ADEQ Arizona Department of Environmental Quality Memorandum

1. In your agency's experience implementing the Clean Air Act (CAA), what is working well? What is not working well?

The Arizona Department of Environmental Quality (ADEQ) believes that the CAA, as it was originally envisioned, has worked well. The initial application of the National Ambient Air Quality Standard (NAAQS) provisions and the programs developed to protect them have limited the number of acute public health problems associated with short term exposure to high concentrations of air pollution. For example, since 1987 the concentrations of carbon monoxide, dust and ozone in the Phoenix metropolitan area have been reduced by 83 percent, 40 percent and 6 percent, respectively. These improvements occurred despite the area's population increasing from 1.98 million to 3.84 million people between 1990 and 2010.

There are provisions in the CAA, though, that do not appear to make as much sense as they once did. For example, the CAA requires EPA to review the NAAQS every five years, and if science can demonstrate that there is a documentable health impact to any individual, the standard must be changed to be protective of that individual's health, *without regard to the economic impact associated with the lower standard*. Due to the law of diminishing returns, this scenario often defies reason – and can actually do more harm than good because the single best indicator of a healthy natural environment is a healthy economy. In addition, recent changes to NAAQS have been heavily litigated, delaying the implementation of new standards to the point where the standard is being reviewed a second time before States ever get the opportunity to implement the previous standard (e.g. ozone).

Under the CAA, once EPA sets the NAAQS, each state is required to develop a State Implementation Plan, or SIP, to remedy areas where the NAAQs are not being met. This makes perfect sense in that the States are far better suited to develop plans that balance environmental benefit with economic impact. The CAA tasks EPA with ensuring that the state plans are consistent with the CAA's provisions, and requires EPA to approve or deny the plan within 12 months of deeming the SIP complete, but no later than 18 months after receiving the SIP from the state. Nothing in the CAA allows EPA is to substitute its own judgment for a state's. EPA's authority is limited to reviewing the state's plan for compliance with the CAA.

For a variety of reasons, EPA limits its work only to those SIPs that EPA considers important. Often times, action on SIPs deemed unimportant is delayed, for as much as 20 years. This exposes EPA to litigation for failure to perform a non-discretionary duty, resulting in settlements that typically require the affected state to update and resubmit a SIP on a schedule agreed upon by EPA and the plaintiffs - with no input from the state. In some cases, these settlements do not leave enough time for the resubmission of a SIP and instead commits EPA to developing its own Federal Implementation Plan, or FIP, to

take place of the SIP - further excluding the state from its right to manage its own resources. This is completely contrary to the intent of the CAA, and represents the current situation in Arizona regarding its submission of a SIP dealing with Regional Haze.

Compliance with the federally established NAAQS is not only the basis for determining when a SIP is needed, but also for determining if a SIP is working. The CAA has provided exceptions to compliance with the NAAQS, though, if a natural phenomenon is the cause of the exceedance. As you can imagine, this provision of the CAA is of particular interest to Arizona where during the monsoon season, outflow from collapsing thunderstorms can lead to extremely large walls of dust moving hundreds of miles throughout the State. This is particularly problematic for the Phoenix metropolitan area, which is subject to some of the most stringent dust controls in the nation, but can not control dust coming from other portions of the State. EPA has developed an exceptional events rule to allow States to exclude the exceedance of a NAAQS that is due to a natural or exceptional event. By EPA's own admission, the rule is poorly written and difficult to implement. There are no deadlines for EPA to take action in response to a State's demonstration; the only criterion against which a demonstration is to be judged is "EPA's satisfaction"; and any decision EPA makes is not appealable until an otherwise appealable decision is based upon the finding. While EPA has developed guidance that starts to address some of these issues, there is still not enough due process, certainty or predictability in implementing these provisions of the CAA.

2. Do state and local governments have sufficient autonomy and flexibility to address local conditions and needs?

The CAA was initially designed to allow States the autonomy and flexibility to address local conditions, and balance those needs with protection of the environment. In recent years, however, that autonomy appears to have eroded. Arizona uses a stakeholder-driven process to identify, select and implement the controls necessary to reduce concentrations of air pollution. This process is open to all parties and allows for full consideration of the environmental problem and the solutions that best work for State's environment and economy, while also ensuring compliance with the CAA. Instead of reviewing SIP submissions for CAA compliance, EPA seems compelled to ensure that its action on the SIP is completely devoid of litigation risk. This often means duplicating the State's technical work and delaying its decisions based on last minute comments from parties that did not bother to involve themselves in the State's SIP process, but may later bring a lawsuit challenging EPA's decision. Under the threat, or as a result, of litigation, EPA often proposes less than full approval, and in some cases, substitute its own judgment for the State's, leading to requirements that the State did not select, and in some cases, does not support.

3. Does the current system balance federal, state, and tribal roles to provide timely, accurate permitting for business activities, balancing environmental protection and economic growth?

Arizona's experience has been that EPA's current system for taking action on SIPs no longer works. EPA often decides when to review SIPs based upon the risk of being sued by special interest groups, and will often delay decisions on SIPs to accommodate last moment or even late comments filed by parties that did not involve themselves in the state's process. This has led to the state process being marginalized, and resulted in significant delays in implementing environmental protections. Rather than take quick action on a SIP that would result in immediate implementation, EPA often takes years to review the SIP. In 2007, Arizona submitted a SIP to address particulate matter in the Phoenix metropolitan area. It wasn't until September of 2010 that EPA finally took action on the SIP, using data that wasn't available in 2007 to propose its partial disapproval. This type of delay creates uncertainty for local businesses, reduces the predictability of government, and delays potential environmental benefits.

With respect to Exceptional Events, entire economies can be held hostage waiting for EPA to decide if the State was correct in its position that specific events were beyond any reasonable control. Over time, the Phoenix metropolitan area, as required by the CAA, has implemented Reasonably Available Control Measures, then Best Available Control Measures, and then Most Stringent Measures to reduce dust from activities in the area. When it was determined that those measures did not result in the area's attainment of the standard, EPA required the community to reduce its emissions of dust by five percent every year until attainment is reached (resulting in submittal of the plan in 2007 as mentioned above). After five years of continual reductions of five percent, there are very few exceedances that are directly related to local activity, and none that could be prevented by additional area-wide dust prevention regulations. Although 2010 was the first year in many without a dust exceedance, 2011 resulted in multiple exceedances, the vast majority of which were related to giant summer dust storms that are common in the area and clearly beyond any reasonable control. Arizona has experienced similar issues this year, though not quite to the extreme of 2011. In order to avoid further draconian reductions of dust emissions each year, Arizona will likely spend more than $500,000 submitting demonstrations to EPA that the dust from these storms was uncontrollable and/or not of a local origin. Arizona expects to make similar expenditures for 2012 and is considering this as an on-going budget item for future years as these dust storms are semi-regular natural occurrences in Arizona.

4. Does the CAA support a reasonable and effective mechanism for federal, state, tribal and local cooperation through State Implementation Plans? How could the mechanism be improved?

The framework for supporting reasonable and effective mechanisms for federal, state, tribal and local cooperation in a SIP or Tribal Implementation Plan (TIP) exists in the CAA. The previously identified issues could be resolved through small changes to the existing framework resulting in improved operation of the existing framework under the CAA. Such changes could include: 1) making approval of a SIP automatic as a matter of law 12 months after it has been deemed complete if EPA fails to take action; 2) requiring

parties that comment to EPA regarding a SIP to provide comments during the State's SIP development in order to have standing in EPA's decision to approve or deny a SIP; and/or 3) requiring EPA to approve a SIP if the SIP meets the terms of the CAA by a preponderance of the evidence (rather than providing EPA with complete deference).

5. Are cross-state air pollution issues coordinated well under the existing framework?

While the basis for cooperation between States exists and in some places is encouraged by the CAA, the programs meant to foster that cooperation have been difficult to implement. For example, Congress tasked the Grand Canyon Visibility Transport Commission with developing a set of recommendations to improve visibility in areas of national significance on the Colorado Plateau, including the Grand Canyon and Petrified National Forest. The CAA was then amended to enable the implementation of the Commission's findings. Through a successor organization, the Western Regional Air Partnership, five states and one municipality (AZ, NM, UT, WY, OR and the City of Albuquerque) developed a regional program for reducing emissions of visibility impairing pollutants that impacted the Colorado Plateau. In Arizona, the regional program was codified and submitted to EPA in a Regional Haze SIP in 2003 and a revised Regional Haze SIP in 2004. The other states provided similar submissions. Until the summer of 2010, Arizona worked with the other states to make the multi-state program viable, but in the end, EPA's regional offices in San Francisco, Denver and Dallas could not agree on a method for approving the program under the CAA, and Arizona was forced to resubmit a state-only Regional Haze SIP in February 2011 (this was beyond the deadline set in the CAA, and the subject of the Regional Haze lawsuit mentioned below).

The existing framework of the CAA includes provisions that require consultation when cross-state air pollution issues are considered, but these provisions must be enhanced. As the NAAQS are progressively lowered, cross-state and international contributions to local air pollution concentrations becomes increasingly important. States need the ability to work collaboratively with their neighbors to reduce concentrations of air pollution. EPA regional offices should be given broader authority and make a commitment to work together to approve multi-state plans.

6. Are there other issues, ideas or concerns relating to the role of federalism under the CAA that you would like to discuss?

The framework of the CAA rightfully provides states with the ability to decide how environmental benefits should be achieved in each state and at what cost. In recent years EPA's inaction, either in approving or disapproving SIPs, has created an environment where states' rights have been diminished. EPA's inaction leads to lawsuits from groups with only one interest or objective in mind. To avoid extremely short deadlines set by the court, EPA has engaged in a practice of settling these lawsuits and negotiating deadlines by which EPA will act on a state's plan. If EPA can not approve that plan, it then

develops a federal plan to address any deficiencies that it has identified, rather than resolving the deficiencies with the state as contemplated by the CAA.

Arizona appears to be unique in its attempt to become involved in the litigation that comes from single-minded special interest groups. Recently, Arizona successfully intervened in the litigation regarding Regional Haze, but its success ended there. Even though the State was listed as a party to the lawsuit, Arizona was never consulted by either the plaintiffs or its co-defendant, EPA in finalizing or amending the settlement. When the other parties reached two separate agreements on the matter, the Court approved the negotiated settlements before Arizona even had time to object. In both cases the court had to withdraw its decision, only to dismiss Arizona's arguments and reaffirm a decision that appears to have been pre-determined.

The "sue and settle" approach further frustrates Arizona's ability to administer its own SIP process. Under normal circumstances, EPA will review a SIP and either fully approve, partially approve and partially disapprove, or fully disapprove a SIP. Each of these actions provides states with the opportunity to accept EPA's approval or disapproval, correct the identified deficiency and resubmit the SIP, or use its rights to legally challenge EPA's decision. As a condition of the EPA's Regional Haze settlement, however, EPA has agreed to either: 1) approve the State's plan; or 2) prepare and adopt a Federal Implementation Plan for any deficiencies it might identify in the State's plan.

In July 2012, EPA proposed the partial approval and partial disapproval of a single element of Arizona's February 2011 Regional Haze SIP. This announcement was the first time that EPA identified specific issues in Arizona's analyses, even though EPA had the document for almost 17 months prior to its decision. Arizona was not provided the opportunity to correct and resubmit its SIP, or the opportunity to challenge EPA's decision until EPA had also proposed its own remedy. Furthermore, EPA only acted on a portion of Arizona's SIP, leaving action on the rest of the SIP for a date beyond that set in the CAA (the CAA also does not allow for the splitting of the decision as allowed under the Consent Decree). Arizona plans to challenge these efforts.

The CAA was built upon a model of cooperation. EPA was to set the NAAQS. States were to determine the best ways to come into compliance with those standards. EPA would then review the state's plans to ensure that the process was applied appropriately. Unfortunately, over time, EPA has begun scrutinizing the substance of each plan, in addition to the process, and in many cases, has begun to replace the state's judgment with its own. As a result, outside parties no longer fully participate in the state's SIP process, opting instead to threaten to sue EPA if an outcome does not match their organization's desired outcome. This creates delay and inaction on EPA's part, delaying implementation of measures designed to achieve compliance with the NAAQS, increasing the risk of litigation, and further diminishing the state's role in deciding what is in its own best interest.