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U.S. Environmental Protection Agency  
EPA Docket Center  
Docket ID Number: EPA-HQ-OGC-2024-0490  
Mail Code 28221T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Re: U.S. Environmental Protection Agency's Notice of "Proposed Consent Decree, Clean Air Act Citizen Suit" in *Center for Biological Diversity and Sierra Club v. Regan*, No. 4:24-cv-01900-HSG (N.D. Cal.), Docket ID Number: EPA-HQ-OGC-2024-0490.

To Whom It May Concern:

The Arizona Department of Environmental Quality (ADEQ) appreciates the opportunity to comment on the Environmental Protection Agency's notice of "Proposed Consent Decree, Clean Air Act Citizen Suit" in *Center for Biological Diversity and Sierra Club v. Regan*, No. 4:24-cv-01900-HSG (N.D. Cal.).<sup>1</sup>

ADEQ was established under the Environmental Quality Act of 1986 by the Arizona State Legislature as the state's cabinet-level environmental agency. ADEQ carries out several core functions including: planning, permitting, compliance, management, monitoring, assessments, cleanups, and outreach. ADEQ's mission is to protect and enhance public health and the environment.

This comment letter will briefly describe the background of the proposed consent decree and address ADEQ's main concerns. First, ADEQ wishes to highlight that the original complaint failed to reference ADEQ's 2023 submission of the "Final SIP Revision: 2023 Hayden Sulfur Dioxide Nonattainment Area for the 1971 and 2010 SO<sub>2</sub> NAAQS" (2023 SIP Revision)<sup>2</sup> to EPA.

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<sup>1</sup> 89 FR 87368 (Nov. 1, 2024).

<sup>2</sup> See Arizona Department of Environmental Quality, Final SIP Revision: 2023 Hayden Sulfur Dioxide Nonattainment Area for the 1971 and 2010 SO<sub>2</sub> NAAQS (Oct. 3, 2023).

Second, ADEQ wishes to clarify that the Federal Implementation Plan (FIP) described in the proposed consent decree would apply only to the disapproved elements of the Hayden Sulfur Dioxide (SO<sub>2</sub>) SIP. Lastly, ADEQ proposes that the August 28, 2026 deadline for the FIP be extended to December 18, 2026.

## **I. Background**

### **A. Consent decree**

On May 11, 2024, Plaintiffs Center for Biological Diversity and Sierra Club filed an amended complaint to the United States District Court for the Northern District of California, alleging that EPA failed to perform certain non-discretionary duties in accordance with the federal Clean Air Act.<sup>3</sup> Plaintiffs alleged that EPA failed to: determine that certain nonattainment areas under the 2010 primary National Ambient Air Quality Standards (NAAQS) for SO<sub>2</sub> had failed to submit required state implementation plans; promulgate FIPs for certain SO<sub>2</sub> nonattainment areas; and determine whether certain nonattainment areas had timely attained the NAAQS.<sup>4</sup>

On November 1, 2024, under section 113(g) of the Clean Air Act (CAA), EPA provided notice of a proposed consent decree in the case. The proposed consent decree establishes deadlines for EPA to take action.

### **B. Hayden, Arizona SO<sub>2</sub> Nonattainment Area**

On March 18, 2016, EPA published a finding that Arizona had failed to submit the required SO<sub>2</sub> nonattainment plan for the Hayden, Arizona nonattainment area (Hayden SO<sub>2</sub> nonattainment area) by the submittal deadline.<sup>5</sup> This finding triggered a CAA requirement that EPA promulgate a FIP within two years of the finding, unless, before promulgating the FIP, the state had made the necessary complete submittal and EPA approved such submittal as meeting applicable requirements.<sup>6</sup> Arizona did not submit a complete SIP within the required timeframe. As a result, EPA was required to promulgate a FIP for the Hayden SO<sub>2</sub> nonattainment area by April 18, 2018. EPA has not complied with this CAA requirement. Plaintiffs further allege that Arizona has failed to make the necessary complete submittal and obtain EPA approval of the required SIP elements.

The finding of failure to submit the required Hayden SO<sub>2</sub> nonattainment plan also triggered the sanctions clock outlined in 42 U.S.C. § 7409(a) and implemented according to 40 CFR § 52.31(d)(1).

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<sup>3</sup> Proposed Consent Decree, Center for Biological Diversity and Sierra Club v. Regan, No. 4:24-cv-01900-HSG (N.D. Cal. Nov. 1, 2024) [hereinafter Consent Decree] at 2.

<sup>4</sup> *Id.* at 5-9.

<sup>5</sup> 81 FR 14736, 14738 (Mar. 18, 2016).

<sup>6</sup> CAA §110(c)(1); 42 U.S.C. § 7410(c)(1).

Currently, the Hayden SO<sub>2</sub> nonattainment area is under both highway and offset sanctions. These sanctions will be permanently lifted upon a final EPA finding that the deficiency forming the basis of the finding of failure to submit has been corrected.<sup>7</sup>

**II. The consent decree should reflect that ADEQ submitted to EPA a SIP revision for the Hayden SO<sub>2</sub> nonattainment area in October 2023, and this SIP revision has since been deemed administratively complete under section 110(k)(1)(B) of the Clean Air Act.**

The Plaintiffs allege that Arizona has failed to submit a SIP revision for the Hayden SO<sub>2</sub> nonattainment area and that EPA has not approved the required SIP elements.

ADEQ submitted the *Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO<sub>2</sub> NAAQS* (ADEQ 2017 SIP) and accompanying rules to EPA on March 8, 2017.<sup>8</sup> Then on November 14, 2018 EPA released the final rule, approving the rules submitted with the SIP in March 2017 into the Arizona SIP.<sup>9</sup>

On November 5, 2020 EPA published a limited approval and limited disapproval of the Hayden Smelter rule A.A.C. R18-2-B1302, submitted to EPA with the ADEQ 2017 SIP.<sup>10</sup> EPA issued its limited disapproval because some rule provisions conflict with the requirements of CAA §§ 110 and 172(c)(6). EPA found: 1) the rule does not contain any numeric emission limits or ongoing monitoring requirements corresponding to the levels of fugitive emissions that were modeled in the 2017 nonattainment SIP; 2) R18-2-B1302(E)(4) provides an option for alternative sampling points that could undermine the enforceability of the stack emissions limit; 3) R18-2-B1302(E)(6) allows for just under 10% of the total annual facility SO<sub>2</sub> emissions to be exempt from the continuous emission monitoring system (CEMS) requirement; 4) the rule lacks a method for measuring or calculating emissions from the shutdown ventilation flue, which could compromise the enforceability of the main stack emissions limit; and 5) the rule lacks a method for calculating hourly SO<sub>2</sub> emissions.<sup>11</sup>

EPA published its “partial approval and partial disapproval” of the 2017 SIP on November 10, 2020.<sup>12</sup> This final action approved the emissions inventory element under CAA §§ 172(c)(3) and (4) and affirmed that the State met the new source review (NSR) requirement for the Hayden SO<sub>2</sub> NAA under CAA § 175(c)(5).<sup>13</sup>

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<sup>7</sup> 40 CFR § 52.31(d)(5).

<sup>8</sup> 78 FR 47191 (Aug. 5, 2013).

<sup>9</sup> 83 FR 56736 (Nov. 14, 2018).

<sup>10</sup> 85 FR 70483 (Nov. 5, 2020).

<sup>11</sup> *Id.* at 70484; *see also* 85 FR 31113 (May 22, 2020).

<sup>12</sup> 85 FR 71547 (Nov. 10, 2020).

<sup>13</sup> *Id.* at 71552.

However, EPA disapproved the attainment demonstration, Reasonably Available Control Measures (RACM)/Reasonably Available Control Technology (RACT) analysis, enforceable emissions limitations, reasonable further progress (RFP) analysis, and contingency measures elements.<sup>14</sup>

ADEQ submitted the 2023 SIP Revision document on October 3, 2023.<sup>15</sup> EPA has not yet acted on the 2023 SIP Revision; however, under CAA §110(k)(1)(B), the 2023 SIP Revision was deemed administratively complete by operation of law on April 3, 2024. Further, on May 2, 2024, ADEQ received a completeness letter from EPA. Though EPA has not yet acted on the 2023 SIP Revision, EPA is not required to do so until May 2025.

ADEQ requests the consent decree be amended to reflect that Arizona submitted SIP revisions for the Hayden SO<sub>2</sub> nonattainment area, and that the 2023 SIP revision has been deemed administratively complete.

**III. The FIP described in the proposed consent decree will apply only to the disapproved elements of the Hayden SO<sub>2</sub> SIP. The consent decree should include limiting language for clarity.**

The proposed consent decree would require EPA to sign a final rulemaking notice on or before August 28, 2026, promulgating a FIP containing the emissions inventory, attainment demonstration, contingency measures, enforceable emissions limitations and controls, RACT and RACM analysis, nonattainment new source review (NNSR) analysis, and reasonable further progress (RFP) analysis elements for the Hayden SO<sub>2</sub> nonattainment area.<sup>16</sup> This provision should be adjusted to clarify that a FIP would only be limited to the disapproved elements of the 2018 Hayden SO<sub>2</sub> SIP, which are the attainment demonstration, RACM/RACT analysis, enforceable emissions limitations analysis, RFP analysis, and contingency measures elements.<sup>17</sup> ADEQ notes that the NNSR element listed in the proposed consent decree was approved by EPA in 2020.<sup>18</sup>

**IV. The August 28, 2026 deadline for EPA to promulgate a FIP for the Hayden, Arizona SO<sub>2</sub> nonattainment area should be extended to December 28, 2026 to allow the normal 18 months of review following the submission of rules supplementing the 2023 SIP Revision.**

The proposed consent decree provides that the deadline for EPA to promulgate a FIP for the Hayden SO<sub>2</sub> nonattainment area is August 28, 2026. As noted above, ADEQ submitted its 2023 SIP Revision to EPA on October 3, 2023. Since submitting this SIP revision, ADEQ has been working to complete a rulemaking that would bolster the 2023 SIP Revision's approvability.

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<sup>14</sup> *Id.*

<sup>15</sup> *Supra* note 2.

<sup>16</sup> Consent Decree, *supra* note 3, at 10.

<sup>17</sup> *Supra* note 13.

<sup>18</sup> *Id.*

ADEQ anticipates its proposed rule will go out for public notice and comment in February 2025. Further, ADEQ anticipates that the final rule will be published into the Arizona Administrative Register in June 2025. If the deadline were to be moved to December 28, 2026, EPA would have the normal 18 months (6 months for completeness and 12 months for action) to consider the relevant SIP revisions.

ADEQ does, however, understand that EPA may not need the full 18 months. ADEQ also understands that EPA was obligated to act on the 2023 SIP Revision by May 2025.

## V. Conclusion

ADEQ appreciates the opportunity to provide these comments on the proposed consent decree. ADEQ recommends that the final consent decree 1) acknowledge that a SIP revision has been submitted, 2) clarify that the FIP would only apply to the disapproved elements of the Hayden SO<sub>2</sub> SIP, and 3) extend the FIP deadline to December 18, 2026. If you have any questions, please contact me at (602)771-4684 or at [czecholinski.daniel@azdeq.gov](mailto:czecholinski.daniel@azdeq.gov).

Thank you for your consideration of ADEQ's comments.

Sincerely,

Signed by:



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Daniel Czecholinski, CHMM  
Director, Air Quality Division