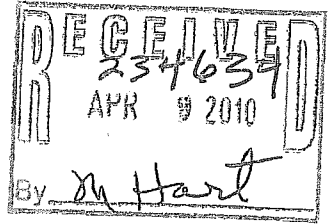


April 8, 2010

**CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

Lisa Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable Jan Brewer
Governor of Arizona
1700 W. Washington
Phoenix, AZ 85007

Benjamin H. Grumbles, Director
Arizona Department of Environmental Quality
1110 W. Washington St.
Phoenix, AZ 85007

Re: Notice of citizen suit under §304 of Clean Air Act –Noncompliance by State of Arizona with Commitments Regarding Transit Funding under the State Implementation Plans for Carbon Monoxide, Ozone, and PM-10.

Pursuant to 42 U.S.C. §7604(a)(2), we hereby provide notice to the above parties that the State of Arizona (“State”) is in violation of “an emission standard or limitation” under the Clean Air Act (“CAA” or “Act”), 42 U.S.C. § 7401 *et seq.* In particular, as discussed below, by repealing the funding of the Local Transit Assistance Fund (“LTAF”), the state has violated the Arizona state implementation plans (“SIP”) for carbon monoxide, ozone and PM-10. Unless this funding is restored, we intend to file a citizen suit in federal court to enforce this important SIP commitment.

As you may be aware, the state of Arizona has a long history of failing to adequately address air pollution in the Phoenix metropolitan area. In particular, the area has struggled with reaching attainment for three pollutants: carbon monoxide, ozone and particulates. As the state has struggled to address each of these pollutants, increasing public transportation has been an important control measure included in the various implementation plans.

Carbon Monoxide.

In 1978, EPA designated Maricopa County a nonattainment area for carbon monoxide ("CO"). On May 5, 1982, EPA formally approved portions of the Maricopa County CO SIP and the overall CO SIP on the condition that certain deficiencies in the county's permit program for individual pollution sources be cured. On February 24, 1984, the EPA's Regional Administrator informed Arizona's governor that the state's 1979 SIP for Maricopa County was not adequate to attain the CO NAAQS by December 31, 1982. Additionally, the governor was warned that failure to submit an approved 1987 Extension SIP would result in a construction ban.

It was only after a citizen suit was filed against EPA for failing to perform its duties under the CAA that EPA disapproved the plan in 1986. On August 10, 1987, the U.S. District Court for the District of Arizona ordered EPA to promulgate a federal implementation plan ("FIP") under section 110(C) of the CAA. Shortly thereafter, in 1987 and 1988, the state submitted additional CO SIP revisions for Maricopa County. Based on these additional submittals, on August 10, 1988, EPA approved the CO NAAQS attainment demonstration and the additional control measures proposed by the state.

However, in March 1990, the Ninth Circuit Court of Appeals vacated EPA's 1988 approval of the CO attainment demonstration and directed EPA to promulgate a CO FIP for Maricopa County. *Delany v. EPA*, 898 F. 2d 687, 695 (9th Cir. 1990). The court vacated EPA's approved action because the Maricopa CO SIP did not go far enough, fast enough to demonstrate timely attainment. *Id.* On January 28, 1991, in response to the Ninth Circuit order, EPA published a CO FIP for Maricopa County.

In December 1992, Phoenix recorded two violations of the CO standard. On August 9, 1993, EPA issued a SIP call in the form of a letter to the Governor directing Arizona to submit a carbon monoxide SIP revision for Phoenix. In November 1994, Phoenix submitted a CO SIP to the EPA, later supplementing it with an April 4, 1994 submittal. ("1993 SIP Revision"). The 1993 SIP Revision included numerous transportation control measures that had been recently adopted by the Arizona State Legislature in a special session called by Governor Fife Symington to consider "measures necessary to comply with the requirements of the Federal Clean Air Act as amended by P. L. 101-549." Proclamation by the Governor of the State of Arizona dated November 23, 1993.

Among the provisions enacted by the Legislature in the special session was an amendment to A.R.S. §5-522 providing for the use of lottery proceeds to fund expanded public transportation. In order to fully understand the full import of 1993 legislation, it is necessary to retrace the history of the use of lottery proceeds to support public transportation in Arizona. The practice of using lottery proceeds to fund transportation needs in the state began shortly after the state lottery was approved by Arizona voters in 1980. In 1981, the Arizona legislature amended the lottery statutes to provide that not less than thirty percent (30%) of the total revenues from the sale of lottery tickets would go to the LTAF or the Arizona highway user fund. Ariz. Sess. Laws ch. 2 §§1&2 (1981)(second special session).

The statutes were further amended in 1986 to eliminate any deposit into the highway user fund, to limit the deposit into the LTAF to a maximum of twenty three million dollars (\$23,000,000) each fiscal year, and to provide for the deposit into a county assistance fund of any remaining proceeds up to seven million six hundred fifty thousand dollars (\$7,650,000), with any balance going to the state's general fund. Ariz. Sess. Laws ch. 382 §1 (1986)(second regular session). In 1987, the legislature amended the statute again, this time providing that after the payment of expenses authorized by A.R.S. §5-522(A), 75% of the excess proceeds, up to the maximum of \$23,000,000 would be deposited into the LTAF. Ariz. Sess. Laws, Ch. 309, §1 (1987). Notably, during that same year, the Arizona legislature adopted an "omnibus air quality bill" that established state support for expanded public transportation. Ariz. Sess. Laws, Ch. 365, §11 (1987).

In 1993, the statute was once again amended during the special session called to address air quality and the 1990 amendments to the Clean Air Act. In the omnibus air quality bill passed during that special session, A.R.S. §5-522(A) was amended to provide not only for the payment of expenses of the commission and repayment of any advances made from the general fund, but also to require payment of not less than 31.5% of the revenues received, up to a maximum of \$18,000,000 to the LTAF (unless the monies available to the state general fund were less than \$45,000,000). The statute continued to include the payment of 75% of any "excess" funds up to \$23,000,000 to the LTAF under Subsection B. Thus, provided the lottery generated sufficient funds, under the statutory structure enacted in 1993 to comply with the requirements of the CAA, the LTAF would receive a maximum of \$41,000,000 from lottery proceeds.

The increase in transit funding was one of the measures that the State relied upon in the 1993 SIP Revision for numeric credit. Specifically, in Chapter Two, Section I, entitled "Measures in H.B. 2001 Used for Numeric Credit" the SIP provides as follows:

Transit Improvements

For transit improvements, H.B. 2001 establishes two new funding sources. The first funding source is a new multistate lottery game. A maximum of \$18 million per year will be deposited into the statewide Local Transportation Assistance Fund (LTAF). .

....

Addendum to the MAG 1993 Carbon Monoxide Plan, p. 2-1. In the modeling for the plan, the State assumed that the Maricopa region would receive 60% of the maximum \$18 million, or approximately \$10.8 million per year from and after June 30, 1994. *Id.* Of that \$10 million, \$8.8 million would be available for increased transit. In addition, the entire bill, including all of the designated LTAF funding, was included in the commitments of the State of Arizona in the SIP submitted to EPA.

Although portions of the 1993 SIP were approved by EPA in 1995, the area continued to experience CO exceedances and in 1996, EPA reclassified Maricopa County as a "serious" nonattainment area. In July 1999, the State submitted the 1999 Carbon Monoxide Serious Area Plan

to EPA. The 1999 plan continued to include the transportation control measures included in the 1993 Revised Plan, including the transit funding authorized by HB2001.¹

In June 2003, the State submitted a request for redesignation and maintenance plan as a SIP revision. On September 22, 2003 EPA published a finding of attainment of the CO standard for Maricopa County. (68 FR 55008) On March 9, 2005, EPA approved the Revised 1999 MAG CO Serious Area Plan and the Maintenance Plan, which is essentially a continuation of the Serious Area Plan. (70 FR 11553)

Thus, the use of lottery proceeds to fund transit authorized by HB2001 and included in the SIP revisions submitted in 1994, was approved by EPA as a part Arizona's CO SIP, and as such, the commitment is federally enforceable.

Ozone:

Under the 1977 Amendments to the Clean Air Act, Phoenix was designated a nonattainment area for ozone. After the adoption of the 1990 Amendments to the CAA, in November 1990, Phoenix was classified as a "moderate" ozone nonattainment area. The CAA required the State of Arizona to submit an ozone control plan for the Phoenix nonattainment area no later than November 15, 1993. The State submitted an Ozone SIP proposal for the Phoenix nonattainment area on November 15, 1993, however, on April 13, 1994, the EPA found that the State's ozone SIP did not meet the completeness criteria of section 110(k)(1)(A) of the CAA because the plan failed to include, in fully adopted and enforceable form, all of the measures relied upon in the 15% demonstration. This started a two year clock for EPA to promulgate a 15% rate of progress federal implementation plan (FIP).

On August 13, 1996, a citizen suit, *ALAA v. Browner*, was brought to compel EPA to promulgate the FIP, as required by the CAA. In May 1997, the parties in *ALAA v. Browner* entered into a consent decree whereby EPA agreed to adopt federal controls on ozone-forming pollutants within one year unless the State adopted adequate controls of its own before then. In July, 1997, yet another citizen suit was brought to compel EPA to perform its nondiscretionary duty with respect to determining whether the Phoenix, Arizona ozone nonattainment area had timely attained the national ambient air quality standard for ozone. As a result, on November 6, 1997, EPA reclassified the Phoenix area as a "serious" nonattainment area. On May 27, 1998, EPA promulgated the FIP for the 15% rate of progress requirement. (64 FR 36243)

On May 19, 2000, the EPA published a Notice of Proposed Rulemaking in which it proposed to determine that the Phoenix metropolitan serious ozone nonattainment area had attained the 1-hour ozone air quality standard deadline under the CAA. A few months later, on December 14, 2000, ADEQ submitted the State's Serious Area Ozone SIP for Maricopa County. In May 2004, the State submitted a One-Hour Ozone Redesignation Request and Maintenance Plan. The Serious Area

¹ The 1999 plan was revised slightly and resubmitted in 2001 after the state legislature passed a bill repealing the remote sensing portion of the Vehicle Emissions and Inspection program (which had been separately approved by EPA in 1995). The revisions in the resubmittal, however, did not affect the LTAF funding.

Ozone SIP, the Maintenance Plan and the Redesignation request were all approved by EPA on June 14, 2005. The next day, June 15, 2005, the one-hour ozone standard was revoked and the more stringent 8-hour standard went into effect.

Under the new standard, the Maricopa County eight-hour ozone nonattainment area was classified as "Basic" with an attainment date of June 15, 2009. The State submitted its Eight Hour Ozone Plan for the Maricopa Nonattainment Area in June 2007 and in February 2009 submitted a Redesignation Request and Maintenance Plan. The eight-plan and maintenance plan, like the one-hour ozone plans before them, rely upon "the legally-binding committed measures in programs and plans that have already been approved by EPA [including]...the Serious Area Carbon Monoxide Plan and Carbon Monoxide Maintenance Plan, approved by EPA on April 8, 2005..." MAG Eight-Hour Ozone Redesignation Request and Maintenance Plan For The Maricopa Nonattainment Area, ES-3.

PM-10

In 1996, the Phoenix area was classified as a serious PM-10 nonattainment area under the CAA and was required to develop a nonattainment plan that provided for expeditious attainment of both the annual and 24 hours PM-10 standards and met the other applicable CAA plan requirements for serious areas. (61 FR 21372) Since 1996, Arizona has made several SIP submittals and adopted various control measures but continues to violate the 24 hour standard.

The serious area PM₁₀ plan was first submitted on July 8, 1999. EPA found the plan "complete" on August 4, 1999 but in November 1999, EPA notified the State that additional work needed to be done in order for EPA to approve it. Consequently, on February 23, 2000, the State submitted a revised Serious Area PM₁₀ plan, which was found "complete" by EPA on February 25, 2000.

On April 13, 2000, EPA proposed to approve the Serious Area PM₁₀ plan for the annual standard, but took no action on the 24 hour standard. Consequently, in May 2001, this office filed a citizen suit in U.S. District Court on behalf of Phoenix residents to compel EPA to take action. *Bahr v. Whitman*, CIV 01-0835 PHX ROS (D. Ariz.) The parties entered into a Consent Decree requiring EPA to take action on the 24 hour standard on or before September 14, 2001, and to approve or disapprove the entire plan by January 14, 2002. *Id.*, consent decree entered October 2, 2001.

On July 25, 2002, EPA published its final approval of the Serious Area Plan. The approval also granted the Phoenix area the maximum five year extension of the attainment deadline, giving the area until December 31, 2006 to come into compliance with the NAAQS. On behalf of residents of the Phoenix area, this office filed a Petition for Review of the Serious Area Plan with the Ninth Circuit Court of Appeals. *Vigil v. Leavitt*, 381 F. 3d 826 (9th Cir. 2004). In ruling on that Petition, the Ninth Circuit held that EPA's approval of the Serious Area Plan was arbitrary and capricious and remanded the action to EPA for further consideration of whether Arizona's decision to reject CARB diesel as an emissions control measure satisfied BACM and MSM. The court also remanded the question of Arizona's eligibility for the extension of the attainment deadline insofar as that question depended on EPA's determination regarding MSM.

In June 2005, EPA proposed to reapprove the BACM and MSM demonstrations and finalized the re-approval in July 2006. This office again petitioned for review, however, that action was resolved through a voluntary remand when it became apparent that the State would not be able to meet the extended December 31, 2006 deadline for attainment. In March 2007 EPA filed a proposed finding of nonattainment and the final notice of nonattainment was published on June 6, 2007. (72 FR 31183)

Under section 189(d) of the CAA, serious PM-10 nonattainment areas that fail to attain are required to submit within 12 months of the applicable attainment date, "plan revisions which provide for attainment of the PM-10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area." 42 U.S.C. §7513a(d).

Arizona submitted its 5% plan to EPA by the December 2007 deadline and EPA had six months, or until June 30, 2008 to find the plan "complete." 42 U.S.C. §7410(k)(1)(b). Because EPA did not take action by that date, the plan was deemed "complete" by operation of law. *Id.* Once a plan is deemed complete, EPA then has 12 months to approve or disapprove the plan. *Id.* at (k)(2). Thus, in the case of the Phoenix area's 5% plan, EPA had until June 30, 2009 to approve or disapprove the submitted plan. As of this date, EPA has taken no action on the 5% plan and in December 2009, this office filed an action in federal district court requesting enforcement of that deadline. *Bahr v. Jackson*, CV09-2511-PHX-MHM (D. Ariz.).

The Serious Area PM₁₀ plan that is currently in force, like the Ozone plans, relies in part upon committed existing control measures contained in the Serious Area Carbon Monoxide Plan. See Revised Serious Area PM₁₀ Plan, p. 4-1. The specific control measures relied upon are set forth in Appendix B to the plan. In that Appendix, the plan specifically addresses transit funding and the fact that the Transit Department's operating budget includes state lottery funding. *Id.*, Appendix B, p. 8-4. In fact, the Appendix also includes a copy of the description of the Measures in H.B. 2001 from the Addendum to the MAG 1993 Carbon Monoxide Plan, which lists the transit improvements quoted above. Thus, the LTAF funding is also an enforceable commitment under the Serious Area PM₁₀ plan.

Effect of Repeal of LTAF Funding.

Once EPA approves all or part of a state implementation plan, then the approved portions of the SIP become enforceable as federal law. CAA Sections 113, 304(a) and (f), 42 U.S.C. §§7413, 7604(a) and (f). Moreover, once a SIP is approved, the State is without power to revise or repeal its provisions without EPA approval. *See, e.g. United States v. Ford Motor Company*, 814 F. 2d 1099 (6th Cir. 1987), *cert. denied*, 484 U. S. 822. Because the deposit of lottery funds into the LTAF is part of the approved CO, Ozone, and PM-10 SIPs it is enforceable as *federal* law, and no unilateral act by the State can effectively repeal it.

On March 18, 2010, Governor Brewer signed HB2012 (substituted for SB1012) into law, which amended A.R.S. §5-522 to repeal the deposit of lottery funds into the LTAF. . Specifically, 42

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Hon. Jan Brewer
Benjamin H. Grumbles

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U.S.C. §7604(a)(1) provides that "any person may commence a civil action on his own behalf...against any person...who is alleged to have violated ...or to be in violation of ...an emission standard or limitation under this chapter." *See also McCarthy v. Thomas*, 27 F. 3d 1363, 1365 (9th Cir. 1995) ("A FIP or a SIP, designed to remedy a nonattainment problem, is enforceable in federal court against a state by (1) the EPA or (2) a citizen to the extent permitted by the Eleventh Amendment."); *Olson v. State of Arizona*, 166 Ariz. 455, 456, 803 P. 2d 448, 449 (App. 1990)("Once the EPA approves a SIP, it becomes enforceable as federal law.") Section 304(f) expressly provides that "the term 'emission standard or limitation under this chapter' means...any condition or requirement under an applicable implementation plan relating to...vehicle inspection and maintenance plans...." 42 U.S.C. §7604(f)(3). Thus, the LTAF is an "emission standard or limitation" and subject to enforcement by a citizen suit. Moreover, this repeal of funding for the LTAF not only subjects the State to a citizen suit, but also subjects the State to possible sanctions, including highway sanctions. 42 U.S.C. §7509(a)(4).

If the State of Arizona does not correct the above-described violation within 60 days, be advised that we intend to initiate legal action under 42 U.S.C. §7604(a)(2) of the CAA to compel compliance. This notice is submitted on behalf of:

Sandra L. Bahr
2046 N. 10th St.
Phoenix, Arizona 85006

Kelly Paisley
11317 E. Butherus Drive
Scottsdale, AZ 85297

I am acting as counsel for the above-named parties and ask that all communications regarding this matter be directed to me at the address shown in the letterhead.

Sincerely,



Joy E. Herr-Cardillo

Cc: Jared Blumenfeld, Regional Administrator, EPA Region 9
Colleen McKaughan, Associate Director, Air Division, EPA Region 9

