

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

DAVID MATUSOW and SANDRA L. )  
BAHR, ) Case No. \_\_\_\_\_  
)  
Petitioners, ) EPA No. EPA–R09–OAR–2019–0541  
) Environmental Protection Agency  
v. )  
) **PETITION FOR REVIEW**  
ANDREW R. WHEELER, )  
Administrator, United States )  
Environmental Protection Agency; )  
JOHN BUSTERUD, Regional )  
Administrator, U.S. EPA Region 9; and )  
UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondents. )  
\_\_\_\_\_ )

Pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), Rule 15 of the Federal Rules of Appellate Procedure, and Circuit Rule 15-1, David Matusow and Sandra L. Bahr hereby petition the Court for review of the final action of Respondents Andrew R. Wheeler, Administrator, United States Environmental Protection Agency; John Busterud, Regional Administrator, U.S. EPA Region 9; and the United States Environmental Protection Agency, published at 85 Fed. Reg. 33571–33577 (June 2, 2020) and titled “Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Phoenix-Mesa, Arizona” [Attachment 1].

Dated this 1st day of August, 2020.

*/s/ Jennifer B. Anderson* \_\_\_\_\_

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review were mailed via first class mail, postage prepaid, this 1st day of August, 2020 to:

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Jennifer B. Anderson

## **Attachment 1**

**Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements;**

**Phoenix-Mesa, Arizona**

**85 Fed. Reg. 33571–33577 (June 2, 2020)**

Coast Guard plans to provide notification of this enforcement period via a Marine Safety Information Bulletin and/or Broadcast Notice to Mariners.

Dated: May 18, 2020.

**K. M. Luttrell,**

*Captain, U.S. Coast Guard, Captain of the Port Sector New Orleans.*

[FR Doc. 2020-11056 Filed 6-1-20; 8:45 am]

BILLING CODE 9110-04-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R09-OAR-2019-0541; FRL-10009-19-Region 9]

### Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Phoenix-Mesa, Arizona

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action on a state implementation plan (SIP) revision submitted by the State of Arizona on behalf of the Maricopa Association of Governments (MAG) to meet Clean Air Act (CAA or “the Act”) requirements for the 2008 ozone national ambient air quality standards (NAAQS or “standards”) in the Phoenix-Mesa (“Phoenix”) ozone nonattainment area (NAA). The EPA is finalizing approval of the portions of the “MAG 2017 Eight-Hour Ozone Moderate Area Plan for the Maricopa Nonattainment Area (December 2016)” (“MAG 2017 Ozone Plan” or “Plan”) that address the requirements for emissions inventories, a demonstration of attainment by the applicable attainment date, reasonably available control measures (RACM), reasonable further progress (RFP), motor vehicle emission budgets for transportation conformity, vehicle inspection and maintenance (I/M) programs, new source review (NSR) rules, and offsets. The EPA is finalizing a disapproval of the portion of the MAG 2017 Ozone Plan that addresses the requirements for contingency measures for failure to attain or to make RFP. However, based on a separate finding that the Phoenix 2008 ozone NAA (“Phoenix NAA”) attained the 2008 ozone standards by the applicable attainment date, we previously determined that the requirement for the State to submit a SIP revision addressing attainment contingency measures no longer applies for the Phoenix NAA. We are also

finalizing our determination that the requirement for the State to submit a SIP revision addressing RFP contingency measures no longer applies for the Phoenix NAA. Finally, we are finalizing approval of the portions of a SIP revision, the “MAG 2014 Eight-Hour Ozone Plan—Submittal of Margicopa Area Requirements for the Maricopa Nonattainment Area (June 2014)” (“MAG 2014 Ozone Plan”), on which we previously deferred action.

**DATES:** This rule is effective on July 2, 2020.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R09-OAR-2019-0541. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Nancy Levin, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105. Phone: (415) 972-3848 or by email at [levin.nancy@epa.gov](mailto:levin.nancy@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us,” and “our” refer to the EPA.

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### I. Proposed Action

On October 3, 2019, the EPA proposed action on a SIP revision submitted by the State of Arizona on behalf of MAG to meet CAA requirements for the 2008 ozone NAAQS<sup>1</sup> in the Phoenix NAA.<sup>2</sup> We also proposed to approve the portions of a SIP revision, the MAG 2014 Ozone Plan, on which we previously deferred action. Our proposed action contains more information on the MAG 2017 Ozone

<sup>1</sup> Since the 2008 primary and secondary NAAQS for ozone are identical, for convenience, we refer to both as “the 2008 ozone NAAQS” or “the 2008 ozone standard.”

<sup>2</sup> 84 FR 52838.

Plan, the MAG 2014 Ozone Plan, and our evaluation of these submittals.

### II. Public Comments and EPA Responses

The EPA’s proposed action provided a 30-day public comment period. During this period, we received comments from two commenters: (1) Arizona Center for Law in the Public Interest (ACLPI) on behalf of ACLPI, the Sierra Club-Grand Canyon Chapter, and their supporters and members who live and work in the Phoenix metropolitan area; and (2) the Arizona Department of Environmental Quality (ADEQ). We summarize the comments and provide our responses below. All the comments received are included in the docket for this action.

#### Commenter #1—ACLPI

*Comment 1.a:* The commenter asserted that MAG should do more to combat worsening ozone pollution, particularly given the area’s economic expansion and population, but that in this Plan, MAG relied on existing controls, tightening fuel standards, and fleet turnover, which are not enough to achieve attainment. Specifically, ACLPI noted that the Act and the 2008 Ozone SIP Requirements Rule (SRR) require implementation of RACM to achieve attainment as expeditiously as practicable and to meet RFP requirements; and that “[s]tates should consider all available measures, including those being implemented in other areas.” The commenter stated that “MAG did not incorporate any new control measures in the Plan” and that the Plan’s reliance on existing control measures, tighter fuel standards, and fleet turnover, is “clearly not enough to reach attainment in the Phoenix NAA.” The commenter also asserted that economic expansion and population growth in the Phoenix area will continue to drive onroad and nonroad mobile source emissions upwards, and that “MAG and its member agencies should lead the way in finding more effective and long-lasting solutions to Phoenix’s ozone pollution problem.”

*Response:* We do not agree that the controls reflected in the Plan are insufficient to achieve attainment of the 2008 ozone NAAQS in the Phoenix NAA. For the reasons described in our proposal and in response to ACLPI’s other comments in this document, we find that the Plan adequately demonstrates that the area will attain the 2008 Ozone NAAQS by the attainment date and meets all other applicable requirements, including RACM requirements. In particular, the Plan documents that the State did consider whether additional measures

were reasonably available as part of its RACM analysis, but determined that no new control measures were needed to attain the NAAQS or achieve RFP in the Phoenix NAA at this time.<sup>3</sup> As described in our proposal, this analysis follows the approach outlined in the SRR, which provides that states need only adopt those control measures that “will advance the attainment date or contribute to RFP for the area.”<sup>4</sup> ACLPI has not provided any information or analysis that undermines our conclusion that the MAG 2017 Ozone Plan meets this requirement.

*Comment 1.b:* ACLPI commented that the area exceeded the 2008 ozone standard multiple days in 2015 through 2019, and that the design value for the 2017 attainment year exceeded the 2008 ozone NAAQS when “unsupported ‘exceptional events’ exceedances on June 20, 2015 are included in the calculation.” The commenter also stated that, even assuming these exceedances were properly excluded, the design value for 2018 was 77 parts per billion (ppb). On this basis, the commenter asserted that “any paper ‘attainment’ of the 2008 standard in 2017 was fleeting and not the result of permanent emission reductions.” Finally, the commenter stated that 2018 monitoring data indicate that ozone concentrations have increased since 2016 and that the Phoenix metropolitan area is ranked 7th on the American Lung Association’s list of the most ozone-polluted cities in the U.S.

*Response:* Under the CAA, a determination of whether an area has attained by the attainment date is a separate action from the review of an attainment demonstration in a SIP revision. The EPA’s review of the SIP revision occurs under CAA section 110(k), while a determination of whether an area has failed to attain is governed by CAA section 181(b)(2). Under section 181(b)(2), the EPA must determine whether an ozone NAA has attained the applicable NAAQS “[w]ithin 6 months following the applicable attainment date (including any extension thereof).” In this instance, the EPA has already undertaken a separate final action to determine, pursuant to section 181(b)(2), that the Phoenix NAA attained the 2008 ozone NAAQS by the “Moderate” area attainment date, based on 2015–2017 monitoring data.<sup>5</sup> That separate action was based, in part, on our prior concurrence with ADEQ’s demonstration that, based on the weight

of evidence, the ozone exceedances that occurred on June 20, 2015, were caused by wildfire ozone exceptional events.<sup>6</sup> These separate actions are beyond the scope of this final rule.

We do not consider the exceedances of the 2008 ozone standard in 2018 and 2019, years after the area’s applicable attainment date, to be relevant to the approvability of the State’s demonstration that this area would attain the 2008 ozone NAAQS by the attainment date, as discussed in our response to comment 1.d.

*Comment 1.c:* ACLPI stated that the EPA’s approval of the Plan “would defer or significantly delay taking meaningful actions to protect . . . vulnerable residents, contravening the Act’s express policy that ‘protection of public health is the highest priority’” (quoting CAA section 319(b)(3)(A)).

The commenter further asserted that MAG and its member agencies should act now to “promote and implement clean mobility measures,” such as converting all or part of government fleets to zero-emission vehicles and offering tax incentives and rebate programs to residents who purchase electric vehicles, to bring the Phoenix area into compliance with ozone standards “with an adequate margin of safety and to ensure that such compliance is maintained.” In addition, the commenter argued that “MAG should do more to control ozone precursor emissions from gas-powered lawn equipment.” Finally, citing MAG’s RACM analysis in Chapter 4 of the Plan, the commenter argued that MAG should evaluate additional control measures from the EPA’s menu of control measures and measures adopted by the Sacramento Metropolitan Air Quality Management District, at least as contingency measures.

*Response:* Our approval is based on our finding that the Plan meets all of the applicable requirements of the Act, as described in our proposal and in this document. Under CAA section 110(k)(3), the EPA is required to approve any SIP submittal that meets all such requirements. The EPA cannot require states to adopt measures that are more stringent than necessary to meet CAA requirements. While we encourage ADEQ, MAG, and Maricopa and Pinal Counties to consider adopting the measures suggested by the commenter, we have determined that these measures are not necessary to provide for attainment of the 2008 ozone NAAQS in

the Phoenix NAA by the attainment date or to meet RFP requirements, and are therefore not needed to meet RACM requirements. As noted in our response to comment 1.b, the EPA has determined, pursuant to section 181(b)(2), that the Phoenix NAA attained the 2008 ozone NAAQS by the “Moderate” area attainment date. In addition, for the reasons described in our response to comment 1.f, we find that RFP contingency measures are not required for the Phoenix NAA at this time. Therefore, ADEQ, MAG, and the counties are not required to adopt any additional control measures for purposes of the MAG 2017 Ozone Plan.

Furthermore, the commenter’s reliance on CAA section 319(b)(3)(A) is misplaced. This provision establishes five principles that the EPA must follow in developing implementing regulations for exceptional events, including that “protection of public health is the highest priority.”<sup>7</sup> As noted in our response to comment 1.b, we previously concurred with ADEQ’s demonstration that, based on the weight of evidence, the ozone exceedances that occurred on June 20, 2015, were caused by wildfire ozone exceptional events.<sup>8</sup> This was done through a separate Agency action and is beyond the scope of this final rule. Requirements for exceptional events demonstrations are not directly relevant to the EPA’s action on an attainment plan pursuant to CAA section 110(k)(3).

*Comment 1.d:* ACLPI asserted that “the EPA should disapprove the Plan’s attainment demonstration because it does not demonstrate that the Phoenix NAA attained the 2008 standard by the July 20, 2018 attainment date or made RFP goals.” The commenter stated that MAG erred in omitting ozone exceedances that occurred on June 20, 2015, from the 2015–2017 design value calculation. The commenter also argued that the “EPA cannot simply ignore the fact that monitors in the Phoenix NAA have continued to record numerous violations of the 2008 ozone standard in 2018 and 2019, or that the 8-hour ozone design value for the Phoenix NAA in 2018 was 77 ppb.”

*Response:* We do not agree with the commenter’s argument that the EPA should disapprove the attainment demonstration because it did not demonstrate that the area factually attained or achieved RFP, or with the commenter’s assertions concerning

<sup>7</sup> CAA section 319(b)(3)(A)(i).

<sup>8</sup> Letter dated May 7, 2019, from Elizabeth J. Adams, Director, Air Division, EPA Region IX, to Timothy S. Franquist, Director, Air Quality Division, ADEQ.

<sup>3</sup> Plan Chapter 4.

<sup>4</sup> 80 FR 12264, 12282 (March 6, 2015).

<sup>5</sup> 84 FR 60920 (November 12, 2019).

<sup>6</sup> Letter dated May 7, 2019, from Elizabeth J. Adams, Director, Air Division, EPA Region IX, to Timothy S. Franquist, Director, Air Quality Division, ADEQ.

exceptional events and the consideration of monitoring data collected after the Moderate attainment date.

MAG has satisfied the legal and regulatory criteria for attainment demonstrations. Contrary to the commenter's suggestion, the CAA does not require an attainment demonstration to show that an area has attained the NAAQS based on monitored values, or that it has achieved emissions reductions corresponding to RFP. Such demonstrations would not be practical, given that attainment demonstrations are generally required to be submitted to the EPA well before the milestone and attainment dates.<sup>9</sup> Rather, the CAA requires states to submit SIP revisions that "provide for attainment" of the NAAQS by the attainment date and "require" RFP.<sup>10</sup>

To address the requirements to provide for attainment and submit an attainment demonstration, the MAG 2017 Ozone Plan includes an attainment demonstration using air quality modeling that shows that existing control measures are sufficient for the Phoenix area to attain the 2008 ozone standard by 2017. In particular, to predict future ozone levels, the modeled attainment demonstration uses a baseline design value derived from historical monitoring data, historical meteorological data from the baseline period, emissions inventories representing the baseline design value period, and modeled reductions in emissions based on SIP control measures. The modeled attainment demonstration is intended to assess whether SIP controls are adequate to reduce ambient ozone to a level at or below the NAAQS by the attainment date.<sup>11</sup>

The modeled attainment demonstration showed that the emissions reductions would provide for attainment of the 2008 ozone NAAQS by the attainment date. As a separate matter, as described in our response to comment 1.b, the monitoring data for 2015–2017 show attainment, and the EPA has already determined in a prior final Agency action that the area attained the 2008 ozone NAAQS by the

attainment date based on these data.<sup>12</sup> Data from 2018 and preliminary data from 2019 for the area do not alter our assessment of the modeled attainment demonstration for the 2008 ozone NAAQS. However, we note that the Phoenix area is currently designated and classified as a "Marginal" NAA for the 2015 ozone NAAQS and has a maximum attainment date of August 3, 2021.<sup>13</sup> The EPA will consider the monitoring data from 2018 through 2020 to determine whether the area attained the 2015 ozone NAAQS by the attainment deadline.<sup>14</sup> If these data show that the area has not attained, the area would be reclassified to a Moderate NAA for the 2015 ozone NAAQS, and the State would be required to submit a new attainment plan that addresses the Moderate area requirements for the 2015 ozone NAAQS.<sup>15</sup> Therefore, while the 2018–2019 monitoring data for the Phoenix NAA are not pertinent to our action on the 2017 MAG Ozone Plan, these data will be relevant to our determination of whether the area has attained the 2015 ozone standard.

*Comment 1.e:* The commenter argued that approval of the attainment demonstration would be "problematic, given the weaknesses of MAG's modeling" that the EPA identified in the proposed rule.

*Response:* We do not agree that the "weaknesses" identified in our proposal concerning meteorological inputs and model performance are obstacles to approving the attainment demonstration in the MAG 2017 Ozone Plan. As an initial matter, it is important to note that the EPA's "Modeling Guidance for Demonstrating Attainment of Air Quality Goals for Ozone, PM<sub>2.5</sub>, and Regional Haze" ("Modeling Guidance") states, "[b]y definition, models are simplistic approximations of complex phenomena" and "all models have strengths and weaknesses."<sup>16</sup> Accordingly, the Modeling Guidance recommends conducting evaluations of both meteorological inputs and air quality model performance to evaluate the reliability of the modeling results. These are important aspects of the

attainment demonstration. However, the Modeling Guidance recommendations are not regulatory requirements, and there are no recommended pass/fail thresholds for any particular evaluation metric. The guidance recommendations are generally applicable to evaluating model performance, but there are no specific requirements that are applicable or must be met in all cases. The particular analyses used may vary on a case-by-case basis, depending on the availability of modeled and observational data (both meteorological and air quality data).

In evaluating the meteorological inputs to the modeling, MAG followed the recommendations of the Modeling Guidance by conducting an "operational evaluation" focusing on "the values and distributions of specific meteorological parameters as paired with and compared to observed data."<sup>17</sup> Specifically, MAG used a series of statistical metrics to compare wind speed, wind direction, temperature, and water vapor mixing ratio values from the model to observations from weather stations in the NAA. As described in our proposal, temperature and water vapor mixing ratios showed good agreement with observations, with little bias. The modeled wind speed showed an overestimate at low wind speeds and an underestimate at high wind speed. Modeled wind direction showed poorer performance for wind directions from the south-east. MAG asserted that modeling wind speed and direction in Phoenix is difficult due to the complex terrain in the area, but that results are comparable to the benchmarks described in the Modeling Guidance.<sup>18</sup>

The Modeling Guidance explains that these benchmarks are to be "used as a means of assessing general confidence in the meteorological model data" rather than as "as a 'pass/fail' indicator of the acceptability of a model simulation."<sup>19</sup> The fact the meteorological parameters used in MAG's modeling are comparable to these benchmarks, despite the challenges presented by the complex terrain of the area, supports a conclusion that the meteorological inputs used by MAG "represent a reasonable approximation of the actual meteorology that occurred during the modeling period."<sup>20</sup>

In addition to an operational evaluation of meteorological inputs based on statistical comparisons, the Modeling Guidance also recommends that states conduct a phenomenological

<sup>9</sup> See, e.g., CAA section 181(a)(1) (setting the attainment date for Moderate areas of 6 years after November 15, 1990); and 182(b)(1)(A) (requiring submittal of attainment demonstration for Moderate areas 3 years after November 15, 1990 and setting RFP milestone date of 6 years after November 15, 1990).

<sup>10</sup> CAA sections 172(c)(1), (2), and (6).

<sup>11</sup> 40 CFR 51.1108(c) (attainment demonstration must be "based on photochemical grid modeling or any other analytical method determined . . . to be at least as effective.").

<sup>12</sup> 84 FR 60920.

<sup>13</sup> 40 CFR 81.303, 51.1303(b).

<sup>14</sup> The 2015 ozone primary and secondary NAAQS are 0.070 parts per million (ppm), while 2008 NAAQS are 0.075 ppm. Both are based on a three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations. Accordingly, exceedances of the 2008 NAAQS are also exceedances of the 2015 NAAQS.

<sup>15</sup> CAA section 181(b)(2).

<sup>16</sup> "Modeling Guidance for Demonstrating Attainment of Air Quality Goals for Ozone, PM<sub>2.5</sub>, and Regional Haze", November 2018, EPA 454/R-18-009 ("Modeling Guidance"), 169, 24.

<sup>17</sup> Modeling Guidance, 33.

<sup>18</sup> 84 FR 52838, 52844.

<sup>19</sup> Modeling Guidance, 33.

<sup>20</sup> Id. at 32.



evaluation (*i.e.*, a qualitative comparison of observed features versus their depiction in the model data). As noted in our proposal, while the inclusion of such an analysis “would have provided additional confidence, the model adequately simulates the temporal and spatial variability in ozone concentrations across the area, suggesting the model captures the meteorological phenomena that are important for ozone formation in the Phoenix area.”<sup>21</sup> Therefore, we find that the absence of a phenomenological evaluation of meteorological data does not undermine the overall adequacy of the modeling.

Concerning air quality model performance evaluation, the EPA’s “Guideline on Air Quality Models” explains that, “[t]here are no specific levels of any model performance metric that indicate ‘acceptable’ model performance.”<sup>22</sup> Thus, “[t]he EPA recommends that air agencies conduct a variety of performance tests and weigh them qualitatively to assess model performance.”<sup>23</sup> Specifically, as part of an operational evaluation, the EPA recommends evaluating the following statistical metrics: mean observed, mean model, mean bias, mean error and/or root mean square error, normalized mean bias and/or fractional bias, normalized mean error and/or fractional error, and the correlation coefficient.<sup>24</sup> In this case, as part of its air quality model evaluation, MAG evaluated each of the recommended (except for the correlation coefficient, for which it substituted the related “coefficient of determination”) to evaluate ozone model performance.<sup>25</sup> Figures IV–5 through IV–10 of the Modeling technical support document provide time-series plots, scatter plots, spatial maps of mean error and bias, and box plots comparing model performance with previous studies. As described in the proposal, these analyses show that, although there were “a few periods where peak ozone concentrations were underpredicted in July and overpredicted in August, MAG modeling statistics are within or close to the distribution of other published modeling studies.”<sup>26</sup> Accordingly, we concluded that, “[o]verall, the operational evaluation shows good model performance.”<sup>27</sup> As we further

noted in our proposal, the “addition of some dynamic and diagnostic evaluations as described in the Modeling Guidance would have provided additional confidence.”<sup>28</sup> However, the Modeling Guidance also explains that, “[g]iven that air agencies might have limited resources and time to perform diagnostic and dynamic evaluation, the use of these methods may be limited in scope in a typical regulatory modeling application.”<sup>29</sup> Accordingly, we do not consider the omission of such dynamic and diagnostic evaluations to undercut the adequacy of the modeling.

In sum, the meteorological inputs were reasonable, and the Plan demonstrated good air quality model performance. Furthermore, in addition to the modeling demonstration, the Plan also contains a comprehensive “weight of evidence” analysis, consisting of several supplemental analyses that further support the modeled attainment demonstration.<sup>30</sup> These include ozone air quality trends and precursor emission trends, both of which show continued progress and support the conclusion that the attainment demonstration is sound. Other analyses include: an evaluation of the sensitivity of the model to oxides of nitrogen (NO<sub>x</sub>) and volatile organic compound (VOC) emissions reductions; a comparison to the EPA’s modeling for the Cross-State Air Pollution Rule, which projects the area will be in attainment in 2017; a process analysis using the VOC:NO<sub>x</sub> ratio as a photochemical indicator; and an examination of weekday versus weekend effects. These analyses provide assurance that the model is adequately simulating the physical and chemical processes leading to ozone in the atmosphere and that the model responds in a scientifically reasonable way to emissions changes. Therefore, we do not agree with the commenter that we should disapprove the attainment demonstration in the MAG 2017 Ozone Plan based on the modeling.

*Comment 1.f:* The commenter supported the EPA’s proposal to disapprove the contingency measure element of the Plan based on *Bahr v. EPA*,<sup>31</sup> but argued that there is no statutory basis for “excusing” MAG from including contingency measures in the Plan. The commenter stated that CAA section 172(e) “expressly prevents EPA from loosening controls applicable to a nonattainment area when a NAAQS

is relaxed,” and the EPA applies the same concept “where the NAAQS is made more stringent.” Citing *South Coast Air Quality Management District v. EPA* (“*South Coast*”),<sup>32</sup> the commenter noted that contingency measures are “controls” because they are “designed to constrain ozone pollution.” Citing *South Coast*, the commenter argued that MAG cannot withdraw its contingency measures because “withdrawing measures from a SIP would also constitute impermissible backsliding.”

*Response:* The commenter’s reliance on CAA section 172(e) is misplaced. This provision applies if the EPA relaxes a NAAQS and requires the EPA to promulgate “requirements applicable to all areas which have not attained that standard as of the date of such relaxation.”<sup>33</sup> The commenter alleges that this provision would preclude our determination that a SIP revision providing for contingency measures for the Phoenix NAA for the 2008 ozone NAAQS is no longer required. The promulgation of the 2008 ozone NAAQS was a strengthening from the prior 1997 ozone NAAQS. Accordingly, CAA section 172(e) is not directly applicable.

The commenter further discusses, but mischaracterizes, the EPA’s past actions invoking the principles of section 172(e) when revoking an ozone standard. The commenter wrongly suggests that the EPA has applied section 172(e) in cases where the Agency strengthens the NAAQS; this is not true. The EPA has looked to the principles of section 172(e) to develop anti-backsliding regulations when the EPA has revoked ozone standards in order to ensure air quality protections are preserved during the transition to a more protective NAAQS.<sup>34</sup> The EPA has not taken any action to revoke the 2008 ozone NAAQS.<sup>35</sup>

The relevant provision of the CAA, section 172(c)(9), requires nonattainment plans to “provide for the implementation of specific measures to be undertaken if the area fails to make [RFP], or to attain the [NAAQS] by the attainment date applicable under this part.” Thus, contingency measures are required for two purposes: attainment

<sup>32</sup> 472 F.3d 882, 900–902 (D.C. Cir. 2006).

<sup>33</sup> 42 U.S.C. 7502.

<sup>34</sup> 80 FR 12264 (March 6, 2015) (revoking the 1997 ozone NAAQS); 69 FR 23951 (April 30, 2004) (revoking the 1979 1-hour ozone NAAQS).

<sup>35</sup> 83 FR 62998 (December 6, 2018) (“The EPA is not taking any final action regarding our proposed approach for revoking a prior ozone NAAQS and establishing anti-backsliding requirements; the agency intends to address any revocation of the 2008 ozone NAAQS and any potential anti-backsliding requirements in a separate future rulemaking.”).

<sup>21</sup> 84 FR 52838, 52844.

<sup>22</sup> “Guideline on Air Quality Models,” 40 CFR part 51, appendix W, section 5.2.d.

<sup>23</sup> Modeling Guidance, 69.

<sup>24</sup> *Id.* at 70–72.

<sup>25</sup> MAG 2017 Ozone Plan, Appendix B, Exhibit 1, (“Modeling Technical Support Document” or “Modeling TSD”), section IV.

<sup>26</sup> 84 FR 52838, 52844.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Modeling Guidance, 68.

<sup>30</sup> 84 FR 52838, 52845.

<sup>31</sup> 836 F.3d 1218, 1235–1237 (9th Cir. 2016).

contingency measures and RFP contingency measures. On November 12, 2019, the EPA took final action to determine that the Phoenix NAA attained the Moderate area 2008 ozone NAAQS by the attainment date, and Arizona was no longer required to provide a SIP submission that includes attainment contingency measures for the 2008 NAAQS for the Phoenix NAA because attainment contingency measures for this NAAQS would never be required to be implemented.<sup>36</sup> With regard to the RFP contingency measure requirement, we proposed, in conjunction with our proposal on the MAG 2017 Ozone Plan, to find that the RFP contingency measure requirement would also no longer apply to the Phoenix NAA for the 2008 ozone NAAQS.<sup>37</sup> We explained that the EPA's long-standing interpretation is that RFP contingency measures for Moderate areas would be triggered only by a finding that the area failed to attain the standard by the Moderate area attainment date.<sup>38</sup> Because we have determined that the area has attained the standard by the attainment date, the RFP contingency measures have not, and will not, be triggered. Thus, we have determined that a SIP revision addressing RFP contingency measures is no longer needed.

*Comment 1.g:* The commenter noted that section 107(d)(3)(E)(v) prohibits the EPA from redesignating a NAA to attainment unless "the State . . . has met *all* requirements applicable to this area" under section 110 and part D of the CAA, including contingency measures under section 172(c)(9). The commenter also quoted CAA section 110(l), which prohibits the EPA from approving a SIP revision that would interfere with any applicable requirement concerning attainment and RFP or any other applicable requirement of the CAA.

*Response:* None of the provisions cited by the commenter are relevant either to our disapproval of the contingency measures for the Phoenix NAA or to our determination that a SIP revision addressing contingency measures is no longer required for the Phoenix NAA. CAA section 107(d)(3)(E)(v) applies when the EPA is redesignating an area from nonattainment to attainment. ADEQ has not submitted a redesignation request for the Phoenix NAA, and we have not proposed to redesignate the area.

Therefore, CAA section 107(d)(3)(E)(v) does not apply to this action.

CAA section 110(l) prohibits the EPA from approving a SIP revision that would interfere with any applicable requirement of the CAA. Because we are disapproving the contingency measure element of the Plan, this requirement does not apply to our action on the contingency measure portion of the Plan. To the extent the commenter is suggesting that our approval of the remainder of the 2017 MAG Ozone Plan would interfere with any applicable requirement of the CAA, we do not agree. First, in this action, the EPA is not approving the removal of any existing provisions in the approved Arizona SIP, and thus there is no concern that our approval action would interfere with any applicable CAA requirement. Second, to the extent that the commenter is concerned that the EPA's approval of the nonattainment plan without contingency measures contravenes the requirements of the CAA to include such measures, the EPA has determined that such measures are not in fact required for this area for this NAAQS for the reasons described in our response to comment 1.f in this action. Section 110(l) prohibits the EPA's approval of a SIP revision if it would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA. Given that attainment contingency measures and RFP contingency measures are no longer applicable requirements, following the EPA's final action to determine the area attained by the attainment date, the EPA's approval of the remainder of the SIP submission is consistent with CAA section 110(l). For the reasons discussed in our proposal and in this document, we find that the Plan meets all applicable CAA requirements. Therefore, our approval of the other elements of the Plan complies with CAA section 110(l).

*Comment 1.h:* The commenter stated that there was no merit to the EPA's argument that based on the "milestone" requirement for ozone NAAs classified as "Serious" or higher, the RFP contingency measures are no longer required. In particular, citing *South Coast*, the commenter asserted that "[t]his provision demonstrates that when Congress intended to exempt nonattainment areas from statutory requirements, it did so expressly." The commenter concluded that the EPA must disapprove the contingency measure element of the Plan and require the adoption of additional contingency measures consistent with *Bahr*.

*Response:* In our proposal, we explained that under CAA section 182(g), ozone nonattainment areas classified Serious or higher are required to meet RFP emissions reduction milestones and to demonstrate compliance with those milestones, except when the milestone coincides with the attainment date and the standard has been attained. We noted that this specific statutory exemption from milestone compliance demonstration submittals for areas that attained by the attainment date indicates that Congress intended that a finding that an area attained the standard—the finding made in a determination of attainment by the attainment date—would serve as a demonstration that RFP requirements for the area have been met. Therefore, a finding that a Serious or above area has attained the NAAQS by the attainment date would also indicate that RFP contingency measures could not be triggered and are therefore no longer necessary.

The commenter points to the absence of a similar exemption (*i.e.*, an exemption from RFP milestone compliance demonstration submittals when the milestone coincides with the attainment date and the standard has been attained) for Moderate areas. The commenter appears to be arguing that this omission indicates that Congress intended to subject Moderate areas to the requirement for RFP contingency measures, even if they attained the NAAQS by the attainment date. Contrary to the commenter's suggestion, however, Congress expressly exempted Moderate areas from all RFP milestone compliance demonstration submittals.<sup>39</sup> Accordingly, unlike for Serious and above areas, Congress did not need to provide a specific exemption for a milestone coinciding with the attainment date for Moderate areas. The overall statutory exemption from requirements for RFP milestone compliance demonstration submittals in Moderate areas supports the EPA's interpretation that RFP contingency measures in Moderate ozone NAAs can be triggered only by a finding that the area has failed to attain the standard by the attainment date.<sup>40</sup> Therefore, while

<sup>39</sup> CAA section 182(g)(1) ("6 years after November 15, 1990, and at intervals of every 3 years thereafter, the State shall determine whether each nonattainment area (other than an area classified as Marginal or Moderate) has achieved the applicable milestone).

<sup>40</sup> As noted in our proposal, "a determination of attainment by the attainment date for a Moderate area serves as demonstration that RFP requirements for the area have been met and that RFP contingency measures are no longer needed. Thus,

Continued

<sup>36</sup> 84 FR 60920.

<sup>37</sup> 84 FR 52838, 52847.

<sup>38</sup> *Id.* (citing 57 FR 13498, 13511 (April 16, 1992) and Memorandum dated March 11, 1993, from G.T. Helms, Chief Ozone/Carbon Monoxide Programs Branch, to Air Branch Chief, Regions I–X).

we are disapproving the contingency measure element of the Plan, we are also determining that Arizona is no longer required to submit a SIP revision including contingency measures for the Phoenix NAA.

#### Commenter #2—ADEQ

*Comment:* ADEQ expressed support for the EPA's proposed action, including disapproval of the contingency measure requirements, provided the EPA finalizes its determination that the Phoenix NAA attained the 2008 ozone standard by the attainment date.

*Response:* The EPA finalized its determination that the Phoenix NAA attained the 2008 ozone standard by the applicable attainment date on November 12, 2019.<sup>41</sup>

### III. Final Action

No comments were submitted that change our assessment of the determinations as described in our proposed action. Therefore, for the reasons discussed in the preceding sections and in our proposed rule, under CAA section 110(k)(3), the EPA is finalizing approval as a revision to the Arizona SIP the following portions of the "MAG 2017 Eight-Hour Ozone Moderate Area Plan for the Maricopa Nonattainment Area," submitted by ADEQ on December 19, 2016:

- Base year and periodic emission inventories as meeting the requirements of CAA sections 172(c)(3), 182(a)(1), and 182(a)(3)(A) and 40 CFR 51.1115(a) and (b);
- RACM demonstration and control strategy as meeting the requirements of CAA section 172(c)(1) and 172(c)(6) and 40 CFR 51.1112(c);
- Attainment demonstration as meeting the requirements of CAA section 182(b)(1)(A)(i) and 40 CFR 51.112 and 51.1108(c);
- Rate of progress plan and RFP demonstration as meeting the requirements of CAA sections 172(c)(2) and 182(b)(1) and 40 CFR 51.1110(a)(3)(i);
- Motor vehicle emissions budgets for the 2017 attainment year because they are consistent with the RFP demonstration and the attainment demonstration approved herein and meet the other criteria in 40 CFR 93.118(e);
- Vehicle I/M provisions as meeting the requirements of 40 CFR part 51, subpart S;

<sup>41</sup> the EPA concludes that RFP contingency measures for Moderate areas are no longer needed if the area has attained the relevant NAAQS." 84 FR 52847.

<sup>41</sup> 84 FR 60920.

- NSR discussion as demonstrating that the requirements of CAA sections 173 and 182(a)(2)(C) have been met; and
- Offset discussion as demonstrating that the requirements of CAA sections 173 and 182(b)(5) have been met.

The EPA is finalizing disapproval of the contingency measure element of the MAG 2017 Ozone Plan for failing to meet the requirements of CAA sections 172(c)(9) and 182(c)(9). However, based on our November 12, 2019 finding of attainment by the applicable attainment date,<sup>42</sup> we are also finalizing our determination that Arizona is no longer required to submit a SIP revision addressing the contingency measures requirement for failure to meet RFP for the Phoenix 2008 ozone NAA. Therefore, our disapproval does not trigger sanctions or FIP clocks.

Finally, we are finalizing approval of the NSR and offset elements of the MAG 2014 Ozone Plan as meeting the Marginal area requirements of CAA section 182(a)(2)(C) and CAA sections 173 and 182(b)(5), respectively, for the Phoenix 2008 ozone NAA.

### IV. Statutory and Executive Order Reviews

Additional information about the following statutes and Executive orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

#### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

#### B. Executive Order 13711: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

#### C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

#### D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small

entities beyond those imposed by state law.

#### E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

#### F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

#### G. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

#### H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

#### I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

<sup>42</sup> Id.

*J. National Technology Transfer and Advancement Act (NTTAA)*

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

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

*L. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

*M. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate

circuit by August 3, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

**List of Subjects in 40 CFR Part 52**

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

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

Dated: May 1, 2020.

**John Busterud,**

*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 in table 1 in paragraph (e), under the heading “Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas,” by adding entries for “MAG 2017 Eight-Hour Ozone Moderate Area Plan for the Maricopa Nonattainment Area (December 2016)” and “MAG 2014 Eight-Hour Ozone Plan—Submittal of Marginal Area Requirements for the Maricopa Nonattainment Area (June 2014), Sections titled “A Nonattainment Area Preconstruction Permit Program—CAA section 182(a)(2)(C),” “New Source Review—CAA, Title I, Part D,” and “Offset Requirements: 1:1 to 1 (Ratio of Total Emission Reductions of Volatile Organic Compounds to Total Increased Emissions)—CAA Section 182(a)(4)” on pages 8 and 9” after the entry for “Reasonably Available Control Technology (RACT) Analysis, Negative Declaration and Rules Adoption” to read as follows:

**§ 52.120 Identification of plan.**

\* \* \* \* \*

(e) \* \* \*

**TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES**  
[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively]<sup>1</sup>

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
<b>The State of Arizona Air Pollution Control Implementation Plan</b>				
*	*	*	*	*
<b>Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas</b>				
*	*	*	*	*
MAG 2017 Eight-Hour Ozone Moderate Area Plan for the Maricopa Nonattainment Area (December 2016).	Phoenix-Mesa 2008 8-hour ozone nonattainment area.	December 19, 2016.	[Insert <b>Federal Register</b> Citation], June 2, 2020.	Adopted by the Arizona Department of Environmental Quality on December 13, 2016.
MAG 2014 Eight-Hour Ozone Plan—Submittal of Marginal Area Requirements for the Maricopa Nonattainment Area (June 2014), Sections titled “A Nonattainment Area Preconstruction Permit Program—CAA section 182(a)(2)(C),” “New Source Review—CAA, Title I, Part D,” and “Offset Requirements: 1:1 to 1 (Ratio of Total Emission Reductions of Volatile Organic Compounds to Total Increased Emissions)—CAA Section 182(a)(4)” on pages 8 and 9.	Phoenix-Mesa 2008 8-hour ozone nonattainment area.	July 2, 2014 .....	[Insert <b>Federal Register</b> Citation], June 2, 2020.	Other provisions of the MAG 2014 Eight-Hour Ozone Plan—Submittal of Marginal Area Requirements for the Maricopa Nonattainment Area (June 2014) were approved on October 16, 2015.
*	*	*	*	*

<sup>1</sup> Table 1 is divided into three parts: Clean Air Act Section 110(a)(2) State Implementation Plan Elements (excluding Part D Elements and Plans), Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas), and Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas.

\* \* \* \* \*

[FR Doc. 2020-09732 Filed 6-1-20; 8:45 am]

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