for PM-10 by December 31, 2001, *see* 42 U.S.C. § 7513(c)(2), and to explain how it would implement the best available control measures for PM-10, *id*. § 7513a(b).

The Maricopa Area did not meet the NAAQS for PM-10 by the end of 2001. Rather, in 2000 Arizona preemptively applied for a five-year extension (until December 2006) under § 7513(e) and at the same time submitted a SIP for the Maricopa Area (the 2000 SIP). The 2000 SIP proposed to implement over 70 best available control measures for major dust sources, Approval and Promulgation of Implementation Plans; Arizona—Maricopa County PM-10 Nonattainment Area; Serious Area Plan for Attainment of the Annual PM-10 Standard, 65 Fed. Reg. 19964, 19972–83 (Apr. 13, 2000), and stated that its measures were "the most stringent measures that are included in the implementation plan of any State, or are achieved in practice in any State," *id*. at 19984. In 2002, the EPA issued a final rule approving the 2000 SIP and granting the requested extension. Approval and Promulgation of Implementation Plans; Arizona– Maricopa County PM-10 Nonattainment Area; Serious Area Plan for

Attainment of the PM-10 Standards, 67 Fed. Reg. 48718, 48718–19 (July 25, 2002) (the 2002 Final Rule). The 2002 Final Rule stated that the control measures in the 2000 SIP met the BACM and MSM standards. *Id*.[7]

By December 2006, the Maricopa Area had still failed to meet the NAAQS for PM-10. *See* Findings of Failure To Attain; State of Arizona, Phoenix Nonattainment Area; State of California, Owens Valley Nonattainment Area; Particulate Matter of 10 Microns or Less, 72 Fed. Reg. 31183, 31184–85 (June 6, 2007). At that point, the CAA gave Arizona 12 months to submit revisions to the SIP that would achieve attainment of the NAAQS for PM-10, provide for an annual five percent reduction in PM-10 in the Maricopa Area, 42 U.S.C. § 7513a(d), and contain appropriate contingency measures, *id*. § 7502(c)(9).

Arizona submitted revisions to the Maricopa Area SIP in December 2007 (the 2007 SIP). In addition to proposing 53 control measures, the 2007 SIP proposed revising a previously approved agricultural control measure, namely an agricultural general permit specifying best management practices for reducing PM-10 from agricultural activities. *See* Approval and Promulgation of Implementation Plans—Maricopa County (Phoenix) PM-10 Nonattainment Area; Serious

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[7] We considered a challenge to EPA's 2002 Final Rule approving the 2000 SIP and held that the EPA's approval of Arizona's rejection of a measure requiring the use of a reformulated diesel fuel as BACM was arbitrary and capricious. *Vigil v. Leavitt*, 381 F.3d 826, 841–46 (9th Cir. 2004). We upheld the rest of the EPA's approval, including its approval of Arizona's general permit rule for agricultural emissions of PM-10 as BACM. *Id.* at 836–38, 847.

Area Plan for Attainment of the 24-Hour PM-10 Standard; Clean Air Act Section 189(d), 75 Fed. Reg. 54806, 54810, 54812–13 (Sept. 9, 2010) (the 2010 Proposed Rule). The 2010 Proposed Rule stated that the EPA would disapprove this revision to the agricultural general permit rule on the ground that other states and local agencies had "acquired additional expertise about how to control emissions from these sources," and as a result the EPA no longer believed that the requirements in the agricultural general permit rule in the 2000 SIP were best available control measures. *Id*. To avoid a partial disapproval, Arizona withdrew the plan in 2011. 79 Fed. Reg. at 7119. As a result of this withdrawal of the 2007 SIP, the EPA found that Arizona had failed to make a required SIP submittal. Finding of Failure To Submit State Implementation Plan Revisions for Particulate Matter, PM-10, Maricopa County (Phoenix) PM-10 Nonattainment Area, AZ, 76 Fed. Reg. 8300, 8300–01 (Feb. 14, 2011). This finding required Arizona to submit another SIP by 2013. *Id*. at 8301; 42 U.S.C. § 7509(a).

Arizona submitted a new SIP revision on May 25, 2012. *See* 79 Fed. Reg. at 7119. Because this SIP was prepared pursuant to § 7513a(d), which requires a state to achieve a five percent annual reduction in PM-10, we adopt the EPA's term and refer to it as the "Five Percent Plan." The Five Percent Plan proposed to achieve the five percent annual reduction required by § 7513a(d) by implementing many of the 53 control measures previously proposed in the 2007 SIP, as well as adopting a new emissions control measure, the "Dust Action General Permit." Unlike the 2007 SIP, the

Five Percent Plan did not propose any changes to the agricultural general permit.

As required by § 7502(c)(9), the Five Percent Plan proposed a number of contingency measures. 79 Fed. Reg. at 7124. Four of the five measures were permanent changes to infrastructure that had been completed in the years 2008 through 2011, namely, paving existing dirt roads and alleys, paving and stabilizing unpaved shoulders, repaving or overlaying paved roads with rubberized asphalt, and lowering speed limits on dirt roads and alleys. *Id*. The fifth contingency measure required the purchase of PM-10 certified sweepers (which had already been accomplished by the end of 2009), and ongoing sweeping of ramps, freeways, and frontage roads. *Id*.

Arizona also acknowledged that there had been a number of exceedances of the 24-hour PM-10 standard during 2011 and 2012, but claimed they should be deemed "exceptional events" and excluded from a determination of whether the Maricopa Area met the NAAQS for PM-10. In support of this claim, Arizona submitted documentation to the EPA to demonstrate that 137 exceedances of the NAAQS for PM-10 on 27 days during the period from 2011 to 2012 were the result of "exceptional events," namely high wind dust events. 79 Fed. Reg. at 7122.[8] The EPA wrote separate reports on each of Arizona's submissions. The reports analyzed the data and concluded that the flagged exceedances met "the definition of an exceptional event:

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[8] Though the EPA's proposed rulemaking mentioned 133 exceedances, the parties agree that Arizona requested approval of 137.

the exceedances affected air quality, were not reasonably controllable or preventable, and meet the definition of a natural event."

In February 2014, the EPA published its proposed decision regarding Arizona's Five Percent Plan. 79 Fed. Reg. at 7118. The EPA noted that the monitoring data for the Maricopa Area showed 133 exceedances of the 24-hour PM-10 NAAQS during the 2011–2012 time period, but stated that 131 of those exceedances "were caused by high wind exceptional events," and "should not be used for regulatory purposes," including for evaluation of the Five Percent Plan. *Id*. at 7122. Excluding these exceedances, the EPA proposed to determine that the Maricopa Area had attained the NAAQS for 24-hour PM-10 by December 31, 2012. *Id*. at 7125. The EPA also proposed to approve Arizona's contingency measures. *Id*. at 7124. In doing so, the EPA explained that it had previously "interpreted [42 U.S.C. § 7502(c)(9)] to allow states to implement contingency measures before they are triggered by a failure of . . . attainment as long as those measures are intended to achieve emission reductions over and beyond those relied on in the attainment and [reasonable further progress] demonstrations." 79 Fed. Reg. at 7124.

The EPA issued a final rule on June 10, 2014, approving the Five Percent Plan "as meeting all relevant statutory and regulatory requirements." Approval and Promulgation of Implementation Plans—Maricopa County PM-10 Nonattainment Area; Five Percent Plan for Attainment of the 24-Hour PM-10 Standard, 79 Fed. Reg. 33107, 33107 (June 10, 2014) (2014 Final Rule). The 2014 Final Rule stated

that the EPA was excluding 135 exceedances[9] from the monitoring data as exceptional events. *Id*. at 33111. For each of the events that EPA determined was exceptional, "EPA found that the event was not reasonably controllable or preventable," and that "reasonable controls" were in place for anthropogenic sources of dust. *Id*. The EPA reached its conclusion that "reasonable controls" were in place by relying on its 2002 Final Rule approving Arizona's 2000 SIP as including best available control measures and most stringent control measures. *Id*. at 33112. The EPA also determined that Arizona sufficiently demonstrated that dust sources outside the Maricopa Area were reasonably controlled. *Id*. at 33113.

The 2014 Final Rule included the EPA's response to comments made by petitioners Sandra Bahr and David Matusow, two residents of Phoenix. First, the EPA addressed petitioners' argument that the EPA should have required Arizona to update its control measures to ensure that they were BACM and MSM, rather than letting Arizona rely on the EPA's approval of the 2000 SIP. 79 Fed. Reg. at 33108–10. The EPA rejected this claim, explaining that "the requirement for BACM is triggered by a specific event: The reclassification of a moderate PM-10 nonattainment area to serious." *Id.* at 33108. Likewise, the EPA explained that § 7513(e) provides "that the requirement for MSM is triggered by a particular event: EPA's granting of a state's request for an extension of the attainment deadline for a serious nonattainment area." *Id.* The EPA then stated

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[9] The EPA's final rule clarified that the number of approved exceedances was 135, which occurred on 25 days over the period of 2010–12. 79 Fed. Reg. at 33110–11.

that § 7513(d) (the section requiring the submission of a five percent plan) "does not contain a specific requirement that the state update the previously approved requirements for BACM and MSM as a consequence of failing to reach attainment by the applicable deadline for serious PM-10 nonattainment areas." *Id*. at 33109. Because there was no statutory trigger requiring Arizona to update its demonstration that its control measures were best available and most stringent, the EPA explained, the Five Percent Plan could rely on the EPA's approval of BACM and MSM in the 2000 SIP. *Id.* The EPA also disagreed with petitioner's comment that the Five Percent Plan was inadequate because the agricultural control measures were not BACM, as indicated by the EPA's 2010 Proposed Rule disapproving of Arizona's proposed revision to its agricultural general permit. In response to this comment, the EPA stated that the Five Percent Plan satisfied the requirements in § 7513a(d) "without relying on additional emissions reductions from agricultural sources." *Id*. at 33109.

Second, the EPA addressed petitioners' argument that its determination that the 135 exceedances constituted exceptional events was contrary to the Interim Guidance. Petitioners interpreted the Interim Guidance as preventingthe EPA from concurring that best available control measures were in place unless the EPA had determined control measures for windblown dust to be BACM within the past three years. 79 Fed. Reg. at 33111–12. The EPA disagreed with this interpretation and concluded that Arizona's controls were reasonable. *Id.* at 33112. The EPA also rejected petitioners' argument that Arizona had failed to provide an adequate description of upwind sources

and control measures as required by the Interim Guidance. *Id*. at 33113–14.

Finally, the EPA dismissed petitioners' comment that the EPA erred in accepting Arizona's "contingency measures" in its Five Percent Plan because the measures had already been implemented. *Id*. at 33114–15. The petitioners argued that because §7502(c)(9) requires contingency measures that "are automatically and immediately implemented if a milestone for reasonable further progress or attainment is not met," the previously implemented measures in the Five Percent Plan could not qualify. *Id*. at 33114. In rejecting this comment, the EPA stated it interpreted § 7502(c)(9) as requiring only that "[c]ontingency measures must provide for additional emission reductions" that were not otherwise included "in the attainment demonstration," and that "[n]othing in the statute precludes a state from implementing such measures before they are triggered," relying on the Fifth Circuit decision in *Louisiana Environmental Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004). 79 Fed. Reg. at 33114.

The plaintiffs filed a petition for review of the 2014 Final Rule on July 29, 2014.

III

Under 42 U.S.C. § 7607(b)(1), we have jurisdiction over "[a] petition for review of the Administrator's action in approving or promulgating any implementation plan."

In reviewing a challenge to the EPA's approval of a SIP under § 7607(b)(1), we apply "the general standard of review for agency actions set forth in the

Administrative Procedure Act (APA)." *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *see also Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004). Under the APA, we must uphold an agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007). Generally, "[a]n agency decision will be upheld as long as there is a rational connection between the facts found and the conclusions made." *Barnes v. U.S. Dep't of Transp*., 655 F.3d 1124, 1132 (9th Cir. 2011). We will deem an agency action to be arbitrary and capricious only "if the agency has relied on factors which 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." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). Where the question presented for review is a factual dispute which implicates "a high level of technical expertise" we defer to "the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). "Even when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting

Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

Where the petitioner challenges the agency's action as inconsistent with the agency's own policies, we examine whether the agency has actually departed from its policy and, if so, whether the agency has offered a reasoned explanation for such departure. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). Generally, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Id.* at 2125. In contrast, where the agency is not offering a policy explanation but is instead interpreting a binding regulation, the agency's interpretation is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Where the agency's action is an interpretation of a statute that the agency administers, "we follow the two-step approach set out in C*hevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Latino Issues Forum*, 558 F.3d at 941. First, "if Congress has 'directly spoken to the precise question at issue,' then the matter is capable of but one interpretation by which the court and the agency must abide." *Vigil*, 381 F.3d at 834 (quoting *Chevron*, 467 U.S. at 842).

At the second step of *Chevron*, if we determine that Congress was silent on the issue, or the statute is subject to multiple interpretations, we must determine the degree of deference to give the agency's interpretation of a statute. *United States v. Mead Corp.*, 533 U.S. 218, 227–29 (2001). "Not all agency statutory interpretations are entitled to *Chevron*

deference." *Sierra Club v. EPA*, 671 F.3d 955, 962 (9th Cir. 2012). "Rather, *Chevron* deference is appropriate where 'the agency can demonstrate that it has the general power to make rules carrying the force of law and that the challenged action was taken in the exercise of that authority.'" *Id.* (quoting *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003) (en banc)). We generally deem Congress to have delegated such authority when it authorizes the agency to engage in notice-and-comment rulemaking. *Mead*, 533 U.S. at 229–30. In such circumstances, a court should accept the agency's interpretation "if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id*. at 229.

Though we have previously applied *Chevron* deference to the EPA's interpretation of the CAA issued in connection with a SIP approval, *see Association of Irritated Residents v. EPA*, 686 F.3d 668, 679–81 (9th Cir. 2011), we have never expressly held that such deference is appropriate, but rather have held the question open, *see Vigil*, 381 F.3d at 835 (declining to address "whether the EPA's interpretation of the Act in the course of approving Arizona's SIP is entitled to *Chevron* deference"). But because "[a] very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed," *Mead Corp.*, 533 U.S. at 229, and because the EPA engages in such a rulemaking process in approving a SIP, we agree with the Fifth Circuit that "EPA's final rules approving the [Arizona] SIP, to the extent they involve the reasonable resolution of ambiguities in the

CAA, will be afforded *Chevron* deference," *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 825 (5th Cir. 2003).

IV

On appeal, petitioners argue that the EPA acted contrary to law by failing to require that Arizona include an updated analysis of best available control measures and most stringent measures in the Five Percent Plan. They also argue that the EPA abused its discretion by excluding 135 exceedances from the monitoring data as "exceptional events." Finally, they argue that the EPA violated the CAA by allowing Arizona to satisfy the "contingency measures" requirement with previously implemented control measures. We consider each argument in turn.

A

We first consider petitioners' argument that the EPA's approval of the Five Percent Plan constituted an abuse of discretion because the EPA did not require Arizona to demonstrate that the plan included best available control measures (BACM) or most stringent measures (MSM) for the control of PM-10. Accordingto petitioners, the Five Percent Plan must demonstrate that Arizona's control measures meet the BACM and MSM standards because Arizona has a continuing obligation to comply with § 7513a(b)(1)(B) and § 7513(e), which set the control requirements for serious nonattainment areas. Petitioners argue that had a BACM demonstration been required, the Five Percent Plan would have failed because the agricultural control measures in Arizona's 2000 SIP are no longer BACM, as stated in EPA's 2010 Proposed Rule. Further, petitioners argue, the EPA's statement

in the 2010 Proposed Rule regarding Arizona's failure to meet the BACM standard is evidence that the EPA generally requires an updated BACM demonstration in each SIP, meaning that the EPA acted inconsistently by not requiring such a demonstration in the Five Percent Plan.

We disagree with these arguments. The EPA's decision not to require an updated demonstration of BACM and MSM in the Five Percent Plan was not an abuse of discretion because it was not contrary to any language in the CAA. Section 7513a(d), which governs five percent plans such as the one before us here, provides only that if a state fails to achieve attainment after receiving the five-year extension, it must submit plan revisions providing for "attainment of the PM-10 air quality standard," and an annual five percent reduction in PM-10 within the Serious Area. It does not mention BACM or MSM. The CAA sections that do require BACM and MSM demonstrations do not expressly apply to a five percent plan. Section § 7513a(b) provides that when the EPA reclassifies a Moderate Area as a Serious Area, the state must then submit a SIP that "assure[s] that the best available control measures for the control of PM-10 shall be implemented." It does not require the state to update that assurance when submitting a five percent plan, nor does it require the EPA to review its previous BACM determination. Similarly, § 7513(e) provides that when the EPA grants a state a five-year extension of the deadline to meet the NAAQS for PM-10, the state must submit a SIP that "includes the most stringent measures" that are included in any SIP or achieved in any state. Again, this language does not

require the state to include an updated demonstration of MSM when submitting a five percent plan.

We also disagree with petitioners' argument that the EPA acted inconsistently in failing to require an updated demonstration of BACM and MSM in the Five Percent Plan. Even though the EPA had previously reviewed and proposed to disapprove the agricultural control measure in Arizona's 2007 SIP as not meeting the BACM standard, the EPA provided a reasonable interpretation of its approach in the 2014 Final Rule. According to the EPA, the CAA lays out a series of escalating control measures that are triggered by a finding of noncompliance with a series of statutory requirements. The EPA will assess compliance with the control measures that were triggered at each step, but will not reassess compliance with those measures at subsequent steps unless a state proposes changes to control measures that were previously approved. 79 Fed. Reg. at 33108–09. This approach is consistent with the CAA, which does not require the EPA to reassess a state's controls in each SIP submission. Here, the EPA's 2010 Proposed Rule reassessed Arizona's agricultural control measures under the BACM standard because Arizona proposed to revise agricultural control measures that were previously approved as BACM in the 2002 Final Rule. Arizona did not propose any revisions to its agricultural controls in the Five Percent Plan, however, so EPA did not have any occasion to reevaluate those measures. Given the EPA's reasonable explanation for its approach, and the lack of any contrary statutory command in the CAA, we conclude that the EPA did not abuse its discretion or act contrary to law by declining to require an updated

demonstration of BACM or MSM in the Five Percent Plan.

Petitioners also argue that the EPA acted in an arbitrary and capricious manner in reviewing the Five Percent Plan because it evaluated Arizona's compliance with CAA requirements regarding emission inventories, reasonable further progress, and contingency measures, but ignored BACM and MSM. We also reject this argument. The EPA reasonably explained that those particular CAA requirements are procedural or otherwise applicable to all SIP submissions, *see* 42 U.S.C. §§ 7410(a), 7502(c), 7506(c), 7513a(c)(1), and the EPA reviews such measures whenever it reviews a proposed SIP. By contrast, the BACM and MSM requirements are not applicable to all SIP submissions, and so the EPA reviews them only when the state is required to demonstrate compliance with these requirements.

B

We next turn to the petitioners' argument that the EPA acted contrary to law by excluding 135 exceedances in the Maricopa Area from Arizona's air quality monitoring data.

Petitioners raise several arguments as to why the EPA erred in concluding that the dust sources causing the 135 exceedances were from anthropogenic sources that were "reasonably well-controlled," and therefore were excludable as exceptional events. *See* 40 C.F.R. § 50.14(b)(1). The petitioners begin by pointing to the statement in the Interim Guidance that "[g]enerally, the EPA will consider windblown dust BACM to constitute reasonable controls if these measures have

been reviewed and approved in the context of a SIP revision for the emission source area within the past three years." Interim Guidance at 15. The EPA's decision was inconsistent with this guidance, petitioners argue, for two reasons. First, Arizona's dust control measures for the Maricopa Area had not been approved since 2002, well over three years before the 2014 Final Rule. Second, agricultural emissions are among the sources of windblown dust in the Maricopa Area, and the EPA's 2010 Proposed Rule had proposed to disapprove of Arizona's agricultural control measures because they were not BACM. Moreover, petitioners argue, the EPA failed to offer a reasonable explanation for its departure from its guidance.

We disagree; the EPA's 2014 Final Rule did not conflict with the Interim Guidance. First, nothing in the Interim Guidance indicates that EPA *must* find that control measures for windblown dust have been reviewed and approved as BACM within the past three years in order for the dust to be deemed reasonably well-controlled. Rather, the Interim Guidance gives the EPA flexibility to consider a wide range of issues, and emphasizes that a prior BACM determination "may be *a reference point, but not the sole means,* by which the EPA assess the reasonableness of controls." Interim Guidance at 15. The EPA's interpretation is therefore consistent with the Interim Guidance and is a reasonable interpretation of the Exceptional Events Rule, to which we owe deference. *Auer*, 519 U.S. at 461.

Second, the EPA provided a reasonable explanation as to why the Maricopa Area had reasonable controls for windblown dust even though the 2010 Proposed Rule had proposed to disapprove of Arizona's

agricultural control measures. The EPA's 2002 Final Rule determined that the 2000 SIP contained the best available control measures for the highest emitters of PM-10 (including unpaved roads and alleys, construction, paved road dust, and non-agricultural windblown dust). 79 Fed. Reg. at 33111–13. The 2014 Final Rule then explained that it was still appropriate to rely on that determination because neither the highest emitters of PM-10 nor the techniques for controlling fugitive dust had changed significantly since 2002. *Id*. at 33112. Moreover, Arizona made its dust control rules even more stringent in the years following its 2000 SIP, further bolstering the conclusion that the controls remained reasonable. *Id*. Although the EPA had proposed to disapprove of the agricultural controls as not meeting the BACM standard in 2010, data showed that agricultural sources were only a minimal contributor to the Maricopa Area's overall level of PM-10 emissions. *Id*. Accordingly, the EPA's judgment was that the control measures in the 2000 SIP ensured that anthropogenic windblown dust was reasonablycontrolled for purposes of the Exceptional Events Rule.

"[W]e generally must be at [our] most deferential when reviewing scientific judgments and technical analyses within the agency's expertise." *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (second alteration in original) (internal quotation marks omitted). Here, the EPA considered the relevant factors and articulated a rational connection between the facts found and the choice made. As a general rule, a determination that particular control measures are reasonable relies on technical considerations that are

"properly left to the informed discretion of" the EPA. *Kleppe*, 427 U.S. at 412. We defer to its conclusion here.[10]

C

Petitioners also claim that the EPA's approval of Arizona's 135 exceedances as exceptional events violated the Interim Guidance because the EPA failed to adequately address the controls in upwind areas outside the Maricopa Area. To qualify as an exceptional event under the Exceptional Events Rule, an exceedance must be "caused by human activity that is unlikely to recur at a particular location or a natural event." 40 C.F.R. §§ 50.1(j), 50.14. The Treatment of Data Guidance states that high wind events will be considered "natural" when "(1) the dust originated from nonanthropogenic sources, or (2) the dust originated from anthropogenic sources within the State, that are determined to have been reasonably well-controlled at the time that the event occurred, or from anthropogenic sources outside the State." 72 Fed. Reg. at 13576. To assist the EPA in determining compliance with this requirement, the Interim Guidance requires a state to provide "a brief description" of "all contributing emission sources in upwind areas and provide evidence that those sources were reasonably controlled, whether anthropogenic or natural." Interim Guidance at 42.

Petitioners argue that Arizona's submissions were inadequate because Arizona did not identify all

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[10] Because we conclude that the EPA did not depart from its Interim Guidance, we do not reach the petitioners' argument that the EPA failed to provide a reasoned explanation for departing from its guidance.

contributing emission sources outside the Maricopa Area, failed to distinguish between natural and anthropogenic sources, and failed to submit evidence that Pinal County had reasonable controls in place.

We again disagree. Under the Treatment of Data Guidance, a high wind event may meet the criteria of the Exceptional Events Rule when the dust originated from nonanthropogenic sources, or from anthropogenic sources that are reasonably well-controlled at the time that the event occurred. 72 Fed. Reg. at 13576–77. Arizona explained that the high wind events causing the 135 exceedances stemmed from monsoonal dust storms. Because "outflow from thunderstorms can carry dust over vast distances encompassing many source areas," Arizona could not clearly distinguish between nonanthropogenic and anthropogenic sources of dust. Nevertheless, Arizona adequately provided a "brief description" of contributing dust sources outside the Maricopa Area and demonstrated that reasonable controls were in place for any anthropogenic sources of dust. For instance, in describing exceedances that occurred during the August 11, 2012, event, Arizona provided a "conceptual model" identifying a nonanthropogenic source, the "undeveloped lands south of Maricopa County," as being the primary contributing source areas in Pima and Pinal Counties. Arizona also provided evidence that any anthropogenic sources of dust in those areas were reasonably controlled, pointing to two Pinal County rules applicable to fugitive dust and construction sites. Arizona compiled similar submissions for each of its exceptional event submittals. Arizona's submissions provided enough detail for the EPA to reasonably conclude that the dust originated either from "nonanthropogenic sources" or

"anthropogenic sources" that were "reasonably well-controlled." Interim Guidance at 42. Accordingly, the EPA's conclusion that Arizona's description of the upwind sources was adequate was not an abuse of discretion.

Petitioners also argue that the EPA ignored the Interim Guidance and thus abused its discretion in concluding that the anthropogenic dust sources in the areas of Pinal County outside of the Maricopa Area were reasonably controlled. The Interim Guidance states that "[f]or the anthropogenic sources to be considered to be reasonably controlled, the EPA anticipates that it is reasonable for an air agency to have the controls required for an area's attainment status." Interim Guidance at 15. "[T]he EPA does not expect areas classified as attainment, unclassifiable, or maintenance for a NAAQS to have the same level of controls as areas that are nonattainment for the same NAAQS." *Id*. In other words, an area that is in attainment should have the control measures appropriate for an attainment area, while an area that has been designated a serious nonattainment area should have the control measures appropriate for that level of classification. *Id*. Where "an area has been recently designated to nonattainment but has not yet been required to implement controls, the EPA will expect the level of controls that is appropriate for the planning stage." *Id*.

Under the Interim Guidance, the EPA did not abuse its discretion in concluding that the anthropogenic dust sources in the areas of Pinal County outside of the Maricopa Area were reasonably well-controlled. The EPA provided a reasoned explanation as to why it

deemed the Pinal County area to have the controls required for that area's attainment status. The 135 exceedances approved by the EPA all occurred between 2010 and 2012. 79 Fed. Reg. at 33111. From January 2011 to June 2012, Pinal County (excluding the portion within the Maricopa Area) was an attainment area, and had adopted two rules addressing fugitive dust emissions that were appropriate for this status. Although Pinal County was redesignated a nonattainment area in July 2012, it was not required to submit a SIP until 18 months after redesignation, leaving it in the planning stage for the remainder of 2012. *See* Designation of Areas for Air Quality Planning Purposes; State of Arizona; Pinal County; PM10, 77 Fed. Reg. 32024, 32030 (May 31, 2012). Because Pinal County had not yet been required to implement controls, the EPA reasonably concluded that Pinal County's fugitive dust rules were appropriate for the planning stage.

V

Finally, we turn to petitioners' argument that the EPA erred in approving the contingency measures in the Five Percent Plan because those measures had already been implemented. As noted above, four of five contingency measures in the Five Percent Plan were permanent changes to infrastructure that had been completed by 2012 (paving and stabilizing existing public dirt roads and alleys, paving and stabilizing unpaved shoulders, repaving or overlaying paved roads with rubberized asphalt, and lowering speed limits on dirt roads and alleys). The fifth contingency measure involved the purchase of PM-10 certified sweepers and sweeping of freeways, though the purchase occurred in

2009 and Arizona had procured contracts for sweeping services by 2010. The CAA provides that a nonattainment SIP:

> [S]hall 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 its 2014 Final Rule, the EPA explained its interpretation of this requirement. While "[c]ontingency measures must provide for additional emission reductions that are not relied on for RFP [reasonable further progress] or attainment and that are not included in the attainment demonstration," the EPA concluded that "[n]othing in the statute precludes a state from implementing such measures before they are triggered." 79 Fed. Reg. at 33114.

Although we defer to the EPA's interpretation of the CAA contained in a final rule approving a SIP if that interpretation involves the reasonable interpretation of ambiguous statutory terms, *see supra* at 22, we cannot defer to the EPA's interpretation of § 7502(c)(9) here. Where Congress has "directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. The statutory language in §7502(c)(9) is clear: it requires the SIP to provide for the implementation of measures "to be undertaken" in

the future, triggered by the state's failure "to make reasonable further progress" or to attain the NAAQS. These measures are included in the SIP as "contingency measures" and are "to take effect" automatically in the future. Although the statute does not define the word "contingency," the meaning of the term is not ambiguous. According to the dictionary definition, it means "a possible future event or condition or an unforeseen occurrence that may necessitate special measures." Webster's Third New International Dictionary (2002). Because Congress was clear that "contingency measures" are control measures that will be implemented in the future, and the statutory language is not susceptible to multiple interpretations, we must give effect to its plain meaning. *Chevron*, 467 U.S. at 842–43.

In arguing that its interpretation of § 7502(c) is entitled to deference despite the clear language of the statute, the EPA relies on the Fifth Circuit's decision in *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575, 580 (5th Cir. 2004). In *Louisiana Envtl. Action Network*, the petitioners challenged the EPA's 2002 approval of Louisiana's SIP because the contingency measure in the SIP (a compressor station's permanent reduction of its emissions) had been implemented in 1998, and therefore was not a measure "to be undertaken" or "to take effect" in the future, as § 7502(c)(9) requires. *Id*. at 582. The Fifth Circuit first acknowledged that "a plain reading of the terms 'to take effect' and 'to be undertaken' imply a prospective, forward looking orientation" that would "preclude the use of past reductions which have already failed to achieve attainment." *Id.* at 583. Nevertheless, the Fifth Circuit held that § 7502(c)(9) was ambiguous because

it "neither affirms nor prohibits continuing emissions reductions—measures which originate prior to the SIP failing, but whose effects continue to manifest an effect after the plan fails—from being utilized as a contingency measure." *Id.* (emphasis omitted). Having found this "ambiguity," it deferred to the EPA's interpretation that "contingency measures" could include measures that had already been implemented by the state.

We cannot agree with the Fifth Circuit's interpretative approach. Having determined that the "plain reading of the terms" indicates a forward looking approach, the Fifth Circuit was bound by *Chevron* to give effect to the plain meaning of the statute. We disagree that the lack of any discussion in § 7502(c)(9) regarding treatment of continuing emissions reductions makes the statute ambiguous. Rather, unless such continuing emissions reductions are "to be undertaken" in the event of a contingency, they do not fit the definition of "contingency measures" provided in § 7502(c)(9). We also disagree with the dissent's contention that previously implemented control measures that provide continuing emissions reductions "take effect" and are "undertaken" both "at the time they are first implemented but also thereafter." Dissent at 38. This is a misreading of the statute, which defines contingency measures as measures "*to be* undertaken" or "*to* take effect" if a future event occurs, namely "*if* the area fails to make reasonable further progress, or to attain the [NAAQS]." 42 U.S.C. § 7502(c)(9) (emphases added). Control measures that have already been implemented are not measures "to be undertaken" or "to take effect" in the future, and the statute cannot reasonably be so interpreted.

The EPA argues that its interpretation is consistent with the CAA's policy goals, because permitting early implementation of contingency measures is consistent with the overall policyof the CAA to reduce particulate emissions and protect public health. *La. Envtl. Action Network*, 382 F.3d at 583. The Fifth Circuit likewise relied on these policy considerations, stating that allowing states to implement measures before the contingency occurs was consistent with the CAA's purpose of creating incentives for states to reach NAAQS compliance earlier and more efficiently. *Id.* at 583–84. The dissent agrees, adopting the Fifth Circuit's policy analysis.[11] Dissent at 39–40. Even if we agreed that the EPA's policy considerations are compelling, such considerations cannot override the plain language of the statute. We therefore cannot give them controlling weight here.

Because the "contingency measures" in Arizona's SIP were not "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

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[11] In addition to relying on the Fifth Circuit's policy arguments, the dissent argues that precluding the use of previously implemented controls as contingency measures "imposes an additional and unnecessary burden upon states where the failure to attain the NAAQS also triggers a bump up of an area's classification under the Act" because states will not be able to "focus their efforts on implementing the newly imposed requirements." Dissent at 40. This is incorrect: because contingency measures automatically take effect when the contingency occurs, "without further action by the State," 42 U.S.C. § 7502(c)(9), the implementation of contingency measures cannot distract a state from meeting the other CAA requirements.

part," the EPA's approval of this part of the Five Percent Plan was contrary to the CAA. Accordingly, we remand to the EPA for further consideration of this portion of the SIP but otherwise deny the petition.[12]

PETITION GRANTED IN PART AND DENIED IN PART.

CLIFTON, Circuit Judge, concurring in part and dissenting in part:

I fully concur in sections I–IV of the majority opinion. I disagree, however, with the majority's conclusion in section V that EPA's approval of the contingency measures in Arizona's SIP is contrary to the clear language of the CAA. In my view, the scope of the CAA's contingency measures requirement is ambiguous and EPA's reasonable interpretation of that requirement is entitled to deference.

Like the majority, I begin by analyzing the text of the relevant statutory provision, 42 U.S.C. § 7502(c)(9). That section of the CAA requires state nonattainment plans to include contingency measures "to be undertaken" and "to take effect" in the event that an area "fails to make reasonable further progress, or to attain" the NAAQS by the applicable attainment date. *Id.* Although I agree with the majority that this language most often refers to measures that are to be implemented in the future, in the event that the other measures included in a state's SIP are not sufficient to meet CAA requirements, I am not persuaded that the provision's text forecloses the interpretation advanced by EPA and applied in this case.

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[12] Each party is to bear its own costs on appeal.

The language of the statute prohibits states from labeling as "contingency measures" the same proposed reductions relied upon to achieve NAAQS compliance. *See La. Envtl. Action Network v. EPA*, 382 F.3d 575, 583 (5th Cir. 2004) ("Such a prospective reading of the text would seemingly preclude the use of past reductions which have already failed to achieve attainment."). It requires states to identify additional measures that must be put into effect without further action by the state or EPA if reasonable progress is not made or the air quality standard is not met by the attainment date. Those additional measures are what the statute describes as "contingency measures."

Arizona's SIP identified additional measures that were not relied upon to obtain the anticipated compliance. The practical issue before us in this case is whether Arizona was prohibited from putting those additional measures into effect in advance. The majority opinion concludes that it was, that the state's contingency measures must be left undone, sitting on the sidelines in reserve. I do not believe that the language or intent of the statute requires that conclusion.

The early implementation of infrastructure improvements that are expected to result in additional and continuing emissions reductions is consistent with the language of §7502(c)(9). These early-implemented contingency measures result in a net reduction in emissions following their implementation. They "take effect" and are "undertaken" not only at the time they are first implemented but also thereafter, including at the time they might formally be required due to nonattainment. So long as these reductions are not

relied upon to meet other CAA requirements, they function as a backup plan, reducing the likelihood that the state will fail to attain the NAAQS even in the "contingency" that the measures explicitlyincluded in the SIP for that purpose are not enough.

The majority responds by asserting that the statute "defines contingency measures as measures '*to be* undertaken' or '*to* take effect' if a future event occurs, namely '*if* the area fails to make reasonable further progress, or to attain the [NAAQS].'" Majority opinion at 35 (emphasis in original). But this language fits just as well with EPA's interpretation as it does with the view of the majority. In both scenarios, the contingency measures must be in effect at the time an area fails to achieve the goals outlined in the SIP. What is at issue here is whether states are prohibited from *also* implementing the measures before that "future event occurs." The language quoted by the majority contains no such prohibition and it is not our role to read one into the statute.

EPA's interpretation also comports well with the purpose of the CAA. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

Allowing states to implement contingency measures before they are triggered makes sense in light of that

same provision's requirement that such measures "take effect . . . without further action bythe State or the Administrator." That requirement, read in context with the Act's mandate that states implement emission-control measures "as expeditiously as practicable," *id.* § 7502(c)(1), evinces a clear congressional preference that contingency measures operate to reduce the emission of harmful pollutants in as efficient and timely a manner as possible. Taking this statutory purpose into account, "it seems illogical to penalize nonattainment areas that are taking extra steps, such as implementing contingency measures prior to a deadline" as a cushion to ensure NAAQS compliance and prevent the need for the contingency measures requirement to be triggered in the first place. *La. Envtl. Action Network*, 382 F.3d at 584. It does not benefit ordinary citizens to read the CAA to incentivize states to hold off from purchasing new street sweepers or repaving their roads until the contingency measures requirement is triggered.

The majority's interpretation also imposes an additional and unnecessary burden upon states in circumstances where the failure to attain the NAAQS also triggers a bump up of an area's classification under the Act. For example, the failure of a moderate nonattainment area to achieve NAAQS compliance by the applicable deadline triggers both § 7502(c)(9)'s contingency measures requirement and the additional requirements imposed upon serious nonattainment areas. 42 U.S.C. § 7513(b)(2). The early implementation of contingency measures allows states in this situation to focus their efforts on implementing the newly imposed requirements while the contingency measures

continue to operate in the interim. *See La. Envtl. Action Network*, 382 F.3d at 583.[1]

I recognize that what is lost by EPA's interpretation of the statute is the advance identification of "still more" measures aimed at improving air quality that can be newly and additionally implemented in the event of nonattainment. If Arizona's SIP does not reach its goal, then reliance upon contingency measures that have already been put into effect will not further reduce airborne particulate matter, and more will have to be done at that point. But EPA applied its expertise and exercised its judgment in concluding that the goal was likely to be reached by the measures proposed in the SIP, without regard to the additional contingency measures. By letting Arizona identify actions that have already been implemented as contingency measures, EPA has obtained a cushion. It is not an unreasonable judgment for EPA to conclude that implementing the cushion right away is more valuable than advance identification of what else might be done, if necessary.

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[1] The majority argues that because contingency measures must take effect "without further action by the State" or EPA, 42 U.S.C. § 7502(c)(9), they "cannot distract a state from meeting the other CAA requirements." Majority opinion at 36 n. 11. However, EPA has interpreted this language to require only "that no further rulemaking activities by the State or EPA would be needed to implement the contingency measures." *Greenbaum v. EPA*, 370 F.3d 527, 541 (6th Cir. 2004) (quoting State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13498, 13512 (Apr. 16, 1992)). Thus, under the majority's interpretation, states would still be required to perform the actual business of implementing the identified contingency measures at the same time they address other requirements imposed by a failure to attain the NAAQS.

For these reasons, I would give *Chevron* deference to the EPA's interpretation of § 7502(c)(9). I respectfully dissent from the majority's conclusion to the contrary.

APPENDIX B

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0762; FRL–9912–01–Region 9]

Approval and Promulgation of Implementation Plans—Maricopa County PM–10 Nonattainment Area; Five Percent Plan for Attainment of the 24-Hour PM–10 Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State implementation plan (SIP) revision submitted by the State of Arizona to meet Clean Air Act (CAA) requirements applicable to the Maricopa County (Phoenix) PM–10 Nonattainment Area. The Maricopa County PM–10 Nonattainment Area is designated as a serious nonattainment area for the national ambient air quality standards (NAAQS) for particulate matter of ten microns or less (PM–10). The submitted SIP revision consists of the *Maricopa Association of Governments 2012 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area* and the *2012 Five Percent Plan for the Pinal County Township 1 North, Range 8 East Nonattainment Area"* (collectively, the 2012 Five Percent Plan). EPA is

approving the 2012 Five Percent Plan as meeting all relevant statutory and regulatory requirements.

DATES: This rule is effective on July 10, 2014.

ADDRESSES: You may inspect the supporting information for this action, identified by docket number EPA–R09–OAR–2013–0762, by one of the following methods:

1. Federal eRulemaking portal, *http://www.regulations.gov,* please follow the online instructions; or,

2. Visit our regional office at, U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* voluminous records, large maps, copyrighted material), and some may not be publicly available in either location (*e.g.,* Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed directly below.

FOR FURTHER INFORMATION CONTACT: Doris Lo, EPA Region IX, (415) 972–3959, *lo.doris@epa.gov*.

SUPPLEMENTARY INFORMATION:
Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Summary of Proposed Action

On February 6, 2014 (79 FR 7118), EPA proposed to approve the 2012 Five Percent Plan,[1] which the State of Arizona submitted on May 25, 2012, as meeting all relevant statutory and regulatory requirements under the Clean Air Act (CAA). As discussed in our proposed rule, the Maricopa County (Phoenix) PM–10 nonattainment area is a serious PM–10 nonattainment area, and is located in the eastern portion of Maricopa County and encompasses the cities of Phoenix, Mesa, Scottsdale, Tempe, Chandler, Glendale, several other smaller jurisdictions, unincorporated County lands, as well as the town of Apache Junction in Pinal County. Arizona's obligation to submit the 2012 Five Percent Plan was triggered by EPA's June 6, 2007 finding that

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[1] The 2012 Five Percent Plan includes the "MAG 2012 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area" (dated May 2012) (MAG 2012 Five Percent Plan) and the "2012 Five Percent Plan for the Pinal County Township 1 North, Range 8 East Nonattainment Area" (dated May 25, 2012) (Pinal 2012 Five Percent Plan) (collectively, the 2012 Five Percent Plan). In our proposed rule we cited primarily to the MAG 2012 Five Percent Plan; however, both plans were submitted by ADEQ on May 25, 2012 and are included in the docket for this rulemaking. See May 25, 2012 letters from Henry R. Darwin, Director, Arizona Department of Environmental Quality, to Jared Blumenfeld, Regional Administrator, U.S. Environmental Protection Agency Region IX.

the Maricopa PM–10 Nonattainment Area had failed to meet its December 31, 2006 deadline to attain the PM–10 NAAQS. The CAA requires a serious PM–10 nonattainment area that fails to meet its attainment deadline to submit a plan providing for attainment of the PM–10 NAAQS and for an annual emission reduction in PM–10 or PM–10 precursors of not less than five percent until attainment. Our February 6, 2014 proposed rule provides the background and rationale for this action.[2]

II. Public Comments and EPA Responses

EPA provided a 30-day public comment period on our proposed action. The comment period ended on March 10, 2014. We received 12 public comment letters from State and local agencies, industry, congressional representatives and environmental groups.[3] All of the submitted comment letters are in our docket. We respond to all the comments below.

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[2] We have also approved Arizona statutory provisions and the Dust Action General Permit, which were submitted with the 2012 Five Percent Plan. See our proposed rule at 79 FR 7118, p. 7123 (footnote 20) and recent EPA actions at 79 FR 17878 (March 31, 2014), 79 FR 17879 (March 31, 2014) and 79 FR 17881 (March 31, 2014).

[3] Commenting organizations include: U.S. Senator Jeff Flake, Arizona Center for Law in the Public Interest (2 letters), Maricopa Association of Governments, City of Phoenix, Arizona Rock Products Association, Salt River Project, ADEQ, Arizona Association of General Contractors, Maricopa County Air Quality Department, the Arizona Chamber of Commerce, and Amanda Reeve, former Arizona State Representative and Chair of Arizona House Environment Committee.

A. Update 2002 BACM and MSM Determinations

Comment: The Arizona Center for Law in the Public Interest (ACLPI) commented that EPA's proposed action did not discuss or analyze requirements under CAA 189(b)(1)(B) for best available control measures (BACM) or requirements under CAA 188(e) for most stringent measures (MSM). ACLPI stated that these requirements apply to the Maricopa County PM–10 nonattainment area because it is a serious PM–10 nonattainment area that obtained a five-year extension of its attainment date pursuant to section 188(e) in 2001. ACLPI also asserts that EPA's 2002 approval of BACM and MSM requirements must be updated in light of EPA's statements in correspondence to ADEQ and in a proposed rulemaking in 2010 that new more stringent control measures have been adopted by air agencies in Nevada and California and that agricultural controls no longer represent BACM. ACLPI also states that addressing the question of whether existing control constitute BACM is necessary in order to evaluate ADEQ's claims that 135 exceedances qualify as exceptional events.

Response: EPA disagrees with the commenter's statement that EPA's proposed action on the 2012 Five Percent Plan did not discuss or analyze section 189(b)(1)(B) and 188(e) requirements for BACM and MSM. Our proposed action on the 2012 Five Percent Plan explained that the Maricopa County PM–10 nonattainment area was initially classified as moderate, and, when it failed to reach attainment by the attainment deadline for moderate areas, was reclassified, on May 10, 1996, as a serious PM–10 nonattainment area with a new attainment deadline of

December 31, 2001. *See* 79 FR 7118–7119. Our proposed action on the 2012 Five Percent Plan also explained the criteria set forth in section 188(e) necessary to grant a five year extension of that deadline. In addition, our proposed action on the 2012 Five Percent Plan included the following statement: "On July 25, 2002, EPA approved the serious area PM–10 plan for the Maricopa PM–10 Nonattainment Area as meeting the requirements for such areas in CAA sections 189(b) and (c), including the requirements for implementation of best available control measures (BACM) in section 189(b)(1)(B) and MSM in section 188(e). In the same action EPA approved the submission with respect to the requirements of section 188(d) and granted Arizona's request to extend the attainment date of the area to December 31, 2006."[4] 79 FR 7119.

We understand the comment to be more specifically directed at the issue of whether our action on the 2012 Five Percent Plan requires EPA to "update" or re-evaluate the BACM and MSM determinations we made when we acted on the State's serious area plan and attainment deadline extension request in 2002. EPA does not agree that the CAA requires such a reevaluation in the context of acting on a state's submission of a new plan to meet the requirements of section 189(d). We interpret CAA section 189(b)(1)(B) to provide that the requirement for BACM is triggered by a specific event: The reclassification of a moderate PM–10 nonattainment area to serious. Similarly, we

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[4] EPA's approval of BACM for this area and approval of the extension under section 188(e) were upheld in *Vigil* v. *Leavitt,* 366 F.3d 1025, amended at 381 F.3d 826 (9th Cir. 2004).

interpret section CAA 188(e) to provide that the requirement for MSM is triggered by a particular event: EPA's granting of a state's request for an extension of the attainment deadline for a serious nonattainment area. If a serious nonattainment area fails to reach attainment by the applicable deadline, CAA section 189(d) requires the state to submit "plan revisions which provide for attainment of the PM–10 air quality standard" and "for annual reduction in PM–10 . . . of not less than 5 percent . . ." The Act, however, does not contain a specific requirement that the state update the previously approved requirements for BACM and MSM as a consequence of failing to reach attainment by the applicable deadline for serious PM–10 nonattainment areas as an element of the plan revision required by section 189(d).

Consistent with the Act's structure of requiring increasingly stringent obligations as the severity of the air pollution problem increases, we interpret sections 189(b)(1)(B) and 188(e), as well as 189(d), as parts of a statutory scheme that imposes increasingly more stringent requirements when a PM–10 nonattainment area fails to reach attainment by applicable deadlines. *See* Addendum to the General Preamble, 59 FR 42010 (August 16, 1994). As stated previously, the Maricopa County PM–10 Nonattainment Area was initially classified as moderate. In 1996, when EPA determined that the Area failed to reach attainment by the moderate area attainment deadline, EPA reclassified the Area to serious. As a consequence of this reclassification, the Maricopa County PM–10 Nonattainment Area was subject to a new attainment deadline (December 31, 2001) as well as new requirements for a serious PM–10 attainment plan

pursuant to CAA section 188(c) and for BACM pursuant to CAA section 189(b)(1)(B). Subsequently, the State's request for an extension of the serious area attainment deadline (December 31, 2006), and EPA's granting of that request in 2002, resulted in an obligation for the State to demonstrate that its SIP imposed MSM pursuant to section 188(e). In 2007, EPA's determination that the Maricopa County PM–10 Nonattainment Area had failed to reach attainment by the extended serious area deadline resulted in section 189(d)'s requirements for plan revisions and annual reductions in PM–10 of five percent until attainment. Thus, the CAA's requirements for BACM and MSM are tied to specific triggers in the Act: BACM by the reclassification to serious following the missed moderate area deadline, and MSM by the extension of the serious area deadline. For serious nonattainment areas that fail to reach attainment by an applicable deadline, the CAA specifies a particular consequence: A requirement for additional plan revisions that provide for attainment and annual five percent reductions. There is no explicit requirement in section 189(d) that a state with a serious nonattainment area that misses its attainment deadline must also reevaluate BACM and MSM provisions in its SIP that EPA has already approved. Indeed, the requirements of section 189(d) do not specify the requisite level of control and merely speak in terms of expeditious attainment and a set percentage of annual reductions from the most recent inventory, without regard to the level of control on sources needed to achieve those objectives. We note further that the commenter did not provide a legal rationale to support an interpretation of the Act that would require the state to reevaluate the existing BACM and MSM in its SIP as part of the

explicit requirements of section 189(d). A state may elect to do so, and may elect to do so as a means of achieving additional emissions reductions to meet the five percent requirement, but that is not a specific requirement of section 189(d).

EPA notes that it has other discretionary authority under the CAA to address deficiencies in existing state SIPs, if that were necessary to address substantive concerns like those raised by the commenter. If EPA were to find a state SIP to be "substantially inadequate" to attain or maintain a standard or to meet any other requirements of the CAA, section 110(k)(5) provides a remedy by which EPA may require a state to revise its SIP to correct the identified inadequacies. In such a situation, EPA notifies a state of the inadequacies and can allow the state up to 18 months to submit revisions to the SIP to address the problems. *See* 42 U.S.C. 7410(k)(5). EPA has not made such a determination with respect to BACM or MSM for the Maricopa County PM–10 Nonattainment Area.

Finally, we note that Arizona was able to demonstrate attainment of the PM–10 NAAQS and provide for annual reductions of five percent until attainment without requiring additional BACM and MSM measures in its SIP.[5] Given that this area has demonstrated that it attained the PM–10 NAAQS by December 31, 2012 and has met the requirements of section 189(d), EPA does not see a need for the State to

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[5] *See* MAG 2012 Five Percent Plan, at p. 5–7, Table 5–3. Note that the emissions from agricultural sources ("tilling, harvesting and cotton ginning" and "windblown agriculture") are constant, reflecting no reductions in emissions from 2008 to 2012.

reevaluate its existing BACM and MSM as part of the action on the 2012 Five Percent Plan.

We address ACLPI's comments with respect to BACM and MSM as they relate specifically to agricultural controls and exceptional events below.

B. BACM for Agricultural Sources

Comment: ACLPI commented that EPA should not approve the 2012 Five Percent Plan because it does not include adequate measures for agricultural emissions. ACLPI commented that EPA has stated that ACC R 18–2–611 [Ag BMP Rule] no longer qualifies as BACM because other nonattainment areas have stronger programs for controlling agricultural emissions and do not have an enforceability issue found in the rule. ACLPI also commented that the State's 2011 revisions to the Ag BMP Rule to address concerns identified by EPA are still clearly insufficient to qualify as BACM.

Response: As explained above, CAA section 189(d) does not require the State to reevaluate the BACM and MSM determinations that were addressed in its serious area PM–10 plan for the Maricopa County PM–10 Nonattainment Area.

In addition, the 2012 Five Percent Plan satisfied all requirements for an approvable section 189(d) plan without relying on additional emissions reductions from agricultural sources. The 2012 Five Percent Plan is based on the "2008 PM–10 Periodic Emissions Inventory for Maricopa County, Revised 2011 (2008 Inventory)," which EPA found to be comprehensive, accurate and current. 79 FR 7120–7121. The 2008 Inventory shows that the most significant sources of emissions in the Maricopa County Nonattainment Area

are unpaved roads and alleys (21 percent), construction-related fugitive dust (17 percent), paved road dust (17 percent) and windblown dust (9 percent). 79 FR 7120. Section 189(d) requires an approvable plan to show annual five percent reductions in PM–10 or PM–10 precursors until attainment. The 2012 Five Percent Plan was able to satisfy this criterion without assuming additional reductions in agricultural emissions.[6] Similarly, the 2012 Five Percent Plan demonstrated that the area would attain the standard without additional reductions in agricultural emissions.[7] Instead, the 2012 Five Percent Plan predicts that decreases in emissions from other categories, primarily construction and windblown dust from vacant and open lands, would achieve the requisite 5 percent reductions.[8]

Recent monitoring data support the attainment demonstration in the 2012 Five Percent Plan. 79 FR 7122. Finally, the State used no reductions in agricultural emissions for contingency measures.[9] Because the 2012 Five Percent Plan did not depend on additional emission reductions from agricultural sources and because EPA finds that the State is not required to reevaluate the BACM determinations we made in 2002 as part of meeting the requirements of

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[6] *Id.*

[7] *See* MAG 2012 Five Percent Plan, App. B, "Technical Document in Support of the MAG 2012 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area," p. V–65.

[8] *Id.* at p. III–2, Table III–1.

[9] *See* MAG 2012 Five Percent Plan, at p. 6–39, Table 6–22.

section 189(d), the content of the Ag BMP rule does not determine the outcome of our action on the 2012 Five Percent Plan.

Nevertheless, EPA is continuing to work with ADEQ, Arizona stakeholders and the Governor's Agricultural BMP Committee to improve the Ag BMP rule. EPA anticipates that these improvements will be particularly important for addressing PM–10 emissions in Pinal County, a portion of which EPA re-designated as non-attainment in 2012. *See* 77 FR 32024 (May 31, 2012).

C. Dust Action General Permit

Comment: ACLPI commented that the 2012 Five Percent Plan relies on an estimate that the Dust Action General Permit (DAGP) will increase the rule effectiveness of Rule 310.01 by one percent, but argued that it is not clear that the DAGP achieves any measurable reduction in emissions. ACLPI stated that the structure of the DAGP means that its scope is unclear and that there is no way to gauge that issuance of the DAGP is actually impacting behavior in a way that reduces emissions. ACLPI stated that compliance is only measured by instances of lack of compliance discovered by inspectors who happen upon an owner or operator of a regulated activity who is not implementing a BMP. ACLPI stated that ADEQ has not yet issued a single Requirement to Operate ("RTO"), which means that it is possible that sources not already subject to permits have implemented BMPs as a result of the permit, but it is equally plausible that BMPs are not being implemented and that inspectors haven't discovered the violations, or that the universe of potential permittees under the DAGP was so small

that the adoption of the permit had no practical effect whatsoever.

Response: The 2012 Five Percent Plan does not rely on assumptions regarding compliance with the DAGP *per se*; rather, the 2012 Five Percent Plan relies on an assumption that the DAGP will improve compliance with Rule 310.01. As the 2012 Five Percent Plan explains, "[e]missions reduction credit was taken for one new measure, the Dust Action General Permit . . . *This new measure is expected to raise rule effectiveness for Rule 310.01 by one percent during high wind hours* . . ."[10] This statement is consistent with Table 5–1 of the MAG 2012 Five Percent Plan, "Impact of Increased Rule Effectiveness on 2008–2012 PM–10 Emissions," which shows that ADEQ estimated that the rule effectiveness for the category "windblown vacant, open, test tracts," (the category of sources subject to Rule 310.01), would increase from 96% in 2010–2011 to 97% in 2012.[11] Table 5–1 associates this improved rate of compliance with an annual reduction in PM–10 emissions of 149 tons per year.[12]

The Maricopa County Air Quality Department's (MCAQD) compliance data for calendar year 2012 support the 2012 Five Percent Plan's assumptions that

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[10] MAG 2012 Five Percent Plan, p. ES–10 (emphasis added). *See also,* MAG 2012 Five Percent Plan at p. 6–45; App. B, "Technical Document in Support of the MAG 2012 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area," ppg. III–1 to III–8.

[11] MAG 2012 Five Percent Plan at p. 5–3, Table 5–1.

[12] *Id.*

the DAGP will improve compliance with Rule 310.01. MCAQD reviewed its records of inspections during calendar year 2012, as documented in "Evaluation of Innovative Control Measures and Existing Maricopa County Control Measures Contained in the MAG 2012 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area, revised," Maricopa County Air Quality Department, June 6, 2013 (2013 Evaluation Report).[13] It found that, out of a total of 5,431 sites inspected for compliance with Rule 310.01 in 2012, 149 citations were issued—amounting to a rule effectiveness rate of 97.62 percent. 2013 Evaluation Report at pages 3–4. This amount exceeds the compliance rate of 96% associated with previous years. MAG 2012 Five Percent Plan at p. 5–3, Table 5–1. EPA acknowledges that estimating rule compliance requires reliance on compliance information collected by reliable means. In this instance, EPA believes that the information gathered through the MCAQD's inspections program provides information to support the conclusion that most affected sources are complying with the requirements of Rule 310.01, and that compliance improved in 2012 as a result of those inspections.

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[13] MCAQD has committed to conducting this evaluation on a triennial basis. MAG 2012 Five Percent Plan, App. C, Exhibit 2, "Maricopa County Resolution to Evaluate Measures in the MAG 2012 Five Percent Plan for the Maricopa County Nonattainment Area."

The 2012 Five Percent Plan further describes the connection between Rule 310.01 and the DAGP.[14] The Plan explains that the DAGP is expected to increase compliance with Rule 310.01 because, whenever ADEQ issues a forecast of a high wind dust event, sources subject to Rule 310.01 (primarily open areas, vacant lots, and unpaved parking areas and roadways),[15] will take additional measures to stabilize open areas and unpaved surfaces by implementing the best management practices (BMPs) specified in Rule 310.01 and the DAGP.[16] Such measures might include restricting access to open areas and vacant lots, or by applying dust suppressants and/or maintaining surface gravel.[17] As specified in the DAGP, sources that fail to choose or implement a BMP when ADEQ issues a forecast of a high wind dust event may trigger applicability of the DAGP and the additional

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[14] *See* MAG 2012 Five Percent Plan, p. ES–10; p. 5–3, Table 5–1; p. 6–45. See also MAG 2012 Five Percent Plan, App. B, "Technical Document in Support of the MAG 2012 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area," ppg. III–1 to III–8. The relationship between Rule 310.01 and the DAGP is also described in ADEQ's comments on our proposed action, Letter from Eric C. Massey, Director, Air Quality Division, ADEQ to Greg Nudd, US EPA, dated March 10, 2014.

[15] S*ee* Rule 310.01, section 102; 2012 Five Percent Plan at ES–7 to ES–10.

[16] MAG 2012 Five Percent Plan at ES–10.

[17] *See* DAGP, Attachment C, "Best Management Practice Examples"; Rule 310.01, sections 301–307.

requirements it imposes.[18] Thus, the existence of the DAGP enhances compliance with Rule 310.01 because sources subject to Rule 310.01 associate noncompliance with Rule 310.01 with an adverse consequence—specifically, the obligation to apply for and comply with the DAGP. Again, MCAQD's study of the compliance rate of Rule 310.01 supports this assumption in the 2012 Five Percent Plan.

D. Exceptional Events—General

Comment: ACLPI stated that it was unable to reconcile some of the numbers of exceptional events cited by EPA. The commenter stated that the subtotals in EPA's concurrence letters add up to 131, but the subtotals in the tables in the supporting documentation add up to 135. The commenter added that if sites with double monitors are counted as only one exceedance, the total number of exceedances is 127.

Response: EPA acknowledges the discrepancy between the number of exceedances in concurrence letters and the tables in the TSDs. After closely re-reviewing the data, EPA has determined that the total number of exceptional events addressed by our concurrence letters dated September 6, 2012, May 6, 2013, and July 1, 2013 should be 135 exceedances.[19] These 135 exceptional event exceedances occurred on 25 days over the three year period, 2010–2012.

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[18] DAGP, section V.

[19] *See* spreadsheet entitled "EPA Exceptional Event Concurrence Sheet," included in the docket for this rule.

Comment: ACLPI commented that EPA's exclusion of such a large number of frequent and severe exceedances is unconscionable and misrepresents the extent of the particulate pollution in the Area. The commenter stated that the reported exceedances are "frequent" and "severe" within the meaning of EPA guidance, specifically, EPA's Interim Guidance on the Preparation of Demonstrations in Support of Requests to Exclude Ambient Air Quality Data Affected by High Winds Under the Exceptional Events Rule, May 2013 (Interim Guidance).

Response: We note that the 135 exceptional event exceedances occurred on 25 days over a three year period from 2010 to 2012. The determinations reflected in our concurrence letters and TSDs dated September 6, 2012, May 6, 2013 and July 1, 2013 are consistent with the EER and our Interim Guidance. We considered a range of relevant factors including whether anthropogenic sources had reasonable controls in place, meteorological data such as wind speed and direction, and the spatial extent of the events. The frequency and severity of the events were considered as part of this analysis, and although we agree that some of the excluded exceedances could meet the criteria for "frequent" and "severe" suggested in our Interim Guidance, that fact alone does not disqualify an exceedance from consideration as an exceptional event. *See* Interim Guidance at 12–13 (frequency and severity of past exceedances may be a factor considered in determining the reasonableness of controls). Also, the Interim Guidance acknowledges that events do not necessarily have to be rare to qualify as exceptional events. *See* Interim Guidance at 3 and 20.

Comment: ACLPI commented that EPA's analysis of whether the events are reasonably preventable or controllable should have been more probing and not a "cookie cutter" approach, given the frequency and severity of the exceedances, as well as the area's status as serious nonattainment and the State's previous withdrawal of its earlier Five Percent Plan.

Response: The State submitted documentation on March 14, 2012, January 28, 2013, and February 13, 2013 to demonstrate to EPA that exceedances of the PM–10 NAAQS on various dates in 2011 and 2012 meet the criteria for an exceptional event in the EER. The State's submittals comprise over 1750 pages of documentation of the facts supporting each of the identified exceptional events. Our TSDs accompanying our concurrence letters dated September 6, 2012, May 6, 2013, and July 1, 2013 reflect EPA's methodical and systematic review of the State's documentation of the events and EPA's technical expertise and judgment. EPA presented its conclusions in a standardized format that was appropriate, considering the volume of information presented and reviewed, as well as the purpose of informing the public. In addition, EPA notes that we also received several comments in this rulemaking regarding the process required to document exceedances as "exceptional events" contending that the level of resources required to prepare and submit such documentation to EPA was too onerous.

Comment: ACLPI commented that the events excluded by EPA were predictable and seasonal in nature and could be ameliorated if the State adopted

appropriate control measures for windblown dust both in the attainment (*sic*) area and statewide.

Response: For each of the events that EPA concurred with, EPA found that the event was not reasonably controllable or preventable (nRCP). EPA's Interim Guidance states that, for anthropogenic sources of dust, "a high wind dust event may . . . be considered to be not reasonably controllable or preventable if: (1) The anthropogenic sources of dust have reasonable controls in place; (2) the reasonable controls have been effectively implemented and enforced; and (3) the wind speed was high enough to overwhelm the reasonable controls." *See* Interim Guidance at 10.

EPA's determinations of nRCP were primarily based on consideration of the control requirements based on the Area's serious nonattainment classification for the PM–10 NAAQS. *See* Interim Guidance at 13. ADEQ provided detailed information of required controls (including BACM- level controls for significant sources previously approved by EPA for this area), as well as information on rule implementation, rule effectiveness, compliance and enforcement, alert systems and public notification activities. A typical example is the documentation ADEQ submitted in connection with the event that occurred on August 11, 2012. *State of Arizona, Exceptional Event Documentation for the Event of August 11, 2012 for the Phoenix PM–10 Nonattainment Area,* February 2013 (AZ EE Documentation for August 11, 2012). This submittal included a list of control measures regulating sources of dust in Maricopa and Pinal counties, information about rule effectiveness, and data

regarding compliance and enforcement. *See* AZ EE Documentation for August 11, 2012, Section 5.

In addition, EPA's determinations of nRCP were based on ADEQ's documentation of wind speeds. For example, the exceedances that occurred on September 11 and 12, 2011 involved wind speeds of 20 miles per hour (mph) and 25 mph, respectively. *See e.g.,* EPA Letter dated July 1, 2013, and accompanying TSD at p. 4. See also, e.g., TSD discussion of June 16, 2012 event at p. 10 (sustained wind speeds of 29 mph–32 mph); TSD discussion of June 27, 2012 event at p. 15 (sustained wind speeds of 31 mph–38 mph); TSD discussion of July 11, 2012 event at p. 20 (sustained wind speeds of 20 mph–25 mph).[20] Given the wind speeds associated with each of the events that EPA concurred upon, EPA believes ADEQ's controls assessment was appropriate and that the pre-existing and previously approved BACM level controls are adequate for meeting the requirement of "reasonable controls" for a PM–10 serious nonattainment area.

Additional information regarding EPA's consideration of reasonable controls can be found in EPA's TSDs for each event.

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[20] The commenter did not specify particular dates or exceedances for which she found EPA's analysis deficient; therefore, EPA's response provides just a few examples from our TSDs in which we refer to the documentation of wind speeds included in the State's submittals. We reiterate, however, that our review of the State's submittals involved a methodical, case-by-case approach as documented by each of the TSDs accompanying our concurrence letters dated September 6, 2012, May 6, 2013 and July 1, 2013.

E. Exceptional Events and Reasonable Controls

Comment: ACLPI commented that BACM level controls were not in place in the nonattainment area. ACLPI commented that EPA's Interim Guidance says that BACM measures may be insufficient if the SIP has not been recently reviewed and that EPA has indicated that it will consider windblown dust BACM to be reasonable controls for purposes of exceptional events claims if the measures have been reviewed and approved in the context of a SIP revision within the past three years and if the measures are specific to windblown dust. ACLPI commented that EPA's proposed action departs from this guidance because EPA last approved BACM for the area in 2002, with a supplemental analysis in 2006.

Response: EPA's Interim Guidance states: "Generally, the EPA will consider windblown dust BACM to constitute reasonable controls if these measures have been reviewed and approved in the context of a SIP revision for the emission source area within the past three years." Interim Guidance at 15. Although our BACM determinations were made outside this recommended time frame, we believe that our determinations regarding nRCP were correct. First, the 2012 Five Percent Plan shows that the significant stationary source categories for PM–10 are: construction; unpaved roads and alleys; paved road dust; windblown dust (non-agriculture); unpaved parking lots; and off-road recreational vehicles.[21] Each of these source categories was included in our earlier BACM determinations. *See* 67 FR 48718 (July 25,

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[21] MAG 2012 Five Percent Plan, at -. 5–7, Table 5–3.

2002); *see also,* 67 FR 48733–34. Because the significant sources within the Phoenix PM–10 nonattainment area have not significantly changed since 2002, and the range of potential measures for controlling emissions from these source categories (e.g., stabilization of disturbed surface areas; spray bars to apply water or dust suppressants; track out, rumble grate and wheel washer requirements) have not significantly changed since 2002, we believe that our previous BACM determinations remain appropriate for the purposes of making exceptional event determinations, including determinations regarding nRCP.

Second, although the State has not prepared a new BACM analysis and EPA has not made new BACM determinations in the past three years, Arizona has adopted revisions to rules regulating sources of windblown dust that EPA has approved into the SIP because they are more stringent. Specifically, EPA has approved updated revisions of: Rule 310, which regulates sources of fugitive dust from dust generating operations such as construction; Rule 310.01, which regulates sources of windblown dust from open areas, vacant lots, unpaved parking lots, and unpaved roadways; and Rule 316, which regulates sources of dust from nonmetallic mineral processing.[22]

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[22] *See* 74 FR 58554 (November 13, 2009) (EPA approval of Maricopa County's revisions to Rule 316, adopted on March 12, 2008); 75 FR 78167 (December 15, 2010) (EPA approval of Maricopa County's revisions to Rule 310 and 310.01, adopted on January 27, 2010).

Third, to the extent the commenter interprets the Interim Guidance as stating that a BACM determination that is older than three years cannot be relied upon in a demonstration of reasonable controls, the commenter is incorrect. The Interim Guidance provides a guideline to states preparing documentation to submit to EPA that more recent BACM determinations will generally satisfy EPA's consideration of reasonable controls. It does not disqualify measures that EPA determined to be BACM more than three years previously from consideration as reasonable controls, nor does it impose an obligation on the part of the state or EPA to re-evaluate BACM.

Comment: ACLPI commented that EPA found that the 2007 Maricopa BMP Rule no longer represents BACM for agricultural emissions (referencing statements in a 2010 proposed rulemaking and in a 2010 letter to the Arizona Agricultural Best Management Practices (BMP) Committee) and that although the 2007 Maricopa BMP Rule was revised in 2011, the revisions were not implemented until March 2012. The commenter states that 98 of the 217 exceedances at issue occurred in 2011 (i.e., prior to the implementation of the 2011 Maricopa BMP Rule revisions). The commenter argued that even into 2012, the "revised Maricopa BMP Rule" (which EPA understands to be a reference to the 2011 Maricopa BMP Rule) is not clearly BACM because it did not include EPA's recommendations for improvement. The commenter concludes that EPA's concurrence on exceptional events was erroneous because EPA relied on its prior approval of the State's previous BACM demonstration and did not attempt to determine

whether the controls in place during the event were BACM.

Response: Our response above explains why the CAA does not require EPA to reevaluate its earlier BACM determination in connection with our action on the 2012 Five Percent Plan. We understand the commenter to be asserting another basis for EPA to reevaluate BACM, in particular, that EPA's concurrence on exceptional events may be a basis to require EPA to make a determination regarding BACM. EPA's Interim Guidance, however, states that BACM for windblown dust is a measure that EPA has identified as being "reasonable" for the purposes of exceptional events determinations. Interim Guidance at 15. The Interim Guidance acknowledges that "[h]aving BACM/RACM in place during the time of the event is an important consideration" for an exceptional event determination, but more justification may be necessary if, for example, the measures are not related to windblown dust, or if the SIP has not been recently reviewed. *Id.* For the reasons set forth below, EPA's reliance on the BACM determinations it made in 2002 was a reasonable basis to concur on the State's exceptional event claims.[23]

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[23] EPA notes that it applies a weight-of-the-evidence standard in evaluating exceptional events claims. *See e.g.,* Interim Guidance at 8: "The EPA uses a weight-of-the-evidence approach in reviewing air agency requests for data exclusion under the EER [Exceptional Events Rule]. Evidence and narrative that constitute a strong demonstration for one element can also be part of the demonstration for another element, but cannot make up for the absence of or insufficient explanation supporting another element. A strong demonstration for one requirement could, however, influence the persuasiveness of the demonstration for another."

First, the 2008 Inventory shows that agricultural sources are a very small contributor to windblown dust in Maricopa County. According to the 2008 Inventory, agricultural windblown dust comprises approximately 0.9% of the total annual windblown dust emissions in the nonattainment area (448 tons out of a total of 49,673.01 tons in 2012).[24] Other agricultural sources, such as tilling, harvesting, and cotton ginning, comprise approximately 1.8% of the total annual PM–10 emissions inventory (893 tons out of a total of 49,673.01 tons in 2012).[25] Thus, agricultural sources contribute only a relatively small percentage of the total emissions in the 2008 Inventory.

Second, in determining that the exceedances that occurred in 2011 and 2012 were nRCP, it was appropriate for EPA to find that the existing controls were "reasonable" because, as we explained above, the State met the requirements of section 189(d) in the 2012 Five Percent Plan without relying on additional reductions from agricultural sources. Significantly, no additional reductions from the Maricopa BMP Rule were needed to demonstrate that the area would attain the standard.[26] Therefore, our determination that existing BACM requirements were sufficient to find that emissions sources were reasonably controlled at the time the exceedances occurred was appropriate.

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[24] *Id.* at p. II–3, Table II–2; *see also,* MAG 2012 Five Percent Plan at p. 5–5, Table 5–2.

[25] *Id.*

[26] *See* MAG 2012 Five Percent Plan, at p. 5–7, Table 5–3.

Third, we acknowledge that EPA has previously indicated to the State that improvements to controls on agricultural sources should be considered. It is important to note, however, that EPA's proposed 2010 rulemaking was a proposed action to disapprove a different section 189(d) plan, the State's 2007 Five Percent Plan, in part because of EPA's concerns regarding the accuracy of the State's 2005 Periodic Emission Inventory. (We also note that the proposed rulemaking was never finalized.) It is also important to note that EPA's comments to the Ag BMP Committee predate the finalization of the 2008 Emission Inventory (May 2012) in which emissions from agricultural sources are a small part of the PM–10 emissions inventory. Further, although the 2008 Inventory indicates that agricultural sources are relatively small contributors to PM–10 emissions in the Maricopa County PM–10 Nonattainment Area, EPA believes that agriculture is a significant source in certain portions of Pinal County, which EPA recently redesignated as a PM–10 nonattainment area. *See* 77 FR 32024 (May 31, 2012). Therefore, EPA believes that it is important to continue to improve the controls on agricultural sources, and EPA is working with ADEQ, stakeholders, and the Governor's Agricultural BMP Committee to improve these controls.

Comment: ACLPI commented that ADEQ and EPA did not adequately address the issue of whether the events were reasonably controllable or preventable with respect to sources outside the Maricopa County PM–10 Nonattainment Area. ACLPI stated that EPA's Interim Guidance says that a basic controls analysis should consider all upwind areas of disturbed soil to be potential contributing sources, and that the basic

controls analysis should identify all contributing sources in upwind areas and provide evidence that such sources were reasonably controlled, whether anthropogenic or natural, and include inspection reports and/or notices of violation, if available. The commenter stated that ADEQ and EPA did not indicate that control measures outside of Maricopa County were evaluated for their "reasonableness." ACLPI commented that Pinal County's controls are "minimalist rules" that do not require controls to address emissions caused solely by high wind events and that although Pinal County was only recently designated nonattainment, Pinal County should not be excused from the requirement to show that sources in the county were subject to reasonable controls.

Response: The comment concerns the level of controls imposed on sources outside the Maricopa County PM–10 Nonattainment Area, in particular, sources located in Pinal County. As noted in our proposed action, the Maricopa County PM–10 Nonattainment Area encompasses several cities within Maricopa County (including the cities of Phoenix, Mesa, Scottsdale, Tempe, Chandler, and Glendale), and several other smaller jurisdictions and unincorporated county lands. The Maricopa County PM–10 Nonattainment Area also includes the town of Apache Junction in Pinal County. Recently, EPA designated a portion of Pinal County ("West Pinal") as a moderate PM–10 nonattainment area, which triggered

nonattainment planning obligations that the State must fulfill. *See* 77 FR 32024 (May 31, 2012).[27]

EPA's Interim Guidance contemplates that a basic controls analysis should include "a brief description" of upwind sources. The level of detail provided in describing the Pinal County sources was adequate given relevant factors such as wind speed. Moreover, ADEQ and EPA both indicated that they evaluated control measures outside of Maricopa County. For example, ADEQ's exceptional event documentation included an analysis of reasonable controls that identified measures that apply to sources located within the Maricopa County PM–10 Nonattainment Area, and measures applicable to sources in Pinal County, outside the Maricopa County PM–10 Nonattainment Area.[28] ADEQ specifically identified two Pinal County rules, Article 2, Fugitive Dust, and Article 3, Construction Sites—Fugitive Dust, as regulatory control measures.[29] EPA's TSDs also

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[27] We note that our action on the 2012 Five Percent Plan relates to our concurrences with the State's exceptional event claims for exceedances at monitors for the Maricopa County PM–10 Nonattainment Area dated September 6, 2012, May 6, 2013, and July 1, 2013. Our action on the 2012 Five Percent Plan does not depend on data from monitors located within the newly redesignated West Pinal PM–10 Nonattainment Area or on any exceptional events claims regarding data from such monitors.

[28] *See e.g., ADEQ EE Documentation for July 3–8, 2011* at 39–45; in particular, ppg. 40–41, Tables 4–1 and 4–3 (sources within the Maricopa PM–10 Nonattainment Area) and Table 4–2 (sources outside the Maricopa PM–10 Nonattainment Area).

[29] *Id.* at 41, Table 4–2.

referenced this section of ADEQ's documentation, including the discussion of rules applicable to sources in Pinal County.[30]

In addition, the level of detail describing Pinal County sources and controls was also adequate for an area such as Pinal County for which a portion was recently redesignated as a PM–10 nonattainment area and is currently undergoing the nonattainment planning process. As EPA's Interim Guidance states, an area's attainment status is an appropriate guideline for assessing the reasonableness of controls: "Generally, the EPA does not expect areas classified as attainment, unclassifiable, or maintenance for a NAAQS to have the same level of controls as areas that are nonattainment for the same NAAQS. Also, if an area has been recently designated to nonattainment but has not yet been required to implement controls, the EPA will expect the level of controls that is appropriate for the planning stage." Interim Guidance at 15. EPA's recent redesignation of a portion of Pinal County as a moderate PM–10 nonattainment area triggered CAA planning obligations for the State to develop regulations to implement controls such as Reasonably Available Control Measures (RACM) for existing sources of PM–10 and a section 173 preconstruction permitting program for new and modified sources of PM–10. EPA concurred with exceedances that occurred in 2011 and 2012; the latest exceedance occurred on September 6, 2012, well before the CAA's deadline for Arizona to submit an

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[30] *See e.g.,* EPA Letter dated Sept. 9, 2012 and accompanying TSD at 3.

implementation plan to EPA for approval into the Arizona SIP. *See* 77 FR 32030.

Comment: ACLPI commented that claims that events were caused by "winds transporting dust from desert areas of Pima and Pinal Counties" are not substantiated and that the State's demonstrations do not determine source locations, as required by EPA's 2013 Interim Guidance (referencing 3.1.5.1). ACLPI conducted its own analysis of the event that occurred on July 18, 2011. ACLPI commented that its analysis indicates that dust sources included agricultural sources in Pinal and Maricopa Counties, and that four downdrafts and four outflows impacted the monitors from multiple locations, in contrast to the State's assertion that one thunderstorm outflow transported dust from desert portions of Pinal and Pima counties into the Phoenix PM–10 nonattainment area. ACLPI stated that although the State claims that specific source areas are difficult to determine because of the less dense monitoring network in the general source area, ACLPI's analysis shows that likely source locations can be determined using meteorological modeling and observational data. Therefore, EPA should require the state to make a more concerted effort to identify the actual sources and adopt controls to avoid or ameliorate future events.

Response: Although a more refined analysis of the location of thunderstorm downdrafts and source areas is potentially helpful for certain high wind dust events, this additional analysis is not necessary to analyze the specific events that EPA concurred on. EPA reviewed the commenter's analysis and concluded that it does not contradict ADEQ's documentation, but rather

corroborates the evidence presented in ADEQ's demonstration. ADEQ's documentation states that the contributing source regions were somewhat widespread, but that the "majority" of the PM that was transported into Maricopa County likely originated from areas within Pinal County to the south and southeast of Maricopa County.[31] ADEQ also explained that it is likely that some dust was generated within the Maricopa County PM–10 Nonattainment Area as gusts from the thunderstorm outflows passed through the area.[32] Thus, ADEQ did not claim that all the emissions were specifically caused by a single thunderstorm outflow. ADEQ's statement that the "majority" of the emissions were transported from areas of Pinal County and southeast Maricopa County is supported by the visualization of images from the Phoenix visibility camera included in the July 18, 2011 demonstration, which shows a large dust storm approaching from the south of the Maricopa County PM–10 Nonattainment Area.[33]

Comment: ACLPI commented that the fact that some of the sources are located outside of the Maricopa County PM–10 Nonattainment Area does not absolve the State of its responsibility to ensure that they are reasonably controlled. The commenter stated that ADEQ is the single responsible actor for air quality

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[31] State of Arizona Exceptional Event Documentation for the Event of July 18, 2011, for the Phoenix PM–10 Nonattainment Area, Jan. 23, 2013 at p. 9.

[32] *Id.* at 18.

[33] *Id.* at 27.

control in Arizona and had the responsibility to address the public health risk presented by sources in Pinal County, particularly given high wind events experienced in 2008 and 2009.

Response: EPA agrees that the State has a responsibility to ensure that sources outside the Maricopa County PM–10 Nonattainment Area are reasonably controlled. Our action with respect to exceedances at Maricopa County PM–10 Nonattainment Area monitors does not absolve in any way the State's responsibility to address PM–10 emissions in the West Pinal PM–10 Nonattainment Area. Our July 2012 redesignation of West Pinal to nonattainment triggers Clean Air Act nonattainment planning obligations that Arizona must fulfill. *See* 77 FR 32030. We note that our action on the 2012 Five Percent Plan relates to our concurrences with the State's exceptional event claims for exceedances at monitors for the Maricopa County PM–10 Nonattainment Area dated September 6, 2012, May 6, 2013, and July 1, 2013, and does not depend on the treatment of data for monitors located within the newly redesignated West Pinal PM–10 Nonattainment Area.

F. Exceedances in 2013

Comment: ACLPI commented that the Maricopa County PM–10 Nonattainment Area experienced 30 exceedances over six days in 2013, which ADEQ has flagged and for which ADEQ is preparing EE documentation, and that EPA is simply assuming that it will concur with these EE demonstrations. The commenter stated that this is unsupportable, particularly in light of EPA's failure to require mitigation measures and that there are frequent and

severe violations of the standard at multiple monitors, many of which are located in low income neighborhoods.

Response: The 2012 Five Percent Plan was based on a projection that that the Area would attain the NAAQS in 2012. If, upon review of the available evidence, EPA finds that the exceedances of the standard in 2013 constitute a new violation of the PM–10 NAAQS, we have the authority to require the state to submit a SIP revision with additional controls and a demonstration that the new controls will bring the area back into attainment with the standard.[34]

G. Contingency Measures

Comment: ACLPI stated that EPA's proposal acknowledges that the contingency measures in the 2012 Five Percent Plan are already being implemented. The commenter stated that CAA (175(d)) envisions additional measures that are automatically and immediately implemented if a milestone for reasonable further progress or attainment is not met. The commenter stated that if contingency measures are already being implemented when a milestone is missed, continued implementation will not ensure that the situation will be corrected. The commenter argues that *LEAN* v. *EPA* is not binding on the 9th Cir. and is contrary to the plain language of the CAA. The

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[34] E.g., under CAA section 110(k)(5) EPA may require a state to revise its SIP if we find it to be substantially inadequate to maintain the relevant air quality standard. In such a situation, EPA notifies a state of the inadequacies and can allow the state up to 18 months to submit revisions to the SIP to address the problems. See 42 U.S.C. 7410(k)(5).

commenter stated that approval of the 2012 Five Percent Plan without meaningful and appropriate contingency measures is contrary to law.

Response: EPA disagrees with the comment. Contingency measures must provide for additional emission reductions that are not relied on for RFP or attainment and that are not included in the attainment demonstration. Nothing in the statute precludes a state from implementing such measures before they are triggered. See, e.g., LEAN v. EPA, 382 F.3d 575 (5th Cir. 2004) (upholding contingency measures that were previously required and implemented where they were in excess of the attainment demonstration and RFP SIP).

EPA has approved numerous SIPs under this interpretation—i.e., SIPs that use as contingency measures one or more Federal or local measures that are in place and provide reductions that are in excess of the reductions required by the attainment demonstration or RFP plan. See, e.g., 62 FR 15844 (April 3, 1997) (direct final rule approving an Indiana ozone SIP revision); 62 FR 66279 (December 18, 1997) (final rule approving an Illinois ozone SIP revision); 66 FR 30811 (June 8, 2001) (direct final rule approving a Rhode Island ozone SIP revision); 66 FR 586 (January 3, 2001) (final rule approving District of Columbia, Maryland, and Virginia ozone SIP revisions); and 66 FR 634 (January 3, 2001) (final rule approving a Connecticut ozone SIP revision).

The scenario described by the commenter that already-implemented contingency measures will be a problem if the Maricopa County PM–10 Nonattainment Area misses a deadline for RFP or attainment is

mitigated by the fact that monitoring data for 2010–2012 show that the Area already attained the 24-hour PM–10 NAAQS as of December 12, 2012. See 79 FR 7122. Our approval of the contingency measures is also consistent with EPA guidance that "the potential nature and extent of any attainment shortfall for the area" is relevant to the determining the level of required emission reductions and that contingency measures "should represent a portion of the actual emission reductions necessary to bring about attainment in area." 72 FR 20586, 20643; *see also* PM–10 Addendum at 42015 (the emission reductions anticipated by the contingency measures should be equal to approximately one-year's worth of emission reductions needed to achieve RFP for the area.) EPA's approval of contingency measures that are already being implemented is particularly appropriate where, as is the case for the Maricopa County PM–10 Nonattainment Area, there are no future RFP or attainment deadlines.

H. Other Comments

Comment: ADEQ asked that EPA clarify that this action applies to the entire nonattainment area, including the portion in Pinal County, and not just to the Maricopa County portion.

Response: EPA has made this clarification.

Comment: Several commenters noted that the plan was developed through a cooperative discussion among the many stakeholders in the plan. According to the commenters, this process led to innovative strategies that are appropriate to the local conditions and consistent with EPA requirements.

Response: EPA acknowledges these comments.

Comment: Several commenters expressed concerns about the resources required to demonstrate that measured exceedances of the standard are due to exceptional events. These commenters recommended changing the Exceptional Events Rule to address this issue.

Response: EPA will consider these comments in future rulemakings on the Exceptional Events Rule.

III. EPA's Final Action

As a result of our proposed rule and our response to comments above, we are finalizing our proposal to approve the 2012 Five Percent Plan as meeting the requirements of the CAA for the Maricopa County PM–10 nonattainment area. Specifically, we are approving:

(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(d);

(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).

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act(5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 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).

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 August 11, 2014. 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. This action may not be challenged later in proceedings to enforce its requirements (*see* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: May 30, 2014.

Jared Blumenfeld,
Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart D—Arizona

■ 2. Section 52.120 is amended by adding paragraphs (c)(157)(ii)(A)(*1*) and (*2*) to read as follows:

§52.120 Identification of plan.

* * * * *

(c) * * *
(157) * * *
(i) * * *
(ii) *Additional material*s.
(A) Arizona Department of Environmental Quality.
(1) *2012 Five Percent Plan for PM–10 for the Maricopa County Nonattainment Area,* and Appendices Volume One and Volume Two, adopted May 23, 2012.
(2) *2012 Five Percent Plan for PM–10 for the Pinal County Township 1 North, Range 8 East Nonattainment Area,* adopted May 25, 2012.

* * * * *

[FR Doc. 2014–13495 Filed 6–9–14; 8:45 am]

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-72327
Environmental Protection Admin

[Filed January 9, 2017]

SANDRA L. BAHR; DAVID MATUSOW,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY; et al.,
Respondents,

STATE OF ARIZONA,
Respondent-Intervenor.

ORDER

Before: CLIFTON and IKUTA, Circuit Judges, and HAYES,[*] District Judge.

Respondents' petition for rehearing en banc, filed October 27, 2016, is DENIED. Judge Ikuta voted to deny the petition for rehearing en banc and Judge

[*] The Honorable William Q. Hayes, United States District Judge for the Southern District of California, sitting by designation.

Hayes so recommended. Judge Clifton voted to grant the petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

Respondent-Intervenor's petition for rehearing en banc, filed October 27, 2016, is DENIED. Judge Ikuta voted to deny the petition for rehearing en banc and Judge Hayes so recommended. Judge Clifton voted to grant the petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petitions for rehearing en banc are DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-72327
Environmental Protection Admin

[Filed November 8, 2016]

SANDRA L. BAHR; DAVID MATUSOW, Petitioners,	)
v.	)
U.S. ENVIRONMENTAL PROTECTION AGENCY; et al., Respondents,	)
STATE OF ARIZONA, Respondent-Intervenor.	)

ORDER

Before: CLIFTON and IKUTA, Circuit Judges, and HAYES,[*] District Judge.

Petitioners' petition for rehearing is DENIED.

[*] The Honorable William Q. Hayes, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX E

42 U.S.C. § 7502

Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of title 5 (concerning notice and comment) and shall

not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was

designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

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

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the

applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the

Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

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.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates

otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

APPENDIX F

Examples of past SIP actions approving "early triggered" contingency measures by Circuit:

First Circuit

- Approval and Promulgation of Implementation Plans; MA; One-hour Ozone Attainment Demonstration for the Massachusetts portion of the Boston-Lawrence-Worcester, MA-NH Ozone Nonattainment Area, 67 Fed. Reg. 63,586 (Oct. 15, 2002).
- Approval and Promulgation of Air Quality Implementation Plans; Rhode Island; Post-1996 Rate of Progress Plan, 66 Fed. Reg. 30,811 (Jun. 8, 2001).

Second Circuit

- Approval and Promulgation of Implementation Plans; New York Reasonable Further Progress Plans, Emissions Inventories, Contingency Measures and Motor Vehicle Emissions Budgets, 76 Fed. Reg. 17,801 (Mar. 31, 2011).
- Approval and Promulgation of Air Quality Implementation Plans; Connecticut; One-Hour Ozone Attainment Demonstration and Attainment Date Extension for the Greater Connecticut Ozone Nonattainment Area, 66 Fed. Reg. 634 (Jan. 3, 2001).

Third Circuit

- Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; 2002 Base Year Emission Inventory, Reasonable Further Progress Plan, Contingency Measures, Reasonably Available Control Measures, and Transportation Conformity Budgets for the Pennsylvania Portion of the Philadelphia-Wilmington-Atlantic City 1997 8-Hour Moderate Ozone Nonattainment Area, 75 Fed. Reg. 68,251 (Nov. 5, 2010).

Fourth Circuit

- Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; 1- Hour Ozone Attainment Plans, Rate-of-Progress Plans, Contingency Measures, Transportation Control Measures, VMT Offset, and 1990 Base Year Inventory, 70 Fed. Reg. 25,688 (May 13, 2005).

- Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; Post 1996 Rate-of-Progress Plans, One-Hour Ozone Attainment Demonstrations and Attainment Date Extension for the Metropolitan Washington D.C. Ozone Nonattainment Area, 66 Fed. Reg. 586 (Jan. 3, 2001).

- Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the 1997 8-Hour Ozone National Ambient Air Quality Standard for the

Washington, DC-MD-VA Moderate Nonattainment Area, 80 Fed. Reg. 19,206 (Apr. 10, 2015).

- Approval and Promulgation of Air Quality Implementation Plans; Maryland; Metropolitan Washington DC 1-Hour Ozone Attainment Demonstration Plans, 70 Fed. Reg. 25,719 (May 13, 2005).

Fifth Circuit

- Approval and Promulgation of Air Quality Implementation Plans; Texas; Reasonable Further Progress Plan, Enhanced Monitoring, Clean Fuel Fleets and Failure-to-Attain Contingency Measures for the Dallas/Fort Worth 1997 8-Hour Ozone Nonattainment Area; and Transportation Conformity, 79 Fed. Reg. 67,068 (Nov. 12, 2014).

- Approval and Promulgation of Implementation Plans; Texas; Attainment Demonstration for the Houston-Galveston-Brazoria 1997 8-hour Ozone Nonattainment Area, 79 Fed. Reg. 57 (Jan. 2, 2014).

- Approval and Promulgation of Air Quality Implementation Plans; Texas; Reasonable Further Progress Plan, Contingency Measures, Motor Vehicle Emission Budgets, and a Vehicle Miles Traveled Offset Analysis for the Houston-Galveston-Brazoria 1997 8-Hour Severe Ozone Nonattainment Area, 79 Fed. Reg. 51 (Jan. 2, 2014).

Seventh Circuit

- Approval and Promulgation of Implementation Plans; Illinois; Ozone, 66 Fed. Reg. 56,904 (Nov. 13, 2001).
- Approval and Promulgation of Air Quality Plans; Illinois; Post-1996 Rate of Progress Plan for the Chicago Ozone Nonattainment Area, 65 Fed. Reg. 78,961 (Dec. 18, 2000).
- Approval and Promulgation of Implementation Plans; Wisconsin; Ozone, 66 Fed. Reg. 34,878 (Jul. 2, 2001).
- Approval and Promulgation of State Implementation Plan; Wisconsin; Rate-of-Progress and Contingency Plans, 61 Fed. Reg. 11,735 (Mar. 22, 1996).
- Approval and Promulgation of Air Quality Plans; Wisconsin; Ozone, 66 Fed. Reg. 56,931 (Nov. 13, 2001).
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