

responsibilities established in the Clean Air Act (CAA). This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant. In addition, this rule does not involve technical standards, thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule also does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 2, 2006. 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 CAA section 307(b)(2).)

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

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 14, 2006.

**J.I. Palmer, Jr.**,  
Regional Administrator, Region 4.

■ 40 CFR part 52 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 B—Alabama**

■ 2. Section 52.50(c) is amended by revising entry for "Section 335-3-8.04" to read as follows:

**§ 52.50 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

**EPA—APPROVED ALABAMA REGULATIONS**

| State citation            | Title/subject   | State effective date | EPA approval date       | Explanation |
|---------------------------|---|----------------------|-------------------------|-------------|
| * * * * *                 | <b>Chapter 335-3-8 Control of Nitrogen Oxide Emissions</b>          |                      |                         |             |
| Section 335-3-8-.04 ..... | Standards for Stationary Reciprocating Internal Combustion Engines. | 03/22/05             | 12/28/05 (70 FR 76694). |             |
| * * * * *                 |   |                      |                         |             |

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[FR Doc. E6-12471 Filed 8-2-06; 8:45 am]  
**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R09-OAR-2006-0571, FRL-8204-8]

**Approval and Promulgation of Implementation Plans for Arizona; Nonattainment Area; Serious Area Plan for Attainment of the 24-Hour and Annual PM-10 Standards**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action under the Clean Air Act (CAA) to approve the Best Available Control Measure (BACM) and the Most Stringent

Measure (MSM) demonstrations in the serious area particulate matter (PM-10) plan for the Maricopa County portion of the metropolitan Phoenix (Arizona) nonattainment area (Maricopa County area). EPA is also granting Arizona's request to extend the attainment deadline from 2001 to 2006. EPA originally approved these demonstrations and granted the extension request on July 25, 2002. Thereafter EPA's action was challenged in the U.S. Court of Appeals for the Ninth Circuit. In response to the Court's remand, EPA has reassessed the BACM demonstration for the significant source categories of on-road motor vehicles and nonroad engines and equipment exhaust, specifically regarding whether or not California Air Resources Board (CARB) diesel is a BACM. EPA has also reassessed the MSM demonstration.

**DATES:** *Effective Date:* This rule is effective on September 5, 2006.

**ADDRESSES:** You can inspect copies of the docket for this action at EPA's Region IX office during normal business hours by appointment at the following locations: Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901. Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B-102, 1301 Constitution Avenue, NW., (Mail Code 6102T), Washington, DC 20460.

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

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

**I. Summary of Proposed Action**

On July 1, 2005, EPA proposed to re-approve the BACM and MSM demonstrations in the Maricopa County

area's serious area PM-10 plan.<sup>1</sup> EPA also proposed again to grant Arizona's request for an extension of the area's attainment deadline from December 31, 2001 to December 31, 2006. 70 FR 38064. This proposed action responded to a remand by the U.S. Court of Appeals for the Ninth Circuit on the issue of whether CARB diesel must be included in the serious area plan as a BACM and a MSM. See *Vigil v. Leavitt*, 366 F.3d 1025, amended at 381 F.3d 826 (9th Cir. 2004). EPA re-examined the feasibility of CARB diesel for both the on-road motor vehicle exhaust and nonroad engines and equipment exhaust source categories. In its proposed approval in response to the remand, EPA concluded that implementation of CARB diesel is not feasible for on-road motor vehicles because Arizona cannot obtain a CAA section 211(c)(4) waiver of federal preemption and it is not feasible for nonroad engines and equipment because of the uncertainties with fuel availability, storage and segregation and concerns about program effectiveness due to owners and operators fueling outside the Maricopa County area. 70 FR 38064.

## II. Public Comments and EPA Responses

EPA received two comment letters: One from Joy E. Herr-Cardillo, Staff Attorney, Arizona Center for Law in the Public Interest (ACLPI), on behalf of Phoenix residents Robin Silver, Sandra L. Bahr and David Matusow; and one from Nancy C. Wrona, Director, Air Quality Division, Arizona Department of Environmental Quality (ADEQ). In general, the comments from ACLPI oppose our proposed rule and the comments from ADEQ support our proposed rule. EPA appreciates the time and effort made by the commenters in reviewing the proposed rule and providing comments. We have

<sup>1</sup> On July 25, 2002, EPA approved multiple documents submitted to EPA by Arizona for the Maricopa County area as meeting the CAA requirements for serious PM-10 nonattainment areas for the 24-hour and annual PM-10 national ambient air quality standards (NAAQS). Among these documents is the "Revised MAG 1999 Serious Area Particulate Plan for PM-10 for the Maricopa County Nonattainment Area," February 2000 (MAG plan) that includes the BACM demonstrations for all significant source categories (except agriculture) for both the 24-hour and annual PM-10 standards and the State's request and supporting documentation, including the most stringent measure analysis (except for agriculture) for an attainment data extension for both standards. EPA's July 25, 2002 final action included approval of these elements of the MAG plan. For a detailed discussion of the MAG plan and the serious area PM-10 requirements, please see EPA's proposed and final approval actions at 65 FR 19964 (April 13, 2000), 66 FR 50252 (October 2, 2001), and 67 FR 48718 (July 25, 2002).

summarized the comments and provided our responses below.

### A. On-Road Motor Vehicle Exhaust

*Comment 1:* ACLPI asserts that EPA is allowing Arizona to exclude CARB diesel as a BACM simply because the State did not request a CAA section 211(c)(4)(A) waiver. ACLPI states that section 211(c)(4)(A) generally prohibits the state from implementing fuel controls that are not identical to any Federal standard in place, but that the statute allows EPA to "approve an otherwise preempted state fuel measure as necessary if no other measures would bring about timely attainment, or if other measures exist and are technically possible to implement but are unreasonable or impracticable."

ACLPI argues that the appropriate question is not whether the State has requested a waiver, but rather whether it has provided a reasoned justification for failure to include CARB diesel as a control measure. ACLPI believes that the State has not provided such a justification and that under our "guidance" at 56 FR 58658, when a control measure is rejected, the state must provide a reasoned justification. ACLPI includes the following sentence, purportedly from that **Federal Register** notice, to buttress this point: "[t]he burden is on the State to demonstrate that an available control method for an existing source is infeasible or otherwise unreasonable and, therefore, would not constitute RACM [or BACM]."

ACLPI contends that EPA's speculation that the state would not qualify for a waiver because CARB diesel is not necessary for attainment cannot excuse the state's failure to provide a reasoned justification. ACLPI asserts that EPA cannot simply rely for this purpose on the State's demonstration that the area will not attain until December 2006 because EPA improperly approved that date without CARB diesel as a MSM.

Finally, ACLPI comments that EPA's conclusion that CARB diesel is not needed for attainment conflicts with the Agency's guidance at 59 FR 42011-42012 that "the BACM analysis must be independent of the attainment analysis \* \* \*."

*Response:* Initially we note that we did not rely on Arizona's failure to request a CAA section 211(c)(4) waiver in accepting the State's exclusion of CARB diesel as a BACM. Rather, we acknowledged that a state is eligible to obtain a waiver of federal preemption under certain circumstances, but concluded that Arizona would not have been able to obtain such a waiver here.

Under section 211(c)(4)(C)(i),<sup>2</sup> EPA can approve the implementation of CARB diesel by Arizona only if the Agency "finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard that the plan implements." Further, EPA "may find that a State control or prohibition is necessary to achieve the standard if no other measures that would bring about timely attainment exist, or if other measures exist and are technically possible to implement, but are unreasonable or impracticable." Because EPA has approved the state's demonstration of attainment of the PM-10 NAAQS (67 FR 48718), EPA believes that the state would not be able to provide a demonstration that CARB diesel is necessary to achieve the NAAQS for PM-10 and thus would not be able to obtain a section 211(c)(4)(C)(i) waiver necessary to implement CARB diesel for on-road motor vehicles. 70 FR 38064, 38065.<sup>3</sup>

We agree with ACLPI that generally an appropriate inquiry, among others, in a BACM analysis is whether there exists a reasoned justification for excluding a control measure. 65 FR 19964, 19967 (April 13, 2000). However, a BACM analysis is not undertaken in a vacuum. If it is not possible for the State to obtain a waiver under section 211(c)(4), it would not be able to implement CARB diesel in the nonattainment area. Therefore it is not necessary for the State to provide a reasoned justification for rejecting CARB diesel as BACM. The State should not be compelled to undertake a pointless analysis.<sup>4</sup>

<sup>2</sup> In August 2005, CAA section 211(c)(4)(C) was amended and renumbered by the Energy Policy Act of 2005, 42 USCS 15801 *et seq.* The amendments place additional restrictions on EPA's authority under that provision.

<sup>3</sup> Because we have determined that we could not approve CARB diesel into the Arizona SIP under section 211(c)(4)(C)(i), we believe that we need not address the effect of the new provisions of the Energy Policy Act of 2005 in today's action.

<sup>4</sup> To support its contention that the burden is on the state to demonstrate that a measure is not a BACM, ACLPI misquotes a sentence from an unrelated EPA proposed rule as: "[t]he burden is on the State to demonstrate that an available control method \* \* \* is infeasible and, therefore, would not constitute RACM [or BACM]." The actual quotation is from a **Federal Register** notice in which EPA describes a moderate area PM-10 guidance document and states: "[t]he burden is on the State to demonstrate that an available control method \* \* \* is infeasible and, therefore, would not constitute RACM [or RACT]." 56 FR 58656, 58658 (November 21, 1991) (emphasis added; brackets in original). There is nothing so definitive in EPA's serious area guidance regarding the responsibility of the State to provide the primary justification for rejecting a measure as BACM. Moreover, the Ninth Circuit, in determining that it could not find in EPA's approval of the MAG plan the reasoned justification for rejecting CARB diesel, observed that "Arizona has offered one explanation,

ACLP's assertion that EPA cannot rely on the State's demonstration that the area will not attain until December 2006 because EPA improperly approved that date without CARB diesel as a MSM is also misguided. In granting the State's request for an extension of the attainment deadline from December 31, 2001 to December 31, 2006 under CAA section 188(e), EPA concluded that the MAG plan "includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area." 67 FR at 48739. As we explained in our final approval of the State's PM-10 plan, section 188(e) does not compel the adoption of every possible MSM. We have interpreted the MSM requirement consistent with how we have historically interpreted the general RACM provision in section 172(c)(1), i.e., we have long held that a state is not obligated to adopt and implement measures that will not contribute to expeditious attainment. We are interpreting the MSM requirement using the same principle.

Before we can grant an attainment date extension, the state must show that its plan will result in attainment by the "most expeditious alternative date practicable." See CAA sections 188(e) and 189(b)(1)(A)(ii). If a state can show that including a certain set of potential MSM would not result in more expeditious attainment, then it is reasonable and consistent with the Act not to require their inclusion as a condition of approval. *Id.* at 48723-48724. Here we appropriately concluded that the implementation of CARB diesel would not advance attainment of the PM-10 NAAQS and thus was not required to be adopted under the MSM requirement. *Id.* at 48725. As a result, having determined that the State had demonstrated that attainment by December 31, 2006 was the most expeditious alternative date under section 188(e), EPA properly granted the State's request for an attainment date extension to that date.

Finally, EPA disagrees that its conclusion, pursuant to section 188(e), that CARB diesel is not needed for expeditious attainment conflicts with the Agency's BACM guidance. There is nothing in EPA's guidance for PM-10 serious area plans (59 FR 41998 (August 16, 1994)) that requires that a BACM analysis be entirely independent of attainment questions. More importantly, the Act does not link the BACM and

attainment demonstration requirements. As noted in EPA's guidance, under section 189(b)(2), states have only 18 months following reclassification to submit their BACM demonstrations, but up to four years to submit attainment demonstrations. Therefore, EPA concluded that "Congress intended BACM demonstrations to be based more on the feasibility of implementing the measures rather than on an analysis of the attainment needs of the area." 59 FR at 42012. In contrast, the Act does not specify an implementation deadline for MSM. However, because the clear intent of section 188(e) is to minimize the length of any attainment date extension, the implementation of MSM must necessarily take into account the attainment needs of the area. 66 FR at 50282.

#### *B. Nonroad Engines and Equipment Exhaust*

*Comment 2: Fuel availability:* ACLPI comments that to conclude that CARB diesel is not a BACM due to uncertainty about the fuel's availability in Maricopa County, EPA relies principally on outdated information (the state's submission in 1999 and a MathPro study conducted in 1998) and incomplete information that fails to consider the availability (as of January 1, 2006) of similar diesel fuel in Texas (approved into the Texas SIP by EPA at 66 FR 57196 (2001)) as well as in California.

*Response:* The conditions EPA relied on from the 1998 and 1999 documents still exist, i.e., Arizona has no refineries and therefore must depend on refineries in other states for fuel supplies, principally California, New Mexico, and Texas. Even though CARB diesel fuel is produced in California, and to some extent may be produced to meet Low Emission Diesel (LED) fuel requirements in eastern and central Texas as discussed below, there are limits on refinery capacity in each state, as evidenced by (1) our discussion in the proposed rule of projected refining capacity for CARB diesel in California, which ACLPI does not dispute, and (2) the recent disruption of fuel production, including diesel fuel, in the aftermath of Hurricanes Katrina and Rita.

As a result of fuel supply problems caused by hurricane damage to refineries and other oil production facilities in the Gulf Coast area, EPA issued waivers of certain gasoline and diesel fuel requirements, initially applicable in all 50 states, for a sixteen day period from August 31 to September 15, 2005. The initial waiver was extended for a smaller number of states, including New Mexico and Texas, for

highway diesel fuel sulfur content through October 25, 2005. Additionally, EPA granted a waiver of the start date for the Texas LED fuel through January 31, 2006.

Arizona and California fuel supplies were also affected by the hurricanes, since California depends on imports for 5 to 10% of its gasoline supply, and Arizona depends on California and Texas for a great majority of its gasoline supply. Arizona requested and received a waiver of its SIP-approved Reid Vapor Pressure (RVP) gasoline requirement for the Phoenix area through its duration, September 30, 2005. California requested and received waivers of its SIP-approved RVP gasoline requirement through October 31, 2005, the end of its summer RVP gasoline restriction. For copies of the relevant waivers, see EPA's fuel waiver Web site at <http://www.epa.gov/compliance/katrina/waiver/index.html> or EPA's docket for this rule.

The issuance of these fuel waivers illustrates the limits on refinery capacity in the states cited by ACLPI, California and Texas, which provide the great majority of fuel supplies to Arizona. This limitation, in addition to the information provided in the proposed rule on current projections of CARB diesel production in California, supports our conclusion that there is continuing uncertainty regarding Arizona's sources of fuel supplies as indicated in the 1998 study and 1999 report.

ACLP also states that EPA relied on incomplete information by failing to consider the availability (as of January 1, 2006<sup>5</sup>) of similar diesel fuel in Texas as well as in California. As noted above, CARB diesel may be produced to meet the LED fuel requirements in eastern and central Texas, but it is not required as a result of (1) the permissible use of substitutes for LED fuel that achieve equivalent NO<sub>x</sub> reductions but not necessarily equivalent PM reductions, and (2) recent changes that removed the low sulfur requirement from the LED rule. See 70 FR 58325. We note that California has made the low sulfur requirement of its CARB diesel rule more stringent, implementing a 15 ppm sulfur content requirement as of

<sup>5</sup> As noted above, the LED start date for retailers has now been moved to January 31, 2006, following issuance by EPA of fuel waivers dated September 27 and October 18, 2005, as a result of the supply disruptions caused by Hurricanes Katrina and Rita. See the EPA website noted above for copies of the relevant waivers. Additionally, EPA has approved two subsequent SIP revisions making changes to the LED fuel program. See 70 FR 17321 (April 6, 2005) and 70 FR 58325 (October 6, 2005).

which EPA has declined to ratify, and EPA has not proffered an adequate explanation of its own." 381 F. 3d at 843.

September 1, 2006 at the retail level,<sup>6</sup> but Texas has eliminated the sulfur content requirement completely, deferring to federal requirements for low sulfur content for both highway and nonroad diesel fuel. (See footnote 8 for a brief description of these requirements.)

A significant difference between CARB diesel and the Texas LED fuel program is the ability of fuel producers to meet the LED obligations by using substitutes that achieve equivalent NO<sub>x</sub> emission reductions. For example, a producer may be able to achieve equivalent NO<sub>x</sub> reductions by substituting early introduction of low sulfur gasoline, at least until all relevant EPA requirements for low sulfur gasoline have been implemented, or by the use of diesel fuel with additives which do not necessarily meet the LED limit on aromatic hydrocarbons and the minimum cetane number but would still achieve the same NO<sub>x</sub> reductions.<sup>7</sup> Substitutes in the Texas LED program that achieve equivalent NO<sub>x</sub> reductions are not designed to achieve the PM emission reductions that would be critical if CARB diesel fuel were to be required in the Maricopa County area.

Another significant difference between CARB diesel and the Texas LED fuel program is the elimination in the latter of the low sulfur requirement. EPA approved this change into the relevant Texas ozone SIPs because the low sulfur requirement did not directly reduce the VOC or NO<sub>x</sub> emissions that are precursors to the formation of ozone, and because EPA's requirements for low sulfur diesel fuel will begin implementation in 2006 and 2007.<sup>8</sup>

<sup>6</sup> See Section 2281(a)(2)–(3) of the California Diesel Fuel Regulations, with amendments effective August 14, 2004, at the following Web site: <http://www.arb.ca.gov/fuels/diesel/081404dslregs.pdf>.

<sup>7</sup> See Sections 114.312(f) and 114.318 of the LED fuel program regulations, which provide for alternative diesel fuel formulations and alternative emission reduction plans, at the following Web site: <http://www.tceq.state.tx.us/implementation/air/sip/cleandiesel.html>. Although Section 114.312(f) provides that alternative diesel fuel formulations must provide comparable or better reductions of NO<sub>x</sub> and PM, three of the four alternative diesel fuel formulation approval letters to date have cited NO<sub>x</sub> reductions alone, or (in one case) reductions of NO<sub>x</sub> and hydrocarbons, but not PM, as the basis for approval. (See approval letters for TXLED-A-00001, dated May 10, 2005, TXLED-A-00005, dated December 13, 2005, and TXLED-A-00006, dated April 26, 2006, at the same website.) Section 114.318 provides that the alternative emissions reduction plan must demonstrate emission reductions associated with LED compliance through an equivalent substitute fuel strategy that is achieved through diesel fuel or early gasoline sulfur reduction offsets that meet specified NO<sub>x</sub> reduction requirements or a combination of such strategies.

<sup>8</sup> As noted in the proposed rule, federal requirements for low sulfur diesel fuel for nonroad use will be implemented at 15 ppm in 2010;

None of the Texas ozone attainment demonstration SIP submissions relied on sulfur emission reductions from the LED fuel program.

EPA specifically states, however, that reducing sulfur emissions (through implementing the low sulfur standard) does reduce sulfur dioxides and particulate matter emissions. 70 FR at 58326. However, since there are no SO<sub>2</sub> or PM-10 nonattainment areas in the eastern and central areas of Texas (the LED covered area), and no monitored violations of these standards in these areas, removing the low sulfur standard was not critical to the LED fuel program. *Id.* Removing the low sulfur standard, however, means the LED fuel program is no longer equivalent to CARB diesel for an area such as Maricopa County which ACLPI argues needs CARB diesel to meet the PM-10 standards.

Thus, ACLPI's claim that EPA relied on incomplete information in failing to consider availability of CARB diesel fuel in Texas is not compelling. The LED fuel program is not equivalent to CARB diesel because it allows substitution of other fuels, including gasoline, that achieve equivalent NO<sub>x</sub> emission reductions, and has recently been revised to eliminate the low sulfur requirement which would directly affect PM emission reductions. Furthermore, the LED fuel requirement was developed for ozone nonattainment areas in Texas, not PM nonattainment areas.

*Comment 3: Fuel storage and supply:* ACLPI comments that EPA raises a potential problem of future fuel storage and supply but does not evaluate it except by relying on hypothetical observations of a single ADWM employee. ACLPI states that since the presumption when evaluating potential BACM is in favor of including the control measure unless a reasoned justification is offered to exclude it, this potential problem is not enough to justify excluding it.

*Response:* Although ACLPI describes this "potential problem" as one of fuel storage and "supply," EPA's proposed rule more accurately describes the scope of the problem as fuel storage and "segregation." If the nonroad diesel fuel for the Maricopa County area were CARB diesel, there would be a third type of diesel fuel in addition to the two

beginning in 2007, the federal requirement for low sulfur diesel fuel for nonroad use will begin implementation at 500 ppm. Federal requirements for low sulfur diesel fuel for highway use will be implemented at 15 ppm in 2006. 70 FR 70498 (November 22, 2005). As noted in the MAG plan, Arizona already restricts the sulfur content of nonroad diesel fuel in the Maricopa County area to 500 ppm. (MAG plan, page 9–47.)

types (federal highway diesel fuel and Federal nonroad diesel fuel) currently required for distribution statewide. These three fuels, and the three types of gasoline that are required for the state (Cleaner Burning Gasoline for the Maricopa County area, oxygenated gasoline for Tucson in the winter, and conventional gasoline for the rest of the state), as well as jet fuel, must be stored and transported separately in the fuel storage and distribution systems. These systems include pipelines, terminal tanks, truck tanks, and retail tanks. If not properly segregated, the fuels can be contaminated which would complicate the fuel distribution system since the contaminated fuels would need to be re-blended to be suitable for another use.<sup>9</sup>

The Arizona Department of Weights and Measures (ADWM) is the State agency responsible for implementing and enforcing fuels requirements in the State. The cited employee, the Air and Fuel Quality Program Manager, regularly gathers information from representatives of fuel suppliers and distributors about the storage of different types of fuel for distribution in the State as part of a routine effort to assess the potential for fuel supply interruptions. This employee regularly reports on this information to the Governor's office as part of an effort to anticipate and resolve potential problems with fuel supply or demand.<sup>10</sup> Thus, this employee has the authority and the experience to know if tank farms for fuel storage in the Maricopa County area are at maximum capacity.<sup>11</sup>

Additionally, ADEQ notes in its August 1, 2005 comment letter on our proposed rule that "breakout tankage" does not exist on the eastern part of the pipeline. Breakout tankage, unlike the storage tanks located in the Maricopa

<sup>9</sup> Additionally, as noted in our proposed rule, if nonroad diesel fuel is not kept segregated strictly for nonroad use, and it is available for use by both on-road vehicles as well as nonroad engines and equipment, the nonroad diesel fuel would be preempted just as if it were intended only for use by on-road vehicles. 70 FR at 38066, footnote 8.

<sup>10</sup> See December 22, 2005 Memorandum, "December 20, 2005 telephone conversation with Duane Yantorno, Air and Fuel Quality Program Manager, Arizona Department of Weights and Measures, Ira Domsky, Deputy Director, Division of Air Quality, Arizona Department of Environmental Quality, Carol Weisner, EPA Region 9, and Wienke Tax, EPA Region 9, on Feasibility of Requiring CARB Diesel Fuel in Maricopa County PM-10 Nonattainment Area." Yantorno confirmed the next day, after speaking with representatives of fuel suppliers and/or distributors, that the two large tank farms in the Maricopa area are at or near maximum capacity. One of the facilities might be able to accommodate a different type of fuel for storage, but the other could not.

<sup>11</sup> These tank farms are the large terminal tanks available for storing fuel once the fuel has been off-loaded from a pipeline or other distribution method.

County area, are storage tanks at intermediate terminals outside the area. On the West Kinder Morgan pipeline, intermediate terminals are located in Colton, California; on the East Kinder Morgan pipeline, intermediate terminals are located in El Paso, Texas, and Tucson, Arizona.<sup>12</sup> ADEQ comments that refiners from Texas or New Mexico wanting to bring CARB diesel to the Maricopa market would have to barge it through the Panama Canal to California for distribution through the western pipeline system to find adequate "breakout tankage" for storing the fuel separately.

**Comment 4:** Fueling outside Maricopa County: ACLPI comments that EPA relies on speculation that nonroad diesel fuel users will refuel outside the nonattainment area to avoid paying the higher cost of CARB diesel. ACLPI claims that EPA's only support comes from MAG plan statements, which are themselves unsupported, and irrelevant comments about the trucking industry, and it ignores EPA's explicit rejection of this argument in the 2001 SIP approval of the Texas low emission diesel fuel control.

**Response:** It is the size of the covered area, as well as the incentive to avoid the higher cost of CARB diesel fuel, that EPA cited as its principal reasons for the uncertainty in effectiveness of implementing CARB diesel in the Maricopa area for nonroad engines and equipment alone. 70 FR 38064. Because of the markedly different circumstances, ACLPI's reliance on statements from the Texas LED SIP approval are misplaced. Texas will require sale of LED fuel which, as noted in response to Comment 2 above, is not equivalent to CARB diesel fuel, for use by both on-road vehicles and nonroad engines and equipment in an area that includes 110 counties in eastern and central Texas with borders from 153 to 454 miles wide, as noted in the excerpt quoted by ACLPI. This area includes most of the largest cities in Texas: Houston, Dallas, San Antonio, and Austin. Similarly, California requires sale of CARB diesel fuel statewide (approximately 58 counties totaling 163,696 square miles, [http://www.dof.ca.gov/HTML/FS\\_DATA/stat-abs/tables/a1.xls](http://www.dof.ca.gov/HTML/FS_DATA/stat-abs/tables/a1.xls)) for use by both on-road vehicles and nonroad engines and equipment.

The Maricopa County area that would be covered by a CARB diesel fuel program, by contrast, is much smaller (approximately 66 miles across its widest point, as we noted in our proposed rule (70 FR at 38067) and

would be limited to fuel for nonroad engines and equipment. As ADEQ noted in its August 1, 2005 comment letter, enforcement of the requirement would be virtually impossible because it would be relatively easy to evade, either by purchasing Federal nonroad diesel fuel outside the covered area, or by purchasing Federal highway diesel fuel within the covered area.<sup>13</sup>

In both California and Texas, the size of the covered areas and the application of the requirement to both highway vehicles and nonroad engines and equipment establish much more extensive programs that essentially provide only one type of diesel fuel for sale in very large geographic areas, substantially reducing the potential for evading the special diesel fuel requirements.

#### *C. MSM Demonstration and Extension of Attainment Date*

**Comment 5:** ACLPI states that, because EPA did not undertake a new analysis of CARB diesel as a MSM for purposes of the attainment date extension, ACLPI incorporates by reference comments it submitted "in response to previous rulemakings, as well as the arguments and analysis set forth in the Opening and Reply briefs filed in *Vigil* \* \* \* (specifically Opening Brief, pp. 21–27; <sup>14</sup> Reply Brief, pp. 9–18.)"

**Response:** The *Vigil* Court's remand of EPA's approval of the attainment date extension is limited. The Court concluded that "[w]e also remand the question of Arizona's eligibility for the extension, insofar as that question depends on EPA's determination regarding MSM." (Emphasis added). 381 F. 3d at 487. Therefore to the extent that ACLPI intends to incorporate by

<sup>13</sup> For Federal tax purposes, nonroad diesel fuel is dyed red to distinguish it easily from highway diesel fuel. Both Federal and Arizona excise taxes apply to highway diesel fuel but not to nonroad diesel fuel. Arizona law (as noted in ADEQ's August 1, 2005 comment letter) provides for refunds to users of taxed highway diesel fuel who demonstrate they actually used the fuel in nonroad equipment. This ability to seek a refund means the Arizona excise tax on highway diesel fuel (\$0.26 per gallon) is probably not a significant obstacle to someone who wants to avoid the presumably higher cost of CARB diesel by purchasing highway diesel fuel which would not be subject to the CARB diesel fuel requirements. EPA notes, however, that Arizona sales and use tax (8% of the purchase price of the fuel) would likely apply to purchases of highway diesel fuel that are shown to be for nonroad use, and would be deducted from the refund. See January 20, 2006 Memorandum, "January 12, 2006 telephone conversation between Tim Lee, Director of Revenue Audits, Arizona Department of Transportation, and Carol Weisner, EPA Region 9, regarding Arizona excise tax on diesel fuel."

<sup>14</sup> EPA notes that the discussion of MSM begins on p. 24 of ACLPI's Opening Brief.

reference its comments and arguments on aspects of the extension other than MSM, it is precluded from raising them in this rulemaking.

While ACLPI does not specify, we assume that by "previous rulemakings" it is referring to EPA's proposed approvals of the serious PM–10 plan for the Maricopa County area at 65 FR 19964 (April 13, 2000) and 66 FR 50252 (October 2, 2001). ACLPI commented on these proposed actions in letters from Joy Herr-Cardillo to Frances Wicher, EPA Region 9, dated July 20, 2000 and November 1, 2001. EPA has previously addressed the arguments relating to MSM and the attainment date extension as it relates to MSM raised by ACLPI in their briefs and these letters. See 67 FR at 48722–48725 and EPA's Response Brief in *Vigil* at 10–12 and 30–34. Discussions also relevant to these issues can be found in EPA's proposed approvals of the serious PM–10 plan for the Maricopa County area at 65 FR 19964 and 66 FR 50252.

### III. Final Action

In response to the *Vigil* Court's remand, EPA is again approving the BACM demonstration in the MAG plan for the source categories of on-road and nonroad vehicle exhaust without CARB diesel. CARB diesel is not feasible for on-road motor vehicles because Arizona cannot obtain a CAA section 211(c)(4)(C)(i) waiver for purposes of PM–10 attainment. CARB diesel is not feasible for nonroad engines and equipment because of the uncertainties with fuel availability, storage and segregation and concerns about program effectiveness due to owners and operators fueling outside the Maricopa County area. Therefore, EPA is also again approving the MSM demonstration in the MAG plan and the associated extension of the attainment deadline for the area from December 31, 2001 to December 31, 2006.

In its remand to EPA, the *Vigil* Court did not vacate our approval of the MAG plan as it relates to the BACM and MSM demonstrations, and the associated extension of the attainment deadline for the Maricopa County area. These actions are codified at 40 CFR 52.123(j)(2), (4) and (7) and remain in effect. See 67 FR at 48739.

### IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211,

<sup>12</sup> See December 22, 2005 Memorandum cited in footnote 9.

“Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and

Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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. 804(2).

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 October 2, 2006. 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, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 14, 2006.

**Laura Yoshii**,

*Acting Regional Administrator, Region IX.*  
[FR Doc. E6-12483 Filed 8-2-06; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 300

[FRL-8205-1]

#### National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

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

**ACTION:** Technical Correction of final partial deletion of the Motor Wheel Disposal Superfund Site from the National Priorities List.

**SUMMARY:** On June 23, 2006 (70 FR 36019) EPA published a technical correction to a final notice of deletion from the National Priorities List for the Motor Wheel, Lansing, Michigan Site. The technical correction had an error in the amendatory language. This action is correcting this error.

**DATES:** *Effective Date:* This action is effective as of August 3, 2006.

**ADDRESSES:** Comprehensive information on the Site, as well as the comments that were received during the comment period are available at: Robert Paulson, Community Involvement Coordinator, U.S. EPA, P19J, 77 W. Jackson, Chicago, IL, (312) 886-0272 or 1-800-621-8431.

**FOR FURTHER INFORMATION CONTACT:** Gladys Beard, State NPL Deletion Process Manager, U.S. EPA (SR-6J), 77 W. Jackson, Chicago, IL 60604, (312) 886-7253 or 1-800-621-8431.

#### SUPPLEMENTARY INFORMATION:

*Information Repositories:* Repositories have been established to provide detailed information concerning this decision at the following address: U.S. EPA Region V, 77 W. Jackson, Chicago, IL 60604, (312) 353-5821, Monday through Friday 8 a.m. to 4 p.m.; The Lansing Public Library, Reference Section, 401 Capital Ave., Lansing, MI 48933. On June 22, 2000 (65 FR 38806), EPA published a “Notice of intent to delete 3.45 acres of land from the Motor Wheel Disposal Site from the National Priorities List; request for comments,” and on June 22, 2000 (65 FR 38774), a “Direct final notice of deletion for 3.45 acres of land for the Motor Wheel Superfund Site from the National Priorities List (NPL).” The EPA is publishing this Technical Correction to the June 22, 2000, final notice of deletion due to errors that were published in that notice, a subsequent technical correction dated June 23, 2006, and in the National Priorities List at 40 CFR part 300, Appendix B. After review of the final notice of deletion and the National Priorities List, EPA is