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# ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

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Henry R. Darwin  
Director

*Via [www.regulations.gov](http://www.regulations.gov)*

February 1, 2012

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

Re: Docket No. EPA-HQ-OGC-2011-0929 Arizona Department of Environmental Quality Comments on the Proposed Consent Decree, Clean Air Act Citizen Suit

Dear Administrator Jackson:

The Arizona Department of Environmental Quality hereby submits the following comments in response to the U.S. Environmental Protection Agency's ("EPA") proposed consent decree in Civil Action No. 1:11-cv-01548 (ABJ) in the United States District Court for the District of Columbia ("Proposed Consent Decree").

EPA published a notice of the Proposed Consent Decree at 76 Fed. Reg. 75544 (December 2, 2011) under EPA Docket No. EPA-HQ-OGC-2011-0929. EPA subsequently recognized that the initial notice failed to mention three states covered by the decree, including the State of Arizona, and published a notice extending the deadline for comments relating to the decree as it affects these states to February 3, 2012.

As discussed below, EPA and the Department of Justice must withdraw or withhold consent to the Proposed Consent Decree, at least as it pertains to the State of Arizona, for two reasons:

1. EPA has not satisfied the prerequisites of section 110(c)(1) for the promulgation or approval of plans that "collectively meet the regional haze implementation plan requirements," as required by the Proposed Consent Decree. Specifically, EPA's treatment of the omission of plan elements as a "failure to make a required submission" violates section 110(c)(1).
2. The Proposed Consent Decree fails to address the state implementation plan ("SIP") submitted by Arizona under 40 C.F.R. § 51.308 (the "Section 308 SIP").

## **BACKGROUND**

On December 23, 2003, the State of Arizona submitted a state implementation plan ("SIP") addressing regional haze to EPA pursuant to 40 CFR § 51.309 ("Section 309"). Section 309 allows states to meet the Clean Air Act's regional haze requirements by implementing the recommendations from the Grand Canyon Visibility Transport Commission established under section 169B of the Clean Air Act. On December 30, 2004, the State of Arizona revised the proposed Section 309 SIP and resubmitted it to EPA.

On January 15, 2009, EPA took its only formal action on Arizona's Section 309 SIP, and determined that the state had failed to submit the plan elements required by 40 CFR §§ 51.309(d)(4) and 51.309(g).

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Around that same time, representatives of EPA informed the States of Arizona, Wyoming, Utah and New Mexico as well as the city of Albuquerque that the Section 309 SIPs submitted by each of the States could not be approved without resolving significant issues related to the regional plan.

Between January 15, 2009 and May 13, 2010, the State of Arizona developed the material to satisfy EPA's January 15, 2009 finding and worked with representatives of the States of New Mexico, Utah, and Wyoming, the city of Albuquerque and EPA Regions 6, 8 and 9 to resolve outstanding issues related to the Section 309 SIPs. On May 13, 2010, ADEQ determined that continuing with Arizona's application for a Section 309 SIP was not a feasible strategy for the State to meet the Clean Air Act regional haze requirements, and announced it would submit a SIP under the provisions of 40 CFR § 51.308 ("Section 308"). The State filed its Section 308 plan with EPA on February 28, 2011.

### **FAILURE TO SATISFY CAA § 110(c)(1) PREREQUISITES**

The Proposed Consent Decree provides that for states identified in Table A, including Arizona, EPA will propose and then proceed to promulgate a combination of FIPs and SIP approvals "that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations." EPA, however, has no authority to take this action under section 110(c)(1) of the Clean Air Act.

Section 110(c)(1) provides that:

The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Thus, for EPA to have authority to promulgate a regional haze FIP in Arizona, one of three events must have occurred: (1) a finding of failure to submit a regional haze SIP, (2) a finding of failure to satisfy the minimum criteria for a complete regional haze SIP under section 110(k)(1)(A) or (3) disapproval of a regional haze SIP submitted by Arizona.

None of these three events has occurred:

1. Arizona submitted a Section 309 regional haze SIP on December 23, 2003 and a revision on December 30, 2004, long before EPA's January 15, 2009 notice.
2. EPA has never made a finding of incompleteness for the Arizona SIP and the deadlines for doing so passed years ago. See Clean Air Act § 110(k)(1)(A). All of Arizona's submissions are therefore complete as a matter of law under Clean Air Act § 110(k)(1)(B).
3. EPA has taken no action to disapprove any of Arizona's regional haze submissions.

The January 15, 2009 notice nevertheless claims that a failure to make a required submission has occurred:

Arizona, New Mexico, and Wyoming have opted to develop SIPs based on the recommendations of the Grand Canyon Visibility Transport Commission under 40 CFR 51.309. All three States have *failed to submit the plan elements* required by 40 CFR

51.309(g), the reasonable progress requirements for areas other than the 16 Class I areas covered by the Grand Canyon Visibility Transport Commission Report. Arizona and New Mexico have also *failed to submit the plan element* required by 40 CFR 51.309(d)(4), the alternate stationary source program for control of sulfur dioxide (SO<sub>2</sub>).

74 Fed. Reg. 2392, 2393 (Emphasis added).

Section 110(c)(1), however, does not allow EPA to treat the omission of elements from a SIP submission as a failure to submit a SIP. Section 110(c)(1) is quite specific. If EPA believes SIP omissions render a SIP incomplete, the agency may make a finding under section 110(k)(1)(A) within the time period required by section 110(k)(1)(B) and start the FIP clock under the *second* clause of section 110(c)(1)(A). If EPA cannot make such a finding or, as in this case, fails to do so, the agency may disapprove the SIP, and start the FIP clock under section 110(c)(1)(B). By treating the alleged omission of elements from a SIP as the failure to make a required submission under the *first* clause of section 110(c)(1)(A), EPA is circumventing these procedures.

The January 15, 2009 notice is also inconsistent with the regional haze rules. Section 51.308(b) states that:

Except as provided in § 51.309(c), each State identified in § 51.300(b)(3) must *submit*, for the entire State, *an implementation plan for regional haze meeting the requirements of paragraphs (d) and (e)* of this section no later than December 17, 2007.

(Emphasis added.) Paragraphs (d) and (e) establish comprehensive requirements for initial implementation plans due by that deadline. Section 51.309(c) provides that:

Each Transport Region State electing to *submit an implementation plan under this section* must submit such a plan no later than December 17, 2007.

(Emphasis added.) Paragraph (d) then specifies comprehensive requirements for an initial Section 309 plan. Thus sections 51.308 and 51.309 define a submission as a regional haze plan meeting all of the requirements for an initial plan. These sections provide no basis for treating elements meeting individual requirements as separate submissions.

Even if EPA could treat the omission of plan elements as a failure to submit, it could not on that basis promulgate a combination of FIP and SIP approvals that “collectively meet the regional haze implementation plan requirements,” as the Proposed Consent Decree requires. By EPA’s logic, the SIP elements required by section 51.309(g) and 51.309(d)(4) constitute the “submissions” that Arizona failed to make. If EPA had any authority to promulgate a FIP, and again it does not, that authority would extend only to those elements of the SIP requirements identified in its notice. EPA would not have authority to promulgate a FIP containing all of the regional haze requirements of Section 308 or 309. EPA did not and could not find that Arizona failed to submit a plan under those sections.

Thus, EPA could comply with the Proposed Consent Decree’s requirements only if it could promulgate a FIP meeting the requirements of sections 51.309(g) and 51.309(d)(4) and at the same time fully approve an Arizona SIP meeting all of the other requirements of section 51.309. Arizona, however, has submitted Section 308 SIP as a substitute for its Section 309 SIP. Thus, EPA cannot take the required action. Moreover, even if the Section 309 SIP were still under consideration, EPA could not be certain that it is fully approvable and that the action required by the Proposed Consent Decree is possible. Indeed, as noted above, EPA has indicated that Arizona’s Section 309 SIP is not approvable.

In short, the action the Proposed Consent Decree requires EPA to take with regard to Arizona would violate section 110(c)(1) of the Clean Air Act.

Ms. Lisa Jackson  
February 1, 2012  
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### **FAILURE TO ADDRESS SECTION 308 PLAN**

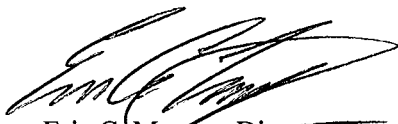
The Proposed Consent Decree ignores the fact that Arizona has already submitted a proposed implementation plan to deal with regional haze issues in the state, pursuant to the provisions of 40 CFR § 51.308. Arizona's Section 308 SIP, which ADEQ submitted on February 28, 2011, awaits approval by EPA pursuant to the provisions of Section 110 of the Clean Air Act.

Under the Proposed Consent Decree, Arizona receives no commitment from EPA with respect to making a decision on its proposed Section 308 Plan, and not even an acknowledgement that the plan exists. The only Arizona submission mentioned in the Proposed Consent Decree is the one formerly made by Arizona under Section 309.

Most importantly, under the Clean Air Act, if the EPA Administrator finds a proposed SIP to be inadequate, she is required to notify the applying state of the inadequacies, and set reasonable deadlines of up to 18 months after the date of notification for the submission of plan revisions by the State. See Clean Air Act § 110(k)(5). Under the proposed Decree (pp. 4-5), EPA has agreed to an order where it has no more than 6 months after notification before it either approves the State plan or promulgates a FIP for regional haze for Arizona. Since developing a FIP must necessarily take some time, the proposed Decree allows an even shorter time for Arizona to correct any SIP issues.

It is for the reasons stated above that EPA and the Department of Justice must withdraw or withhold consent to the Proposed Consent Decree as it pertains to the State of Arizona. Thank you for the opportunity to comment on the Proposed Consent Decree. Please feel free to contact me at (602) 771-2308 with any questions.

Sincerely,



Eric C. Massey, Director  
Air Quality Division

cc: Deborah Jordan, U.S. EPA Region IX  
Colleen McKaughan, U.S. EPA Region IX