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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[EPA-R09-OAR-2012-0398; FRL-9745-8]

**Partial Approval and Disapproval of Air Quality Implementation Plans; Arizona; Infrastructure Requirements for Ozone and Fine Particulate Matter****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA is approving in part and disapproving in part State Implementation Plan (SIP) revisions submitted by the state of Arizona pursuant to the requirements of the Clean Air Act (CAA) for the 1997 8-hour ozone national ambient air quality standards (NAAQS) and the 1997 and 2006 NAAQS for fine particulate matter (PM<sub>2.5</sub>).

The Clean Air Act requires that each State adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA. Arizona has met most of the applicable requirements. Where EPA is disapproving, in part, Arizona's SIP revisions, several of the deficiencies have already been addressed by a federal implementation plan (FIP). The remaining deficiencies are subject to a two-year deadline for EPA to promulgate a FIP, unless EPA approves an adequate SIP revision prior to that time. EPA remains committed to working with Arizona to develop such a SIP revision.

**DATES:** *Effective Date:* This final rule is effective on December 5, 2012.

**ADDRESSES:** EPA has established a docket for this action, identified by Docket ID Number EPA-R09-OAR-2012-0398. The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed directly below.

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**SUPPLEMENTARY INFORMATION:**

Throughout this document, the terms "we," "us," and "our" refer to EPA.

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**I. Background**

On July 18, 1997, EPA issued a revised NAAQS for ozone<sup>1</sup> and a new NAAQS for fine particulate matter (PM<sub>2.5</sub>).<sup>2</sup> EPA subsequently revised the 24-hour PM<sub>2.5</sub> NAAQS on September 21, 2006.<sup>3</sup> Each of these actions triggered a requirement for states to submit an infrastructure SIP to address the applicable requirements of section 110(a)(2) within three years of issuance of the new or revised NAAQS.

On June 27, 2012 (77 FR 38239), EPA proposed to approve in part and disapprove in part several SIP revisions submitted by the Arizona Department of Environmental Quality (ADEQ) to address the infrastructure requirements of CAA section 110(a)(1) and (2) for the 1997 ozone, 1997 PM<sub>2.5</sub>, and 2006 PM<sub>2.5</sub> NAAQS. Additionally, on July 30, 2012 (77 FR 44551), EPA proposed to approve the portion of the Arizona Infrastructure SIP pertaining to section 110(a)(2)(D)(i)(I) concerning interstate transport for the 2006 24-hour PM<sub>2.5</sub> NAAQS.<sup>4</sup> Also on July 30, 2012 (77 FR 44555), EPA proposed to partially approve and partially disapprove the portion of the Arizona Infrastructure SIP pertaining to the conflict of interest provision in section 110(a)(2)(E)(ii). ADEQ submitted SIP revisions to EPA on September 18, 2008 ("2008 Infrastructure Analysis") and October 14, 2009 ("2009 Infrastructure Analysis") to address all of the CAA section 110(a)(2) requirements, except

<sup>1</sup> The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856).

<sup>2</sup> The annual PM<sub>2.5</sub> standard was set at 15 micrograms per cubic meter (µg/m<sup>3</sup>), based on the 3-year average of annual arithmetic mean PM<sub>2.5</sub> concentrations from single or multiple community-oriented monitors and the 24-hour PM<sub>2.5</sub> standard was set at 65 µg/m<sup>3</sup>, based on the 3-year average of the 98th percentile of 24-hour PM<sub>2.5</sub> concentrations at each population-oriented monitor within an area (62 FR 38652).

<sup>3</sup> The final rule revising the 24-hour NAAQS for PM<sub>2.5</sub> from 65 µg/m<sup>3</sup> to 35 µg/m<sup>3</sup> was published in the *Federal Register* on October 17, 2006 (71 FR 61144).

<sup>4</sup> EPA previously approved an earlier interstate transport submittal by Arizona for the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS at 72 FR 41629 (July 31, 2007).

for section 110(a)(2)(G),<sup>5</sup> and a proposed SIP revision submitted on June 1, 2012.<sup>6</sup> The proposed SIP served as a supplement to the prior two infrastructure SIP revisions and was submitted under the parallel processing mechanism provided by 40 CFR Part 51, Appendix V, Section 2.3. The final version of the June 1, 2012 proposed SIP revision was adopted on August 24, 2012 and submitted to EPA on the same day ("2012 Submittal").

We are taking final action on all three submittals because they collectively address the applicable infrastructure SIP requirements for the 1997 ozone, 1997 PM<sub>2.5</sub>, and 2006 PM<sub>2.5</sub> NAAQS. We refer to them collectively herein as "Arizona's Infrastructure SIP Submittals."

The rationale supporting EPA's actions, including the scope of infrastructure SIPs in general, is explained in the Notices of Proposed Rulemakings (NPRs) and associated technical support documents (TSDs)<sup>7</sup> and will not be restated here. The TSDs are available online at [www.regulations.gov](http://www.regulations.gov), Docket ID number EPA-R09-OAR-2012-0398.

**II. EPA's Response to Comments**

The public comment period for our proposal published in the *Federal Register* on June 27, 2012 (77 FR 38239) started at publication and closed on July 27, 2012. The public comment period for our proposals of July 30, 2012 (77 FR 44551), concerning interstate transport

<sup>5</sup> In a separate rulemaking, EPA proposed to fully approve Arizona's SIP to address the requirements regarding air pollution emergency episodes in CAA section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS. 77 FR 21911 (April 12, 2012). The final rule for this action was signed on July 26, 2012. While we are awaiting publication in the *Federal Register*, a prepublication copy of that final rule is available in the docket for today's rulemaking.

<sup>6</sup> On June 14, 2012 ADEQ submitted a letter requesting withdrawal of several statutes included in the June 1, 2012 proposed SIP revision. See letter dated June 14, 2012 from Eric C. Massey, Air Quality Director, Arizona Department of Environmental Quality, to Jared Blumenfeld, Regional Administrator, EPA Region 9.

<sup>7</sup> Each of our three proposed rules had an associated TSD available at [www.regulations.gov](http://www.regulations.gov) under docket ID number EPA-R09-OAR-2012-0398. The three TSDs are as follows: (1) "Technical Support Document: Evaluation of Arizona's Infrastructure SIP for the 1997 8-hour Ozone, the 1997 PM<sub>2.5</sub>, and the 2006 PM<sub>2.5</sub> NAAQS," June 15, 2012 (document ID number EPA-R09-OAR-2012-0398-0003); (2) "Technical Support Document for EPA's Proposed Action on the State of Arizona's 2009 Infrastructure State Implementation Plan (Transport Portion) for the 2006 24-hour Fine Particulate (PM<sub>2.5</sub>) National Ambient Air Quality Standard," July 2012 (document ID number EPA-R09-OAR-2012-0398-0033); and (3) "Technical Support Document: EPA Evaluation of Arizona Provisions for Section 110(a)(2)(E)(ii)/Section 128 Conflict of Interest Requirements," July 2012 (herein, "Section 128 TSD") (document ID number EPA-R09-OAR-2012-0398-0075).

for the 2006 24-hour PM<sub>2.5</sub> NAAQS; and 77 FR 44555, concerning conflict of interest requirements) started at publication in the **Federal Register** on July 30, 2012 and closed on August 29, 2012.

During the respective comment periods we received one comment letter from ADEQ (“ADEQ comment letter”), which concerned the requirements of CAA sections 110(a)(2)(E)(ii) and 128.<sup>8</sup> In our July 30, 2012 notice on these requirements (77 FR 44555), we proposed to partially approve and partially disapprove a SIP revision submitted by ADEQ to address the requirements of CAA section 110(a)(2)(E)(ii) for the 1997 ozone, 1997 PM<sub>2.5</sub>, and 2006 PM<sub>2.5</sub> NAAQS (77 FR 44555). In particular, we proposed to find that the statutes submitted by ADEQ met nearly all the requirements of CAA section 128, and therefore proposed to partially approve the submittal with respect to CAA section 110(a)(2)(E)(ii). However, with respect to the air quality hearing boards in Maricopa, Pima, and Pinal counties [hereinafter “County Boards”], we proposed to determine that the provisions submitted by ADEQ in its 2009 and 2012 SIP revisions did not adequately address all of the requirements of CAA section 128(a)(1). We have summarized the ADEQ comment letter in three comments, and have responded to each, below.

*Comment #1:* ADEQ disagrees with EPA’s assessment that the statutes and regulations provided in its supplementary submittal of June 1, 2012 do not apply to enforcement orders and asks EPA to approve the State’s submittals with respect to CAA section 110(a)(2)(E)(ii). The State argues that the statutes it submitted, “in particular ARS [sections] 38–101 and 38–501 through 39–511, \* \* \* apply to all public agency officers and employees, whether at the State, County, or City level” and that ARS 38–503(B) forbids public officers and employees having a conflict of interest in any decision of the agency from participating in that decision. In other words, “[u]pon recusal of each person with a conflict of interest, all of the members remaining who are authorized lawfully to make the decision represent the public interest and do not derive any significant income from parties subject to the permits or enforcement orders at issue.” ADEQ notes that ARS 49–478 (“Hearing board”) also applies to the counties and

that there is “no gap in coverage of these requirements” between the state statutes and the county regulations. The State highlights the disclosure provisions of ARS 38–508, including the alternate measures implemented when a conflict exists, and notes that “not all conflicts of interest can be identified or even exist at the time of appointment to a board or agency.”

*Response #1:* As outlined in the TSD for our proposal notice, we agree with ADEQ that Arizona’s conflict of interest statutes (ARS Title 38, Chapter 3, Article 8)<sup>9</sup> apply to all public agency officers and employees, whether at the State, County, or City level, that approve permits or enforcement orders. Furthermore, we agree that the term “any decision of a public agency” in Arizona under ARS 38–503(B) encompasses the approval of both permits and enforcement orders. However, we do not agree that the board membership requirements of section 128(a)(1) are adequately addressed by the recusal requirement of ARS 38–503(B). The plain language of section 128(a)(1) establishes requirements regarding membership on a board, and not merely a requirement regarding a member’s action on any particular permit or enforcement order.

Section 128(a)(1) of the CAA provides: “Each applicable plan shall contain requirements that \* \* \* any board or body which approves permits or enforcement orders under [the Act] shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits and enforcement orders under [the Act].” Two elements of this provision prevent it from being satisfied by recusal alone.

First, the “public interest” and “significant income” requirements of section 128(a)(1) apply to a “majority of members” of a “board or body which approves permits or enforcement orders under [the CAA].” The use of the plural in “permits” and “orders” tends to indicate that the relevant board or body is defined by its authority to approve permits and enforcement orders, and not by the particular subset of the board acting on a single given permit or enforcement order. A board member may recuse himself from a particular

permit or enforcement order proceeding in order to avoid a conflict of interest and yet remain a member of that board. Under these circumstances, his conflict of interest must still be considered in determining whether the board as a whole meets the majority membership requirement of section 128(a)(1).

Second, the “significant portion of income” requirement is determined by reference to “persons subject to permits or enforcement orders”. A permit holder is legally bound by a permit and is therefore “subject to” it. Similar reasoning applies to a person legally bound by a final enforcement order. Any reasonable interpretation of “subject to” must at a minimum include persons already legally bound by a final permit or final enforcement order. Yet a recusal requirement, such as that provided by ARS 38–503(B), fails to ensure that a majority of members do not derive a significant portion of their income from persons who already have permits or are already under a final enforcement order.

Thus, even assuming, for argument’s sake, that ARS 38–503(B) could meet the “public interest” requirement of section 128(a)(1), it clearly does not, by itself, fulfill the “significant income” requirement. This interpretation is consistent with EPA’s existing guidance on Section 128. In particular, in 1978, EPA issued a guidance memorandum<sup>10</sup> that suggested definitions of certain terms in section 128. Although the guidance did not specifically mention recusal, it did suggest that the term “persons subject to permits or enforcement orders under this Act” includes, among others, “any individual, corporation, partnership, or association who holds \* \* \* any permit, or who is \* \* \* subject to any enforcement order under the [Act]”. In other words, EPA’s guidance recommended that “persons subject to permits or enforcement orders” should include those persons legally bound to a permit or enforcement order. The guidance also suggested that the term “majority of members” be defined as “a majority of all members of a board or body having or sharing authority to approve permits or enforcement orders under the [CAA], and a majority of members making up any panel of fewer than all members (including panels of a single member) where individual permits or orders are considered by such a panel”. Thus, EPA interprets the statutory language of section 128(a)(1) as

<sup>8</sup> For a copy of the comment letter, see document number EPA–R09–OAR–2012–0398–0079 in [www.regulations.gov](http://www.regulations.gov) under docket ID EPA–R09–OAR–2012–0398.

<sup>9</sup> EPA proposed to approve ARS Title 38, Chapter 3, Article 8 (“Conflict of Interest of Officers and Employees”) statutes on conflict of interest, as well as several statutes related to hearing boards and orders of abatement, into the Arizona SIP with respect to the requirements of CAA section 128. For the listing of the specific statutes, see 77 FR 44555 at 44558. The final rule approving these statutes into the SIP is happening concurrent with today’s action.

<sup>10</sup> Memorandum from David O. Bickart, Deputy General Counsel, to Regional Air Directors, “Guidance to States for Meeting Conflict of Interest Requirements of Section 128,” March 2, 1978.

requiring a majority of members of the entire board to meet the public interest and significant income requirements. EPA's guidance reflected that reading of the statute.

While we agree that, at the time of appointment to a board or agency, it is not possible to identify future conflicts of interest that may result from future permits or enforcement orders, we note that it is possible to identify a prospective or current board member's interest in current permit holders and persons currently under final enforcement orders. Thus, this particular part of ADEQ's comment letter is not directly relevant to the deficiency in question.

Arizona's conflict of interest statutes thus leave a gap with respect to the CAA section 128(a)(1) requirement that boards that approve permits or enforcement orders have "at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits and enforcement orders under [the Act]." However, Arizona's county hearing board statute, ARS 49-478, which we proposed to approve and thus to incorporate into the Arizona SIP, requires that, for county air quality hearing boards, "[a]t least three [of five] members shall not have a substantial interest, as defined in [ARS] 38-502, in any person required to obtain a permit pursuant to this article." Thus, ARS 49-478 partially fills the gap between the Arizona conflict of interest statutes and the board membership requirements of CAA section 128(a)(1) by establishing a majority membership requirement.

As noted in our proposal, Pima County Code 17.04.190 extends this majority membership requirement to interests in persons subject to enforcement orders. See 77 FR 44555 at 44557. Such a provision could be submitted for incorporation into the Arizona SIP. However, Arizona has not submitted this or other provisions for incorporation into the SIP that would require that a majority of members of the County Boards represent the public interest and do not derive any significant portion of their income from persons subject to enforcement orders. Therefore, we are finalizing our partial approval and narrow, partial disapproval as proposed.

**Comment #2:** ADEQ states that EPA failed to comply with section 552 of the Administrative Procedure Act (APA), which requires publication in the **Federal Register** of amendments and revisions to substantive rules of general applicability and statements of general policy or interpretations of general

applicability formulated and adopted by the agency. Specifically, ADEQ asserts that EPA has not issued guidance of general applicability on CAA section 128 since 1978 and that the 1978 guidance memo was "severely lacking." The State references footnote #5 of our proposal (see 77 FR 44555 at 44556) and states that "EPA lacks authority to single out Arizona and create specific retroactive guidance applicable to it, after [Arizona] has submitted the required SIP and SIP Supplement(s)" and that EPA bears responsibility to be transparent and predictable in the planning process. ADEQ states that EPA proposes to change certain interpretations of section 128 by proposing interpretations on a "case-by-case basis for individual states" and that such a process violates APA section 552. Finally, by reference to EPA's infrastructure SIP rulemaking on Hawaii that we cited in our Arizona section 128 proposal, ADEQ states that EPA did not provide public notice and opportunity to comment on proposed amendments or revisions to the 1978 guidance.

**Response #2:** We do not agree that our action violates the APA. While EPA understands ADEQ's interest in having EPA issue comprehensive, generally applicable guidance on section 128, it is not always possible to anticipate all potential issues or questions that may arise in reviewing SIP submittals in advance of the deadlines for such SIP submittals. Therefore, it is often necessary for EPA to make certain judgments about proper application of the statutory requirements of the CAA on a case-by-case basis, as it acts on individual SIP submissions. The notice-and-comment rulemaking procedures followed by EPA in acting on SIP submissions allow for states and other interested parties to weigh in on these case-by-case judgments. This process is what naturally follows when EPA issues guidance making recommendations concerning how states could correctly comply with the statute, but new issues arise in the application of the guidance in rulemaking on a SIP submission.

In this case, the interpretations referred to in our proposal and set out in our TSD<sup>11</sup> were intended to clarify

<sup>11</sup> Footnote 3 of ADEQ's comment letter indicates that ADEQ was unable to find explanation of EPA's reasoning in the TSD. It appears that ADEQ was looking at the more general TSD associated with the earlier proposal on other portions of Arizona's infrastructure SIP (i.e., 77 FR 38239, June 27, 2012, docket ID EPA-R09-OAR-2012-0398, document number EPA-R09-OAR-2012-0398-0003) rather than the separate Section 128 TSD, which was available at [www.regulations.gov](http://www.regulations.gov) (i.e., document number EPA-R09-OAR-2012-0398-0075, under the same docket ID). Thus, while this misunderstanding is unfortunate, we disagree that

previously issued guidance pertaining to section 128 in relation to the Arizona infrastructure SIP. In particular, we wished to clarify that the requirements of 128(a)(1) apply only to boards or bodies composed of multiple individuals and do not apply where a single individual approves permits or enforcement orders under the CAA. As explained in the TSD for our proposal, this interpretation derives from the text of section 128 itself (see TSD at pages 1-3). However, the 1978 memorandum suggests a definition of "board or body" that includes "any individual \* \* \* authorized to approve permits or enforcement orders under the Clean Air Act." In Arizona's case, a strict adherence to the recommendations of the guidance would have rendered the Director of ADEQ, the state administrative law judges and the county controls officers all subject to the "public interest" and "significant income" requirements of 128(a)(1). As explained in the TSD for our proposal, this interpretation seems inconsistent with the plain language of the statute; we therefore instead proposed and took comment on the interpretation that subsection 128(a)(1) should not apply to heads of executive agencies who approve permits or enforcement orders. Similarly, the other interpretations of the statute set forth in our TSD were intended to clarify ambiguities left by the recommendations of the 1978 guidance, so that we could properly evaluate Arizona's submittal under the requirements of the Act.

While we do not necessarily agree that these interpretations are subject to the requirements of APA section 552, we note that our proposal, as published in the **Federal Register**, specifically referred to these interpretations (see 77 FR 44555 at 44556), and that we explained these interpretations in detail in the TSD available in the docket for our proposal (see TSD at pages 1-3). Moreover, the proposed interpretations in our proposal on Arizona are consistent with other recent notices that EPA has published in the **Federal Register**.<sup>12</sup>

**Comment #3:** ADEQ claims that compliance with "EPA's unauthorized amendment or revision to its 1978 guidance is practically infeasible" because EPA's "revised or amended interpretation has not occurred until after the 2012 legislature has adjourned." As such, the State claims

our TSD was "lacking clarity" or that our explanation did "not appear under that specific section in the TSD," as asserted by ADEQ.

<sup>12</sup> E.g., 77 FR 21913, April 12, 2012 (for Hawaii); and 77 FR 22540, April 16, 2012 (for North Dakota).

that it did not have the opportunity to revise its statutes or amend its prior submittal of October 14, 2009 or parallel process submittal of June 1, 2012 prior to the submittal deadline.

*Response #3:* For the reasons explained in Response #2, we disagree with ADEQ's assertion that EPA has made "unauthorized amendment or revision to its 1978 guidance." With respect to ADEQ's argument regarding timing of the legislative session and opportunity to revise statutes or SIP submittals, we disagree that compliance with CAA section 128, in light of the 1978 guidance and the clarifying interpretations presented in our proposal, is practically infeasible, to the extent that "practical infeasibility" is even an allowable consideration in EPA's action on a SIP submission.

Our final, partial disapproval triggers a two-year deadline for EPA to promulgate a federal implementation plan (FIP) for the identified deficiency. However, the State can remedy the deficiency prior to such FIP promulgation. If ADEQ can submit a SIP revision that meets EPA approval within the next two years, EPA's obligation to promulgate a FIP would be discharged.

As noted in the TSD, the CAA requires that section 128 must be implemented through SIP-approved, federally enforceable provisions. However, the Act does not prescribe the exact means of implementation. The state and counties now have the opportunity to consider statutory or regulatory revisions to submit to EPA as a SIP revision to remedy this narrow deficiency. We stand ready to work with ADEQ and Maricopa, Pima, and Pinal counties to develop this revision.

### III. Final Action

EPA is approving in part and disapproving in part the Arizona Infrastructure SIP Submittals for the 1997 ozone, 1997 PM<sub>2.5</sub>, and 2006 PM<sub>2.5</sub> NAAQS. EPA is approving the Arizona Infrastructure SIP with respect to the following requirements:

- Section 110(a)(2)(A): Emission limits and other control measures.
- Section 110(a)(2)(B): Ambient air quality monitoring/data system.
- Section 110(a)(2)(C) (in part): Program for enforcement of control measures and regulation of new and modified stationary sources.
- Section 110(a)(2)(D)(i)(I): Interstate transport (for 2006 24-hour PM<sub>2.5</sub> NAAQS).<sup>13 14</sup>

<sup>13</sup> EPA previously approved an earlier SIP submission from Arizona as fully satisfying the interstate transport SIP requirements of CAA section 110(a)(2)(D)(i) for the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS. 72 FR 41629 (July 31, 2007).

- Section 110(a)(2)(D)(ii) (in part): Interstate pollution abatement and international air pollution.
- Section 110(a)(2)(E)(i): Adequate resources and legal authority.
- Section 110(a)(2)(E)(ii) (in part): Conflict of interest.
- Section 110(a)(2)(E)(iii): State oversight of local or regional government agencies.
- Section 110(a)(2)(F)(in part): Stationary source monitoring and reporting.
- Section 110(a)(2)(G): Emergency episodes (for 1997 and 2006 PM<sub>2.5</sub>).
- Section 110(a)(2)(H): SIP revisions.
- Section 110(a)(2)(J) (in part): Consultation with government officials and public notification.
- Section 110(a)(2)(L): Permitting fees.
- Section 110(a)(2)(M): Consultation/participation by affected local entities.

In addition, we are approving into the SIP certain statutory and regulatory provisions included in the 2009 Infrastructure SIP. These are discussed further in our proposal notices, accompanying TSDs, and in Arizona's August 24, 2012 submittal, all available in the docket for today's action.

Simultaneously, EPA is disapproving Arizona's Infrastructure SIP submittals for 1997 ozone, 1997 PM<sub>2.5</sub>, and 2006 PM<sub>2.5</sub> NAAQS with respect to the following infrastructure SIP requirements:

- Section 110(a)(2)(C) (in part): Permit program for regulation of new and modified stationary sources under part C of title I of the Act (prevention of significant deterioration (PSD)).
- Section 110(a)(2)(D)(i)(II): Provision to prohibit interference with other states' PSD measures (for 2006 24-hour PM<sub>2.5</sub> NAAQS).<sup>15</sup>

<sup>14</sup> With respect to Arizona's section 110(a)(2)(D)(i)(I) interstate transport SIP submission for the 2006 24-hour PM<sub>2.5</sub> NAAQS, the recent opinion vacating the Transport Rule, *EME Homer City Generation v. EPA*, No. 11–1302 (D.C. Cir., August 21, 2012), does not alter our conclusion that the existing Arizona SIP adequately addresses this requirement. Nothing in the Homer City opinion disturbs or calls into question that conclusion or the validity of the technical information on which our July 30, 2012 proposal (77 FR 44551) relied—e.g., ambient PM<sub>2.5</sub> levels at monitoring sites representative of regional background in nearby states and relevant meteorological and topographical information. In addition, nothing in that opinion undermines our proposed conclusion, based on our review of the available technical information, that emissions from Arizona do not significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour PM<sub>2.5</sub> NAAQS in another state.

<sup>15</sup> EPA previously approved an earlier SIP submission from Arizona as fully satisfying the interstate transport SIP requirements of CAA section 110(a)(2)(D)(i) for the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS. 72 FR 41629 (July 31, 2007).

- Section 110(a)(2)(D)(ii) (in part): Interstate pollution abatement and international air pollution.
- Section 110(a)(2)(E)(ii) (in part): Conflict of interest.
- Section 110(a)(2)(F) (in part): Stationary source monitoring and reporting.
- Section 110(a)(2)(J) (in part): PSD.
- Section 110(a)(2)(K): Air quality modeling and submission of monitoring data.

On June 1, 2012 ADEQ submitted the "Proposed Supplement to the Arizona State Implementation Plan under Clean Air Act Section 110(a)(1) and (2): Implementation of [1997 PM<sub>2.5</sub> and 8-hour ozone NAAQS and 2006 PM<sub>2.5</sub> NAAQS], Parallel Processing Version" ("2012 Supplement"). The 2012 Supplement included a number of statutes and regulations that were effective under state law but had not been adopted specifically for submittal to EPA as a SIP revision under CAA section 110. On August 24, 2012, ADEQ provided EPA with evidence that the laws and regulations in the 2012 Supplement have been adopted specifically for submittal to EPA as a SIP revision with the exception of two Pima County regulations (rules 17.12.040 and 17.24.040). As explained in our notice of proposed rulemaking, our proposed approval of CAA section 110(a)(2)(F) was contingent upon receipt of fully adopted versions of the two Pima County regulations discussed above. We proposed in the alternative to disapprove the 2009 Infrastructure SIP with respect to the requirements of CAA section 110(a)(2)(F) in Pima County, if ADEQ did not submit the two Pima County regulations as SIP revisions following all required state and local procedures.<sup>16</sup> Consequently, in the absence of the aforementioned Pima County regulations, we are disapproving Arizona's infrastructure SIP for section 110(a)(2)(F) with respect to Pima County.

As explained in the NPRs and TSD, our disapprovals related to sections 110(a)(2)(C), (D)(i)(II), (D)(ii), (J), and (K) result from the conclusion that the Arizona SIP does not fully satisfy the statutory and regulatory requirements for PSD permit programs under part C of title I of the Act. For these disapprovals, both the Maricopa County Air Quality Department and the Pima County Department of Environmental Quality currently implement the Federal PSD program in 40 CFR 52.21 for all regulated NSR pollutants, pursuant to delegation agreements with EPA. 40

<sup>16</sup> See 77 FR 38239, 38244 (June 27, 2012).

CFR 52.144.<sup>17</sup> Accordingly, although the Arizona SIP remains deficient with respect to PSD requirements in both Maricopa and Pima counties, these deficiencies are adequately addressed in both areas by the Federal PSD program. ADEQ implements a SIP-approved PSD program for all regulated NSR pollutants except for PM-10 and GHGs<sup>18</sup> (48 FR 19878, May 3, 1983), and the Pinal County Air Quality Control District (PCAQCD) implements a SIP-approved PSD program for all regulated NSR pollutants except for GHGs<sup>19</sup> (61 FR 15717, April 9, 1996, as amended by 65 FR 79742, December 20, 2000). EPA understands that both ADEQ and the PCAQCD intend to submit, in the near future, PSD SIP revisions addressing the deficiencies identified in our TSD.<sup>20</sup>

EPA takes a disapproval of a state plan very seriously. Rather than implement a FIP, we believe that it is preferable, and preferred in the provisions of the Clean Air Act, for states to implement the CAA requirements through state provisions that are developed and adopted by the state and approved into the SIP by EPA. A state plan need not contain exactly the same provisions that EPA might require, but EPA must be able to find that the state plan is consistent with the requirements of the Act, in accordance with its obligations under section 110(k). Further, EPA's oversight role

<sup>17</sup> See 59 FR 1730 (January 12, 1994) and "Agreement for Delegation of Authority of the Regulations for Prevention of Significant Deterioration of Air Quality (40 CFR 52.21) Between U.S. EPA and [Maricopa County]," executed November 22, 1993; "Agreement for Delegation of Authority of the Regulations for Prevention of Significant Deterioration of Air Quality (40 CFR 52.21) Between U.S. EPA and Pima County Air Quality Control District," executed April 14, 1994.

<sup>18</sup> For PM-10 and GHGs, ADEQ implements the Federal PSD program in 40 CFR 52.21 pursuant to delegation agreements executed in 1999 and 2011, respectively. 40 CFR 52.37; "Agreement for Delegation of Authority of the PM-10 Regulations for Prevention of Significant Deterioration of Air Quality (40 CFR 52.21) Between EPA and Arizona DEQ," executed March 12, 1999; "U.S. EPA—Arizona Department of Environmental Quality Agreement for Delegation of Authority to Issue and Modify Greenhouse Gas Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21," executed March 30, 2011.

<sup>19</sup> For GHGs, Pinal County implements the Federal PSD program in 40 CFR 52.21 pursuant to a delegation agreement executed in 2011. 40 CFR 52.37; "U.S. EPA—Pinal County Air Quality Control District Agreement for Delegation of Authority to Issue and Modify Greenhouse Gas Prevention of Significant Deterioration Permits Subject to 40 CFR 52.21," executed August 10, 2011.

<sup>20</sup> On April 10, 2012, ADEQ submitted draft PSD program regulations to EPA with a request for "parallel processing" under 40 CFR part 51, appendix V. We intend to act on this PSD submittal expeditiously upon receipt of an official SIP revision containing ADEQ's fully adopted PSD regulations.

requires that it assure consistent implementation of Clean Air Act requirements by states across the country, even while acknowledging that individual decisions from source to source or state to state may not have identical outcomes. EPA believes these disapprovals are the only path that is consistent with the Act at this time.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of part D of title I of the CAA (CAA sections 171–193) or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP Call) starts a sanctions clock. The Arizona Infrastructure SIP was not submitted to meet either of these requirements. Therefore, our partial disapproval of Arizona's Infrastructure SIP Submittals does not trigger mandatory sanctions under CAA section 179.

In addition, CAA section 110(c)(1) provides that EPA must promulgate a FIP within two years after finding that a State has failed to make a required submission or disapproving a State implementation plan submission in whole or in part, unless EPA approves a SIP revision correcting the deficiencies within that two-year period. For the reasons provided in our proposed rules and associated TSDs, and in our responses to comments above, EPA is partially disapproving Arizona's Infrastructure SIP Submittals based on our conclusion that it does not fully satisfy the following CAA section 110(a) requirements: (1) With respect to those areas under ADEQ and Pinal County jurisdiction, the PSD program requirements of CAA sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), 110(a)(2)(D)(ii), 110(a)(2)(F), and 110(a)(2)(K) regarding regulation of nitrogen oxides (NO<sub>x</sub>) as an ozone precursor, regulation of fine particulate matter (PM<sub>2.5</sub>), interstate pollution abatement, and air quality models and modeling data; (2) with respect to the air quality hearing boards in Maricopa, Pima, and Pinal counties, the requirements of CAA section 110(a)(2)(E)(ii) respecting board composition requirements under CAA section 128(a)(1); and (3) with respect to Pima County, the requirements of CAA section 110(a)(2)(F) regarding stationary source monitoring and reporting. Our partial disapproval of Arizona's Infrastructure SIP Submittals based on these deficiencies triggers an obligation on EPA to promulgate a FIP under CAA section 110(c), unless Arizona submits and EPA approves SIP revisions correcting the identified deficiencies within two years of the effective date of this final rule. We encourage the state to

submit a SIP revision to address the deficiencies identified in this final rule and we stand ready to work with the state to develop a revised plan.

#### IV. Statutory and Executive Order Reviews

##### A. Executive Order 12866, Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

##### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., because this partial approval and partial disapproval of SIP revisions under CAA section 110 will not in-and-of itself create any new information collection burdens but simply approves certain State requirements, and disapproves certain other State requirements, for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

##### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This partial SIP approval and partial SIP disapproval under CAA section 110 will not in-and-of itself create any new requirements but simply approves certain State requirements, and

disapproves certain other State requirements, for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

#### *D. Unfunded Mandates Reform Act*

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. EPA has determined that the partial approval and partial disapproval action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action approves certain pre-existing requirements, and disapproves certain other pre-existing requirements, under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

#### *E. Executive Order 13132, Federalism*

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

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, as specified in Executive Order 13132, because it merely approves certain State requirements, and disapproves certain other State requirements, for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

#### *F. Executive Order 13175, Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP on which EPA is taking action would 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. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This partial approval and partial disapproval under CAA section 110 will not in-and-of itself create any new regulations but simply approves certain State requirements, and disapproves certain other State requirements, for inclusion into the SIP.

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

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of

those requirements would be inconsistent with the Clean Air Act.

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

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

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

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. section 804(2). This rule will be effective on December 5, 2012.

#### *L. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 4, 2013. 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, Oxides of nitrogen, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 28, 2012.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

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

**PART 52—[AMENDED]**

■ 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)(152)(ii) and (c)(153) to read as follows:

**§ 52.120 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*  
(152) \* \* \*  
(i) \* \* \*

(ii) Additional materials.

(A) Arizona Department of Environmental Quality.

(1) “Final Supplement to the Arizona State Implementation Plan under Clean Air Act Section 110(a)(1) and (2): Implementation of 2006 PM<sub>2.5</sub> National Ambient Air Quality Standards, 1997 PM<sub>2.5</sub> National Ambient Air Quality Standards, and 1997 8-Hour Ozone National Ambient Air Quality Standards,” August 2012, adopted by the Arizona Department of Environmental Quality on August 24, 2012, excluding the appendices.

(2) Arizona Revised Statutes (West’s, 2011–2012 Compact Edition):

(i) Title 28 (transportation), chapter 7 (certification of title and registration), article 5 (registration requirements generally), section 28–2153 (“Registration requirement; exceptions; assessment; violation; classification”);

(ii) Title 35 (public finances), chapter 2 (handling of public funds), article 2 (state management of public monies), section 35–313 (“Investment of trust and treasury monies; loan of securities”);

(iii) Title 38 (public officers and employees), chapter 1 (general provisions), article 1 (definitions), section 38–101 (“Definitions”) and article 8 (conflict of interest of officers and employees), sections 38–501 (“Application of article”), 38–502

(“Definitions”), 38–503 (“Conflict of interest; exemptions; employment prohibition”), 38–504 (“Prohibited acts”), 38–505 (“Additional income prohibited for services”) 38–506 (“Remedies”), 38–507 (“Opinions of the attorney general, county attorneys, city or town attorneys and house and senate ethics committee”), 38–508 (“Authority of public officers and employees to act”), 38–509 (Filing of disclosures”), 38–510 (“Penalties”), and 38–511 (“Cancellation of political subdivision and state contracts; definition”);

(iv) Title 49 (the environment), chapter 1 (general provisions), article 1 (department of environmental quality), section 49–103 (“Department employees; legal counsel”), subsections (A)(2), (A)(4), (B)(3), and (B)(5) of section 49–104 (“Powers and duties of the department and director”), and sections 49–106 (“Statewide application of rules”) and 49–107 (“Local delegation of state authority”);

(v) Title 49 (the environment), chapter 3 (air quality), article 1 (general provisions), section 49–405 (“Attainment area designations”); article 2 (state air pollution control), sections 49–421 (“Definitions”), 49–422 (“Powers and duties”), 49–424 (“Duties of department”), 49–425 (“Rules; hearing”), 49–433 (“Special inspection warrant”), 49–435 (“Hearings on orders of abatement”), and 49–441 (“Suspension and revocation of conditional order”), subsections (A) and (B)(2) of section 49–455 (“Permit administration fund”), and sections 49–460 (“Violations; production of records”), 49–461 (“Violations; order of abatement”), 49–462 (“Violations; injunctive relief”), 49–463 (“Violations; civil penalties”), and 49–465 (“Air pollution emergency”); and article 3 (county air pollution control), sections 49–471 (“Definitions”), 49–473 (“Board of supervisors”), 49–474 (“County control boards”), 49–476.01 (“Monitoring”), 49–478 (“Hearing board”), 49–479 (“Rules; hearing”), 49–480.02 (“Appeals of permit actions”), 49–482 (“Appeals to hearing board”), 49–488 (“Special inspection warrant”), 49–490 (“Hearings on orders of abatement”), 49–495 (“Suspension and revocation of conditional order”), 49–502 (“Violation; classification”), 49–510 (“Violations; production of records”), 49–511 (“Violations; order of abatement”), 49–512 (“Violations; injunctive relief”), and 49–513 (“Violations; civil penalties”).

(153) The following plan was submitted on October 14, 2009, by the Governor’s designee.

- (i) [Reserved]
- (ii) Additional materials.

(A) Arizona Department of Environmental Quality.

(1) “Arizona State Implementation Plan Revision under Clean Air Act Section 110(a)(1) and (2): Implementation of 2006 PM<sub>2.5</sub> National Ambient Air Quality Standards, 1997 PM<sub>2.5</sub> National Ambient Air Quality Standards, and 1997 8-Hour Ozone National Ambient Air Quality Standards,” September 2009, adopted by the Arizona Department of Environmental Quality on October 14, 2009, excluding the appendices.

■ 3. Section 52.123 is amended by adding paragraphs (l), (m), and (n) to read as follows:

**§ 52.123 Approval status.**

\* \* \* \* \*

(l) 1997 8-hour ozone NAAQS: The SIPs submitted on October 14, 2009 and August 24, 2012 are fully or partially disapproved for Clean Air Act (CAA) elements 110(a)(2)(C), (D)(ii), (J) and (K) for all portions of the Arizona SIP; for CAA element 110(a)(2)(E)(ii) for the Maricopa County, Pima County, and Pinal County portions of the Arizona SIP; and for CAA element 110(a)(2)(F) for the Pima County portion of the Arizona SIP.

(m) 1997 PM<sub>2.5</sub> NAAQS: The SIPs submitted on October 14, 2009 and August 24, 2012 are fully or partially disapproved for Clean Air Act (CAA) elements 110(a)(2)(C), (D)(ii), (J) and (K) for all portions of the Arizona SIP; for CAA element 110(a)(2)(E)(ii) for the Maricopa County, Pima County, and Pinal County portions of the Arizona SIP; and for CAA element 110(a)(2)(F) for the Pima County portion of the Arizona SIP.

(n) 2006 PM<sub>2.5</sub> NAAQS: The SIPs submitted on October 14, 2009 and August 24, 2012 are fully or partially disapproved for Clean Air Act (CAA) elements 110(a)(2)(C), (D)(i)(II) (interfere with measures in any other state to prevent significant deterioration of air quality), (D)(ii), (J) and (K) for all portions of the Arizona SIP; for CAA element 110(a)(2)(E)(ii) for the Maricopa County, Pima County, and Pinal County portions of the Arizona SIP; and for CAA element 110(a)(2)(F) for the Pima County portion of the Arizona SIP.

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