

paper, for each additional 50 sheets or fraction thereof:

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| By a small entity (§ 1.27(a)) | \$135.00 |
| By other than a small entity | \$270.00 |

PART 41—PRACTICE BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

■ 10. The authority citation for 37 CFR part 41 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), 3(a)(2)(A), 21, 23, 32, 41, 134, 135.

■ 11. Section 41.20 is amended by revising paragraph (b) to read as follows:

§ 41.20 Fees.

* * * * *

(b) *Appeal fees.* (1) For filing a notice of appeal from the examiner to the Board:

| | |
|---|----------|
| By a small entity (§ 1.27(a) of this title) | \$270.00 |
| By other than a small entity | \$540.00 |

(2) In addition to the fee for filing a notice of appeal, for filing a brief in support of an appeal:

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| By a small entity (§ 1.27(a) of this title) | \$270.00 |
| By other than a small entity | \$540.00 |

(3) For filing a request for an oral hearing before the Board in an appeal under 35 U.S.C. 134:

| | |
|-------------------------------------|------------|
| By a small entity (§ 1.27(a)) | \$540.00 |
| By other than a small entity | \$1,080.00 |

Dated: August 8, 2008.

Margaret J. A. Peterlin,

Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.

[FR Doc. E8-18822 Filed 8-13-08; 8:45 am]

BILLING CODE 3510-16-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2006-0571; FRL-8703-3]

Approval and Promulgation of Implementation Plans for Arizona; Maricopa County PM-10 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 confirming that it appropriately granted 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 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 and/or MSM. As a result of this reassessment, EPA in 2006 again approved the BACM and MSM demonstrations in the plan and granted the request for an attainment date extension. In light of its 2007 finding that the Maricopa County area failed to attain the 24-hour PM-10 National Ambient Air Quality Standard (NAAQS) by December 31, 2006, EPA has again reassessed the BACM and MSM demonstrations and is again approving these demonstrations.

DATES: *Effective Date:* This rule is effective on September 15, 2008.

ADDRESSES: EPA has established docket number EPA-R09-OAR-0091 for this action. The index to the docket is available electronically at <http://www.regulations.gov> and in hard copy at EPA Region 9, 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., confidential business information. To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Carol Weisner, EPA Region IX, (415) 947-4107, weisner.carol@epa.gov.

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

I. Summary of Proposed Action

On June 8, 2007, EPA proposed to re-approve the BACM and MSM demonstrations in Arizona's serious area PM-10 plan for the Maricopa County area. EPA also proposed to confirm that it appropriately granted Arizona's request for an extension of the area's attainment deadline from

December 31, 2001 to December 31, 2006. 72 FR 31778. EPA originally approved the BACM and MSM demonstrations and granted the attainment date extension in 2002.¹ EPA's 2002 action was subsequently challenged in the U.S. Court of Appeals for the Ninth Circuit. On May 10, 2004, the Court issued its opinion which upheld EPA's final approval in part but remanded to EPA 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).

In response to the Ninth Circuit's remand, EPA re-examined the feasibility of CARB diesel for both the on-road motor vehicle exhaust and nonroad engines and equipment exhaust significant source categories. On August 3, 2006, EPA again approved the BACM and MSM demonstrations in the MAG plan for these significant source categories without CARB diesel and granted the State's request to extend the attainment deadline from 2001 to 2006. 71 FR 43979. In this final action, EPA concluded that implementation of CARB diesel was not feasible for (1) on-road motor vehicle exhaust because Arizona would not be able to make a "necessity" showing for CARB diesel and thus, would not be able to obtain a waiver of federal preemption under CAA section 211(c)(4)(C)(i) in light of EPA's prior approval of the PM-10 attainment demonstration that did not rely on reductions associated with the use of CARB diesel, and (2) nonroad engines and equipment exhaust because of the uncertainties with fuel availability, storage and segregation and

¹ 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 date 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).

Note that, effective December 18, 2006, EPA revoked the annual PM-10 standard. 71 FR 61144 (October 17, 2006). References to the annual standard in this final rule are for historical purposes only. EPA is not taking any regulatory action with regard to this former standard.

concerns about program effectiveness due to owners and operators fueling outside the Maricopa County area.

On June 6, 2007, EPA issued a finding that the Maricopa area failed to attain the 24-hour PM-10 NAAQS by December 31, 2006. 72 FR 31183. As a result, EPA can no longer rely on its August 3, 2006 conclusion that CARB diesel is not necessary for the attainment of the PM-10 NAAQS. Thus, EPA reassessed the BACM demonstration for the on-road motor vehicle exhaust source category in light of the new provisions in the Energy Policy Act of 2005 (EPA) which we had mentioned but not addressed in the August 3, 2006 approval because, as noted earlier, we had concluded that we could not approve CARB diesel into the Arizona State implementation plan (SIP) under CAA section 211(c)(4)(C)(i). EPA concluded that it could not approve a CAA section 211(c)(4)(C)(i) waiver for Arizona for CARB diesel because the effect of such an approval would unlawfully increase the total number of fuels approved under section 211(c)(4)(C) as of September 1, 2004. Therefore, EPA again proposed to approve the BACM demonstration for the on-road motor vehicle exhaust source category in the MAG plan without CARB diesel.

Because our August 3, 2006 approval of the BACM demonstration for nonroad engines and equipment exhaust relied to some extent on our conclusion with respect to on-road motor vehicle exhaust, we also proposed again to find that CARB diesel is not required as a BACM for the nonroad category 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.

Finally, because the December 31, 2006 attainment deadline has passed since EPA granted the State's request for an attainment date extension in its August 3, 2006 action, the extension request is moot. However, if CARB diesel had been required as a MSM in order for EPA to grant the extension request, the State would now be required to implement it absent the requisite showing under CAA section 110(l). Therefore EPA again proposed to approve the MSM demonstration in the MAG plan without CARB diesel. We also proposed to confirm that we had appropriately granted the State's request for an attainment date extension in our 2002 and 2006 actions.

II. Public Comments and EPA Responses

EPA received one comment letter, from Joy E. Herr-Cardillo, Senior Staff Attorney, Arizona Center for Law in the Public Interest (ACLPI), on behalf of Phoenix area residents Robin Silver, Sandra L. Bahr and David Matusow. EPA appreciates the time and effort expended by the commenter in reviewing the proposed rule and providing comments. We have summarized the comments and provided our responses below.

A. On-Road Motor Vehicle Exhaust

Comment 1: ACLPI asserts that EPA inappropriately relies upon an amendment to CAA section 211(c) by EPA when re-evaluating a prior EPA approval on remand from the Court of Appeals. ACLPI notes that at the time Arizona submitted its BACM demonstration for approval, the section 211(c) waiver restrictions now relied upon did not exist and could not have served as a "reasoned justification" for rejecting CARB diesel.

Response: As authority for its conclusion that EPA's reliance on an amendment to section 211(c) by EPA is inappropriate, ACLPI cites without elaboration only *Disimone v. EPA*, 121 F.3d 1262 (9th Cir. 1997). This case is inapt. The *Disimone* case involved a unique set of circumstances. Prior to *Disimone*, in 1990, the Ninth Circuit had ordered EPA to disapprove the Arizona SIP and to promulgate in its place a Federal implementation plan (FIP). *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990), cert. denied 498 U.S. 998 (1990). Later in 1990 Congress amended the CAA and EPA requested that the Ninth Circuit recall its mandate in *Delaney* so that the Agency could take into account the 1990 Amendments in its action on remand. The Ninth Circuit denied EPA's request. EPA subsequently disapproved the Arizona SIP and promulgated a FIP as mandated by the *Delaney* court. EPA thereafter approved a SIP revision and rescinded its FIP. The *Disimone* court held that in so doing EPA acted contrary to a prior direct mandate of the Ninth Circuit and its action thus violated the law of the case. In addition the court held that EPA was collaterally estopped from claiming its action was required by the Act's statutory scheme, as amended in 1990, because the *Delaney* court had denied its motion to amend the judgment to conform to those amendments.

In contrast to *Disimone*, here there has been no prior judicial action with respect to the effect of the 2005 amendment that would have precluded

EPA from proceeding with this regulatory action. Therefore the doctrines on which that court relied do not apply. We must comply with EPA, the applicable current law, even though it did not exist at the time of EPA's original approval action.

Comment 2: ACLPI asserts that, regardless of the intervening EPA restrictions, it does not agree that these restrictions prevent EPA from approving a waiver of preemption in order to allow CARB diesel fuel or other low emission diesel fuel as BACM. ACLPI argues that although CARB diesel fuel is not included on the Boutique Fuels List by virtue of its inclusion in the California SIP, the list does include "low emission diesel," a fuel approved in the Texas SIP, and this fuel includes CARB diesel fuel as an approved low emission diesel fuel. ACLPI further states that because CARB diesel is already approved in California, it is also approved in the applicable Petroleum Administration for Defense District (PADD).

Response: As noted in our June 8, 2007 proposal, at 72 FR 31780, EPA amended the CAA by requiring EPA, in consultation with the Department of Energy (DOE), to determine the total number of fuels approved into all SIPs under section 211(c)(4)(C), as of September 1, 2004, and to publish a list that identifies these fuels, the states and PADD in which they are used. CAA section 211(c)(4)(C)(v)(II). It also placed three additional restrictions on EPA's authority to waive preemption by approving a State fuel program into the SIP. These restrictions are as follows:

- First, EPA may not approve a state fuel program into the SIP if it would cause an increase in the total number of fuel types approved into SIPs as of September 1, 2004.
- Second, in cases where EPA approval of a fuel would increase the total number of fuel types on the list but not above the number approved as of September 1, 2004, because the total number of fuel types in SIPs is below the number of fuel types as of September 1, 2004, we are required to make a finding after consultation with DOE, that the new fuel will not cause supply or distribution interruptions or have a significant adverse impact on fuel producibility in the affected or contiguous areas.
- Third, with the exception of 7.0 psi RVP, EPA may not approve a state fuel into a SIP unless that fuel type is already approved in at least one SIP in the applicable PADD. CAA Section 211(c)(4)(C)(v)(I), (IV) and (V).

On December 28, 2006, EPA published a list of the total number of fuels approved into all SIPs, under

section 211(c)(4)(C), as of September 1, 2004, in the **Federal Register**. 71 FR 78192. The final list (known as the Boutique Fuels List) includes eight types of fuels approved into SIPs under section 211(c)(4)(C) as of September 1, 2004, but does not include CARB diesel fuel because it is not approved into California's SIP under section 211(c)(4)(C).²

ACLPI is correct that Texas Low Emission Diesel fuel (also known as Texas LED fuel) is one of the eight types of fuels on the Boutique Fuels List. ACLPI is not correct, however, in asserting that because CARB diesel fuel is included as an approved low emission diesel fuel under the Texas LED rules, CARB diesel fuel is therefore already included among the fuels on the Boutique Fuels List. Texas LED fuel requirements allow CARB diesel fuel as a compliance option in lieu of meeting the regulatory standard for aromatic hydrocarbons and cetane number, but they also allow other compliance options that would not meet CARB diesel fuel requirements.³

Specifically, Texas LED fuel requirements allow four compliance options in lieu of meeting the 10% (volume) maximum aromatic hydrocarbon limit and the minimum cetane number of 48: (1) Fuel meeting CARB diesel requirements (except those for small refiners) as of January 18, 2005, including the designated equivalent limits; (2) fuel meeting the requirements of a CARB certified alternative diesel formulation (except those for small refiners) approved before January 18, 2005 to meet CARB diesel regulations in effect as of October 1, 2003; (3) fuel meeting the Texas LED requirements for alternative diesel fuel formulations; and (4) fuel meeting the requirements of an alternative emission reduction plan approved as a substitute fuel strategy that will achieve equivalent oxides of nitrogen (NO_x) emission reductions. Based on quarterly reports submitted to the Texas Commission on Environmental Quality for 2007, more than half the volume of Texas LED fuel in 2007 consists of fuel meeting compliance options (3) and (4) noted

above.⁴ Compliance options (3) and (4) do not exist in CARB diesel fuel.

The Texas LED fuel program was modeled on the CARB diesel fuel program, but Texas has adapted the program to meet needs specific to the Texas ozone nonattainment areas, especially the Houston-Galveston ozone nonattainment area, for which the Texas LED fuel program is approved into the SIP. As a result, the two diesel fuel programs are similar but not equivalent, as we noted in our August 3, 2006 final rule, in response to ACLPI's comment that we had failed to account for availability of similar diesel fuel in Texas in assessing the feasibility of using CARB diesel for nonroad engines. See 71 FR at 43981–82.⁵

ACLPI also asserts that, because CARB diesel is already approved in California, it is also approved in the applicable PADD. This is a reference to the PADD restriction, which is mentioned above and can be found in section 211(c)(4)(C)(v)(V). Under the PADD restriction, we are allowed to approve a fuel if it is "approved in at least one [SIP] in the applicable [PADD]." Arizona is in PADD 5, the same PADD as California, and Texas is in PADD 3. Our approval would, however, be subject to the other restrictions listed and discussed above. Thus, our approval must not cause an increase in the number of fuel types above those approved as of September 1, 2004, i.e., there must be "room" on the Boutique Fuels List, and we must consult with DOE on the effect of such a fuel on fuel supply and distribution in the affected or contiguous areas. As earlier mentioned, CARB diesel is approved into the California SIP. We would therefore, not be prohibited from approving CARB fuels for states within PADD 5, if there were room on the

Boutique Fuels List. At this time, however, there is no room on the list, and therefore, we are prohibited from approving CARB diesel into Arizona's SIP since it would be a different fuel type that is not already on the list. Because CARB diesel fuel and Texas LED fuel are not equivalent, as noted above, the two are not interchangeable on the Boutique Fuels List, and thus the only type of low emission diesel fuel on the Boutique Fuels List is the Texas LED fuel program. This program is approved into a SIP in PADD 3, but is not approved into a SIP in the applicable PADD, which is PADD 5. Thus, EPA is further prohibited from approving a low emission diesel fuel program into the Arizona SIP because of the PADD restriction.

B. Nonroad Engines and Equipment Exhaust

Comment 3: Since EPA relies upon its previous assessment in the August 3, 2006 final rule, ACLPI reasserts the objections raised in its comments submitted in response to that rulemaking in its letter dated August 1, 2005.

Response: As noted in the June 8, 2007 proposed rule, EPA is not changing its assessment in the August 3, 2006 final rule that requiring CARB diesel fuel for the control of nonroad engines and equipment exhaust is not currently feasible and is therefore not required as a BACM in the Maricopa County area. Except as specifically modified below, EPA is relying for this final rule on its discussion of Nonroad Engines and Equipment Exhaust in Section II.B(2) of the Agency's July 1, 2005 proposed rule, 70 FR at 38066–38067. We are also relying on our responses to public comments on this issue in Section II.B of our August 3, 2006 final rule, 71 FR at 43981–43983.

We note one further update to the information in footnote 7 of the August 3, 2006 final rule. There are currently thirteen, rather than six, approval letters on the Texas LED fuel program Web site⁶ providing for the use of alternative diesel fuel formulations. The second sentence in footnote 7 should now read as follows: "Although Section 114.312(f) provides that alternative diesel fuel formulations must provide comparable or better reductions of NO_x and PM, four of the thirteen alternative diesel fuel formulation approval letters to date have cited NO_x reductions alone, or (in one case) reductions of NO_x and

⁴ See July 29, 2008 Memorandum, "Summary of total TxLED production volumes reported for 2007" in the docket for this rulemaking. This summary indicates that 41% of TxLED fuel volume consists of fuel meeting the Alternative Emission Reduction Plan compliance option, and 11% of TxLED fuel volume consists of fuel meeting the TxLED requirements for alternative diesel fuel formulations. Forty-seven percent of TxLED fuel volume for 2007 consists of fuel meeting either the California diesel fuel standards (except those for small refiners) or the California certified alternative fuel formulations (except those for small refiners).

⁵ We described two significant differences between the two types of fuel: First, Texas LED rules allow the use of substitutes for LED fuel that achieve equivalent NO_x reductions but not necessarily equivalent PM reductions, and second, Texas LED rules have been amended to remove the ultra low sulfur requirement, which directly affects PM emissions, from diesel fuel, while as of September 1, 2006, there is now a 15 ppm sulfur content requirement at the retail level for CARB diesel fuel. See 71 FR at 43981–82. Compliance option (4) mentioned above corresponds to the first difference noted here.

⁶ As noted in footnote 7 of the August 3, 2006 final rule, the Web site location is: <http://www.tceq.state.tx.us/implementation/air/sip/cleandiesel.html>.

² Pursuant to section 211(c)(4)(B), California is not subject to the restriction in section 211(c)(4)(A) which triggers applicability of section 211(c)(4)(C).

³ See *Summary Comparison of CA and TX Diesel Fuel Programs* in the docket for this rulemaking for a table describing major features of both programs. See also description of the Texas LED fuel program in EPA rulemaking actions at 66 FR 57196 (November 14, 2001), 70 FR 17321 (April 6, 2005), 70 FR 58325 (October 6, 2005), and 73 FR 8026 (February 12, 2008).

hydrocarbons, but not PM, as the basis of approval.”

Comment 4: ACLPI further asserts that, with respect to EPA’s concerns that nonroad diesel fuel users will refuel outside the nonattainment area to avoid paying the higher cost of CARB diesel, the Texas LED rule provides guidance for Arizona since it applies to 102 counties even though only 8 of those counties are in the Houston nonattainment area. Citing EPA’s November 14, 2001 final rule approving the Texas LED rule into the SIP, ACLPI asserts that the principal reason for extending the scope of the rule to so many counties was to prevent refueling outside the nonattainment area. 66 FR 57196, 57216. ACLPI states there is no reason that a similar approach could not be adopted in Arizona.

Response: In addition to the Texas LED fuel program, EPA has approved two other state fuel programs under CAA Section 211(c)(4)(C) in which the covered area included attainment areas outside the nonattainment area for which SIP approval was sought. See 66 FR 20927 (April 26, 2001) for the Gasoline Volatility Program in Eastern and Central Texas, and 67 FR 8200 (February 22, 2002) for the Gasoline Sulfur and Volatility Program in Atlanta, Georgia. In each of these three cases, EPA’s approval of the state fuel program in attainment areas was based on the State’s demonstration that emission reductions attributable to the state fuel program in the attainment areas was necessary to help achieve attainment in the nonattainment area for which SIP approval was sought.

Specifically, in the case of the Texas LED fuel program, EPA noted three reasons for Texas’ conclusion that requiring LED fuel in the 110-county covered area benefits the 8-county Houston ozone nonattainment area. First, it will help ensure that LED fuel is used by intrastate and long-haul trucks that travel through the nonattainment area but purchase fuel in Texas outside the nonattainment area and within the covered area. Second, it will help reduce possible transport of ozone from the surrounding covered areas to the nonattainment area. Third, it will reduce the transport of NO_x from the surrounding covered areas to the nonattainment area. See 66 FR at 57214 and 66 FR 36542, 36545.

ACLPI’s reference to EPA’s statement at 66 FR 57216 is misquoted; in this part of the November 14, 2001 final rule approving the Texas LED rule into the SIP, EPA stated that “a principal purpose of extending the coverage of the LED rule to the 102 counties outside the 8-county Houston nonattainment area is

to ensure that intrastate and long-haul trucks traveling through the Houston area but re-fueling outside the Houston area are re-fueling with LED fuel.” (Emphasis added.) Thus preventing re-fueling with non-LED fuel outside the Houston area was one of three reasons for the expanded scope of the covered area, as described above, but it was not “the” principal reason, as ACLPI mistakenly asserts.

With respect to the potential use of CARB diesel fuel for nonroad engines and equipment, the preemption of state fuel controls in CAA section 211(c)(4)(A) does not extend to fuels used solely in nonroad engines and equipment and not for use in motor vehicles. See 70 FR 38064, 38066 (July 1, 2005), 69 FR 38958, 39072–73 (June 29, 2004). The choice of covered areas for a state diesel fuel program for nonroad engines and equipment might very well be affected, however, by the same kinds of reasons that would influence the design of the program if it were to include diesel fuel for on-road motor vehicles. We agree that the possible enlargement of the covered area beyond the nonattainment area is a factor Arizona could consider in evaluating the feasibility of a diesel fuel program for nonroad engines and equipment, but it is not the only factor Arizona would need to consider.

Such an enlarged program might help avoid the problem of re-fueling outside the Maricopa County area, but it would still face the same obstacles we have evaluated in our prior notices, *i.e.*, the uncertainty of fuel availability and the problem of fuel segregation and storage. Additionally, we note that the geographic considerations in assessing potential re-fueling avoidance are different in Arizona and Texas. Population in the Houston-Galveston ozone nonattainment area is about 22% of the statewide population but represents only 3% of the State’s land area. By expanding the covered area to include the Dallas-Fort Worth and Beaumont-Port Arthur ozone nonattainment areas as well as 95 nearby counties, the Texas LED fuel program covers about 79% of statewide population and 35% of the State’s land area. By contrast, population in the Phoenix nonattainment area is about 60% of statewide population but only 8% of the State’s land area. If a fuel program were expanded to include Pima County, which includes the next largest metropolitan area in Arizona, the population in the covered area would be about 76% of statewide population but only 16% of the State’s land area.

(Statistics are based on 2000 Census Bureau data).⁷

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; ⁸ 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 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 area 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 its 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 area PM–10 plan for the Maricopa County area at 65 FR 19964 and 66 FR 50252.

III. Final Action

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. EPA has concluded that it cannot approve a CAA section 211(c)(4)(C)(i) waiver for Arizona for CARB diesel because the effect of such an approval would unlawfully increase the total

⁷ See July 30, 2008 Memorandum, “Statistical Data for Arizona and Texas Based on 2000 Census” in docket for this rulemaking.

⁸ EPA notes that the discussion of MSM begins on p. 24 of ACLPI’s Opening Brief.

number of fuels approved into SIPs under section 211(c)(4)(C) as of September 1, 2004. Therefore, EPA is again approving the BACM demonstration in the MAG plan for the on-road source category without CARB diesel. Because EPA has found that 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, we are again approving BACM demonstration in the MAG plan for the nonroad source category without CARB diesel. For the reasons discussed above, EPA is also again approving the MSM demonstration in the MAG plan and is confirming that we appropriately granted in 2002 and 2006 the State's request for an extension of the attainment deadline for the area from December 31, 2001 to December 31, 2006. 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, "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. Executive Order 12898 (59 FR 7629, February 16, 1994) establishes a Federal policy for incorporating environmental justice into Federal agency actions by directing agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. Today's action will not have disproportionately high and adverse effects on any communities in the area, including minority and low-income communities.

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.

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. section 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 14, 2008. 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, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: August 4, 2008.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E8-18626 Filed 8-13-08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-R09-OAR-2008-0555; FRL-8701-7]

Delegation of National Emission Standards for Hazardous Air Pollutants for Source Categories; State of Arizona, Arizona Department of Environmental Quality, Pima County Department of Environmental Quality

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is amending certain regulations to reflect the current delegation status of national emission standards for hazardous air pollutants (NESHAP) in Arizona. Several NESHAP were delegated to the Arizona Department of Environmental Quality on June 4, 2008, and to the Pima County Department of Environmental Quality on June 16, 2008. The purpose of this action is to update the listing in the Code of Federal Regulations.

DATES: This rule is effective on October 14, 2008, without further notice, unless EPA receives adverse comments by September 15, 2008. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA-R09-OAR-2008-0555, by one of the following methods: