



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

EPA-R09-OAR-2020-0173; FRL-10014-85-Region 9

**Limited Approval, Limited Disapproval of Arizona Air Plan Revisions, Hayden Area;
Sulfur Dioxide Control Measures - Copper Smelters**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a limited approval and limited disapproval of a revision to the Arizona State Implementation Plan (SIP). This revision concerns sulfur dioxide (SO₂) emissions from the primary copper smelter in Hayden, Arizona. Specifically, we are taking action on a local rule submitted by the Arizona Department of Environmental Quality (ADEQ) that regulates these emissions under the Clean Air Act (CAA or the Act).

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA-R09-OAR-2020-0173. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR**

FURTHER INFORMATION CONTACT section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Kevin Gong, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972-3073 or by email at gong.kevin@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, “we,” “us” and “our” refer to the EPA.

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I. Proposed Action

On May 22, 2020 (85 FR 31113), the EPA proposed a limited approval and limited disapproval of the Arizona Administrative Code section described in Table 1 that was submitted by the ADEQ for incorporation into the Arizona SIP.

TABLE 1 - SUBMITTED RULE

| Rule # | Rule Title | Effective Date | Submitted |
|-------------|---|----------------|---------------|
| R18-2-B1302 | Limits on SO ₂ Emissions from the Hayden Smelter | July 1, 2018 | April 6, 2017 |

We proposed a limited approval because we determined that this rule improves the SIP and is largely consistent with the relevant CAA requirements. We simultaneously proposed a limited disapproval because some rule provisions conflict with the requirements of section 110 and 172(c)(6) of the Act:

1. The rule does not contain any numeric emission limit(s) or ongoing monitoring requirements corresponding to the levels of fugitive emissions that were modeled in the attainment plan for the Hayden 2010 SO₂ nonattainment area (“Hayden SO₂ Plan”). Therefore, the rule does not fully satisfy CAA section 172(c)(6).
2. Rule subsection (E)(4) provides an option for alternative sampling points that could undermine the enforceability of the stack emission limit by providing undue flexibility to change sampling points without undergoing a SIP revision.
3. Rule subsection (E)(6) allows for just under 10% of total facility SO₂ emissions annually to be exempt from continuous emission monitoring system (CEMS) requirements, which could compromise the enforceability of the main stack emission limit.
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 emission limit.
5. The rule lacks a method for calculating hourly SO₂ emissions, so it is unclear what constitutes a “valid hour” for purposes of allowing data substitution.

Our proposed action and the associated Technical Support Document (TSD)¹ contain more information on the basis for this rulemaking and on our evaluation of the submittal.

II. Public Comments and EPA Responses

The EPA’s proposed action provided a 30-day public comment period. During this period, we received comments from Freeport-McMoRan Incorporated (FMI), ASARCO LLC

¹ EPA, “Technical Support Document for the EPA’s Rulemaking for the Arizona State Implementation Plan; Arizona Administrative Code, Title 18, Chapter 2, Article 13, Part B – Hayden, Arizona, Planning Area, R18-2-B1302 – Limits on SO₂ Emissions from the Hayden Smelter,” April 2020 (“Rule B1302 TSD”).

(“Asarco”), and ADEQ.^{2,3,4} All comments received on the proposal, including the comments from ADEQ, are included in the docket for this action. The comments from FMI pertain to Rule B1302 and are addressed below. The comments from Asarco and ADEQ pertain primarily to our proposed partial approval and partial disapproval of the Hayden SO₂ Plan,⁵ and we are addressing them in our final action on the Hayden SO₂ Plan. Copies of these responses are also included in the docket for this action.⁶

Comment: FMI commented on transitional provisions in R18-2-715(I), R18-2-715.01(V), and R18-2-715.02(F). The commenter stated that these provisions are intended to clarify the applicability of current SIP-approved rules for the 1971 SO₂ NAAQS in both the Hayden and Miami SO₂ nonattainment areas, until the effective date of the rules for the 2010 SO₂ NAAQS.

The commenter also noted that, when the EPA approved Arizona’s attainment plan and new rules for the Miami SO₂ nonattainment area,⁷ it did not act on all of the transitional provisions. Accordingly, the commenter explained that there is an inconsistency between the EPA’s SIP-approved rules and ADEQ’s rules (i.e., a “SIP gap”). Therefore, the Miami copper

² Letter dated June 22, 2020, from Todd Weaver, Senior Counsel, Freeport-McMoRan to Rulemaking Docket EPA-R09-2020-0109, Subject: “Re: Comments on Partial Approval and Partial Disapproval of Air Quality Implementation Plans; Arizona Nonattainment Plan for the Hayden SO₂ Nonattainment Area (EPA-R09-OAR-2020-0109) and Limited Approval, Limited Disapproval of Arizona Plan Revisions, Hayden Area; Sulfur Dioxide Control Measures – Copper Smelters (EPA-R09-OAR-2020-0173).”

³ Letter dated June 22, 2020, from Amy Veek, Environmental Manager, Asarco Hayden Operations, ASARCO LLC, to Ashley Graham, Air Planning Office, Air Division, EPA Region IX, Subject: “Re: Comments of ASARCO LLC on (1) “Partial Approval and Partial Disapproval of Air Quality Implementation Plans; Arizona; Nonattainment Plan for the Hayden SO₂ Nonattainment Area, 85 Fed. Reg. 31118 (May 22, 2020), Docket No. EPA-R09-OAR-2020-0109. (2) “Limited Approval, Limited Disapproval of Arizona Air Plan Revisions, Hayden Area; Sulfur Dioxide Control Measures—Copper Smelters, 85 Fed. Reg. 31113 (May 22, 2020), Docket No. EPA-R09-OAR-2020-0173.”

⁴ Letter dated June 18, 2020, from Daniel Czecholinski, Air Quality Division Director, ADEQ, to Rulemaking Docket EPA-HQ-OAR-2020-0109, Subject: “Partial Approval Partial Disapproval of Air Quality Implementation Plans; Arizona; Nonattainment Plan for the Hayden SO₂ Nonattainment Area, Docket ID Number: EPA-HQ-OAR-2020-0109.”

⁵ 85 FR 31118 (May 22, 2020).

⁶ Response to Comments Document for the EPA’s Final Actions on the “Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO₂ NAAQS” and Rule R18-2-B1302, “Limits on SO₂ Emissions from the Hayden Smelter” (September 2020) (“Response to Comments”).

⁷ 83 FR 56736 (November 14, 2018); 84 FR 8813 (March 12, 2019).

smelter must comply with both the old SIP rules for attaining the 1971 SO₂ NAAQS and the new SIP-approved rules for attaining the revised 2010 SO₂ NAAQS. The commenter asserted that “[t]his unintended consequence therefore subjects the copper smelter to an array of duplicative regulatory requirements that no longer serve any purpose.” The commenter also noted that ADEQ has sought to remedy the SIP gap issue by submitting a request to withdraw A.A.C. R18-2-715(F)(2) and R18-2-715(H), which apply only to the copper smelter in the Miami SO₂ nonattainment area, from the Arizona SIP.

FMI therefore requested that the EPA either amend its proposed action on Rule B1302 to include a proposed approval of Arizona’s revisions to A.A.C. R18-2-715 and R18-2-715.01, or to propose such approval in a separate, but concurrent action. The commenter stated that, by doing so, the EPA could “avoid having any period with a SIP gap by taking simultaneous final action on A.A.C R18-2-B1302 and R18-2-715 and R18-2-715.01” and “allow the existing SIP rules for attaining the 1971 SO₂ NAAQS to be properly subsumed by the newly approved SIP rules for attaining the revised 2010 SO₂ NAAQS.” The commenter asserted that such an approach would be consistent with the EPA’s efforts to implement Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.”

Response: The commenter is correct that the EPA has not yet proposed to act on the transitional provisions in A.A.C. R18-2-715(I) and R18-2-715.01(V). As we noted in the TSD for our proposed action on Rule B1302 for the Hayden area, in order to act on the revisions to 715 and 715.01, “we need to evaluate the effect of sunseting the existing SIP-approved requirements of those rules in conjunction with the new requirements for the Hayden smelter established in Rule B1302.”⁸ In conducting this evaluation, we explained that:

⁸ EPA, “Technical Support Document for the EPA’s Rulemaking for the Arizona State Implementation Plan;

. . . Rule B1302 does not include a numeric fugitive emission limit, whereas Rule 715 subsection (G) includes an annual average fugitive limit of 295 lb/hr.

In order to ensure that the existing fugitive limit of 295 lb/hr remains in the SIP, we are not acting on the revisions to Rule 715 at this time. Similarly, we are not acting on Rule 715.01, which includes requirements for SO₂ compliance determination and monitoring that support the enforceability of the emission limits and requirements in Rule 715.⁹

In other words, approval of R18-2-715(I) and R18-2-715.01(V) at this time would result in the removal of the existing SIP-approved fugitive emission limit and associated compliance requirements for the Hayden Smelter without a new fugitive emissions limit to replace it. For the reasons described in our proposed action on Rule B1302, as well as our proposed and final actions on the Hayden SO₂ Plan and the associated responses to comments, in the absence of a fugitive emissions limit, the Plan does not provide for the attainment of the 2010 SO₂ NAAQS.¹⁰ Therefore, an action to approve R18-2-715(I) and R18-2-715.01(V)—and thereby remove the existing fugitive emissions limit from the SIP without replacement—would interfere with attainment of the 1971 and 2010 SO₂ NAAQS.¹¹ Such an action would be impermissible under CAA section 110(I), which prohibits the EPA from approving any SIP revision that would interfere with applicable requirements concerning attainment and reasonable further progress or any other applicable CAA requirement. Therefore, we have not proposed to approve the

Arizona Administrative Code, Title 18, Chapter 2, Article 13, Part B – Hayden, Arizona, Planning Area, R18-2-B1302 – Limits on SO₂ Emissions from the Hayden Smelter,” April 2020 (“Rule B1302 TSD”), 10.

⁹ Id.

¹⁰ 85 FR 31113, 31114; Rule B1302 TSD, 7-8; 85 FR 31118, 31120; Response to Comments.

¹¹ We note that the existing SIP-approved fugitive emissions limit of 295 lb/hr, was intended to provide for attainment of the 1971 SO₂ NAAQS and is significantly higher than the fugitive emissions levels of 10.6 lb/hr (converter aisle), 40.1 lb/hr (anode aisle), and 28.7 lb/hr (flash furnace), which were assumed in the attainment demonstration in the Hayden SO₂ Plan. Therefore, the existing limit is not itself sufficient to constrain fugitive emissions to the level necessary to provide for attainment of the 2010 SO₂ NAAQS. Nonetheless, given that this limit is the only directly enforceable constraint on fugitive SO₂ emissions from the facility, we find that its removal would interfere with attainment of the 2010 SO₂ NAAQS.

transitional provisions in R18-2-715(I) and R18-2-715.01(V).¹²

We acknowledge that our inability to approve these provisions has resulted in a SIP gap and that the requirements in Rule 715 that apply to the Miami smelter are now duplicative of the requirements in SIP-approved rule A.A.C. R18-2-C1302. However, because the transitional provisions that apply to Hayden and Miami are inseparable from one another (i.e., both are contained within a single paragraph within R18-2-715(I) and R18-2-715.01(V)), we cannot separately approve the transitional provisions for Miami without also approving the provisions for Hayden, which is prohibited by CAA section 110(l).

On March 10, 2020, the EPA received a submittal from ADEQ seeking to withdraw A.A.C. R18-2-715(F)(2) and R18-2-715(H), which apply only to the Miami SO₂ nonattainment area, from the Arizona SIP. As noted by the commenter, approval of this SIP revision would remedy the SIP gap issue for the Miami area. We intend to act on this submittal in a separate rulemaking, as it is outside of the scope of this action, which concerns only Rule B1302.

III. EPA Action

No comments were submitted that change our assessment of the rule as described in our proposed action. Therefore, as authorized in sections 110(k)(3) and 301(a) of the Act, the EPA is finalizing a limited approval of the submitted rule. This action incorporates the submitted rule into the Arizona SIP, including those provisions identified as deficient. As authorized under section 110(k)(3) and 301(a), the EPA is simultaneously finalizing a limited disapproval of the rule.

¹² We note that, while we could *disapprove* these provisions for failure to comply with CAA section 110(l), we believe today's final limited disapproval of Rule B1302 and the related partial disapproval of the Hayden SO₂ plan provide sufficient clarity regarding the changes, if made by ADEQ and submitted in a SIP revision, that would be needed to result in proposed full approval of Rule B1302, as well as R18-2-715(I) and R18-2-715.01(V), without having to disapprove the latter provisions at this time.

As a result, the offset sanction in CAA section 179(b)(2) will be imposed 18 months after the effective date this action, and the highway funding sanction in CAA section 179(b)(1) six months after the offset sanction is imposed. A sanction will not be imposed if the EPA determines that a subsequent SIP submission corrects the identified deficiencies before the applicable deadline.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Arizona Administrative Code section described in the amendments to 40 CFR part 52 set forth below. Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.¹³ The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <http://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

¹³ 62 FR 27968 (May 22, 1997).

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because SIP approvals, including limited approvals, are exempted under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, will result from this action.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will 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.

G. Executive Order 13175: Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

I. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA lacks the discretionary authority to address environmental justice in this

rulemaking.

L. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability.

M. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. 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, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur Oxides.

Dated: October 10, 2020.

John Busterud,
Regional Administrator,
Region IX.

For the reasons stated in the preamble the EPA amends part 52, chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for Part 52 continues to read as follows:

AUTHORITY: 42 U.S.C. 7401 *et seq.*

Subpart D – Arizona

2. In § 52.120 amend Table 2 in paragraph (c), by adding an entry for “R18-2-B1302” after the entry for “R18-2-B1301.01” under the heading “Article 13 (State Implementation Plan Rules For Specific Locations)”.

§52.120 Identification of plan.

* * * * *

(c) * * *

Table 2—EPA-Approved Arizona Regulations

| State citation | Title/subject | State effective date | EPA approval date | Additional explanation |
|---|---------------------------------------|----------------------|--|--|
| ***** | | | | |
| Article 13 (State Implementation Plan Rules For Specific Locations) | | | | |
| ***** | | | | |
| R18-2-B1302 | Limits on SO2 from the Hayden Smelter | July 1, 2018. | [INSERT <i>Federal Register</i> CITATION], [INSERT DATE OF PUBLICATION] | Submitted on April 6, 2017. EPA issued a limited approval and limited disapproval of Rule R18-2-B1302. |
| ***** | | | | |

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