

**BEFORE THE AIR QUALITY CONTROL COMMISSION
STATE OF COLORADO**

IN THE MATTER OF PROPOSED REVISIONS TO AMBIENT AIR QUALITY
STANDARDS REGULATION, REGULATION NUMBERS 3, 7, AND 11 FOR THE
DENVER METROPOLITAN AND NORTH FRONT RANGE AREA OZONE ACTION PLAN

REBUTTAL STATEMENT OF WILDEARTH GUARDIANS

Pursuant to Air Quality Control Commission (“AQCC”) procedural regulations, WildEarth Guardians hereby submits the following rebuttal statement in the matter regarding proposed revisions to AQCC Ambient Air Quality Standards Regulations, Regulation Numbers 3, 7, and 11, for the proposed State Implementation Plan (“SIP”) and Denver Metropolitan and North Front Range Area Ozone Action Plan (“Ozone Action Plan”).

Executive Summary

WildEarth Guardians remains concerned that the various state implementation plan (“SIP”) proposals set forth by the Air Pollution Control Division (“Division”) will not achieve the goals of reducing harmful air pollution, protecting public health, and complying with state and federal law. As set forth in our opening prehearing statement, the Ozone Action Plan adopted by the Regional Air Quality Council (“RAQC”) violates the federal Clean Air Act (“CAA”), and falls short of showing that the Denver Metro/North Front Range area will reach attainment with the ozone NAAQS. The two alternatives now proposed by the Division do not cure the Ozone Action Plan’s deficiencies. To the contrary, the alternatives not only suffer the same infirmities, but are even more dubious with respect to protecting public health and complying with federal law. Alternative 2, as proposed by the Division, must be rejected because it unlawfully excludes measures adopted by the RAQC from the federal SIP. Similarly, the proposal to submit as part of the federal SIP a system-wide control requirement for condensate tanks – proposed in Alternative 1 – must be rejected because it is not practicably enforceable, a requirement of federal law.

STATEMENT OF FACTUAL AND LEGAL ISSUES ON REBUTTAL

I. The Division's Proposal of Alternative 2 Violates the Federal Clean Air Act and State Law.

In its prehearing statement, the Division has made a last minute decision not to support the Ozone Action Plan adopted by RAQC and instead has submitted to the Commission for consideration at the December 11, 2008 hearing two competing, alternative proposals to address the Denver Metro/North Front Range's non-attainment with the federal ozone NAAQS. Both proposals make substantive changes to the measures proposed by the RAQC, most notably, as addressed in Part II below, a proposed revision to the RAQC's condensate tank regulation. In addition, the Division has now offered a proposal – Alternative 2 – that removes many of the control measures contemplated in the Ozone Action Plan from the state implementation plan which must be submitted to the U.S. Environmental Protection Agency ("EPA") for approval under Section 110 of the Clean Air Act, 42 U.S.C. § 4210.

Obviously, this is a remarkable change of events. Even more remarkable is the Division's claim that Alternative 2 is necessary pursuant to state law because the Ozone Action Plan as proposed may contain provisions that are not required to comply with the federal Clean Air Act.

Under Section 105.1 of the Colorado Air Pollution Prevention and Control Act ("CAPPCA"), only measures adopted by the Commission that are not required by Subpart D of the Clean Air Act can be excluded from the ozone SIP. C.R.S. § 25-7-105.1(1). The logical starting point to determine whether Section 105.1 poses a impediment to the Commission's adoption of the SIP, however, is to first ask whether the proposal is even adequate to meet the requirements and goals of the federal Clean Air Act. Indeed, the Commission's overarching duty under state law is to adopt a "comprehensive plan [that] shall meet all requirements of the federal act." C.R.S. § 25-7-105(1)(a)(I).

In this regard, the clear purpose of the Clean Air Act, as well as state law, is to approach development of the SIP in a conservative manner that will ultimately ensure attainment of the NAAQS and protection of public health. See, e.g., 42 U.S.C. § 7401(b), (c) (federal Act intended to protect public health by controlling and abating air pollution, and to assist states in doing the same); C.R.S. § 25-7-102 (CAPPCA intended to "foster the health, welfare, convenience, and comfort" of Colorado residents). As we pointed out in our opening prehearing conference, to meet the requirements of Section 110 and Part D, the State will have to do more, not less, to reduce emissions in the Denver Metro/North Front Range area. In this regard, we wholeheartedly agree with the Environmental Defense Fund ("EDF") that the submission of a SIP that demonstrates attainment merely on modeling is insufficient. See EDF Prehearing Statement at 2-3. Instead, all measures that are reasonably available, including those identified by the RAQC, must be included within the SIP. Id.

As the EDF stated in its prehearing statement:

[m]odeling performed for the ozone SIP indicates that without any of the measures proposed in the Ozone Action Plan, we can expect to see ozone levels as high as 84.9 ppb, only a razor-thin margin below . . . federal health standards. Even small errors in assumptions, such as

greater than expected emissions from industry or weather conditions that promote greater ozone formation, could easily cause our region to continue to be in nonattainment.

EDF Prehearing Statement at 2 (emphasis added). Indeed, even with the measures proposed by the RAQC to be included in the SIP, the margin of attainment remains “razor-thin,” as recognized by the RAQC and EPA in the decision to perform a weight of evidence analysis to support the State’s attainment demonstration. Given these “razor-thin” margins of attainment (which, as we discuss in our opening prehearing-statement, have dubious bases), it is ludicrous for the Division to now suggest that some of the measures contained in the Ozone Action Plan are completely unnecessary to support an attainment demonstration, and, therefore, can be excluded from the SIP. Given the “razor-thin” margin, we believe that the Commission should error on the side of public health and compliance with federal law and keep all provisions proposed by the RAQC in the SIP.

While WildEarth Guardians’ position overall is that all of the proposed measures in the original Ozone Action Plan, as well as additional RACT requirements for NO_x and VOC sources, must be included in the SIP, we are also concerned that the Division’s unnecessary confusion over state law may further jeopardize approvability of the SIP under federal law. EPA regulations require the Commission to show that it has the legal authority to “adopt emissions standards and limitations and any other measures necessary for attainment and maintenance of national standards.” 40 C.F.R. § 51.230(a) (2008). In addition, the Commission must represent that it has the authority to enforce said standards and limitations. 40 C.F.R. § 51.230(b). The Commission must identify which state laws or regulations confer such authority, and include in the adopted attainment plan a showing “that the legal authorities specified . . . are available to the State at the time of submission.” 40 C.F.R. § 51.231(a), (b). This requirement is reiterated in Appendix V to Part 51, which sets forth the criteria for determining the completeness of a SIP submission. 40 C.F.R. Part 51, App. V.

Thus, in order for the EPA to accept the State’s submission of its ozone attainment plan, the State must present evidence showing it has the “necessary legal authority under State law to adopt and implement the [SIP].” *Id.* § 2.1(c). Accordingly, the Division must resolve the lingering doubt over state law before the December 11, 2008 hearing. Moreover, the public should be allowed to review and comment upon the State’s proposed statement of legal authority. Unfortunately, it appears that the Division has chosen not to submit to the Commission, and the public, a formal opinion from the Attorney General regarding whether Alternative 2 is legal under state law.

Finally, along with industry, WildEarth Guardians has concerns with the Commission’s stated intent to base its decision on the Division’s alternatives on legal advice received in a closed-door, executive session with the Attorney General. By holding an executive session to decide the Commission’s legal authority under CAPPACA, and foregoing notice and the opportunity for public comment on such a decision, the Commission is hampering the public’s ability to participate in the ozone attainment SIP process. While it is within the Commission’s prerogative to hold an executive session to consult with the Attorney General, WildEarth Guardians wishes to remind the Commission that, in doing so, it must comply with the requirements of the Colorado Sunshine Law (“Sunshine Law”). C.R.S. § 24-6-101, *et seq.* (2008). The Sunshine Law represents the legislature’s intent that the public should have the

opportunity for meaningful participation in a public agency's decision-making process. C.R.S. § 24-6-401; *see also* *Cole v. State*, 673 P.2d 345, 347 (Colo. 1983) (citing *Benson v. McCormick*, 578 P.2d 651 (1978)). Therefore, we urge the Commission to maintain transparency in this process by openly discussing its decisions on the extent of its legal authority to adopt provisions of the Ozone Action Plan. Additionally, WildEarth Guardians joins in industry's request that the Commission preserve a record of the executive session to maintain the parties' abilities to seek review of that record pursuant to the Colorado Open Records Act. C.R.S. §§ 24-6-402(2)(d)(I), (2)(d.5)(I)(A); C.R.S. § 24-72-204(5.5). Furthermore, the Sunshine Law prohibits the Commission from adopting any proposed policy or position during a closed executive session. C.R.S. § 24-6-4-2(3)(a). The Commission must not foreclose the outcome of the hearing by reaching important policy decisions behind closed doors.

II. The Division's Decision To Reject The Regional Air Quality Council's Decision To Graduate From A System-Wide Control Requirement To A Threshold Emission Control Approach For Condensate Tanks Will Violate The Federal Clean Air Act and State Law.

The RAQC proposed that as part of the federal SIP revision the current 75% system-wide provisions for condensate tanks associated with oil and gas production be increased to 80% beginning on May 1, 2009 and transitioned to a threshold emission control of 95% by May 1, 2010, beginning with tanks that emit more than 10 tons per year. The Division, however, in its prehearing statement has rejected this proposal. Instead, the Division now proposes to forego the threshold approach altogether in lieu of a permanent system-wide control requirement, which will start at 81% and gradually increase to 95% by May 1, 2012.

The Division asserts that its alternative proposal provides equivalent emission reductions to the RAQC proposal. Specifically, page 6 of the Division's prehearing statement explains that "this [alternative] measure would account for approximately 25 tons per day in VOC reductions . . . [which is] comparable to the reductions we expected from the control measures in the original 10 tpy threshold proposal, taking into account an 83% rule effectiveness factor." As an initial matter, the Division's alternative proposal lacks specific emission data and estimates necessary to fully support this conclusion. We ask that more detail be provided on how the Division has reached these estimates be admitted into the hearing record for the December 11, 2008 hearing.

More importantly, the Division's determination that a system-wide approach will achieve the necessary reductions is undermined by its continued assistance to use a rule effectiveness ("RE") factor of 83%. As EDF stated in its pre-hearing statement, historically there has been serious concern about compliance with air quality regulations by the oil and gas industry in Colorado. *See* EDF Prehearing Statement at 2. And while compliance rates have increased within the industry recently amid increased scrutiny stemming from these rulemakings, there is no guarantee that compliance rates will not drop to historical levels once the SIP is adopted. Indeed, as recently as October 9, 2008, the U.S. EPA voiced its ongoing objection to use of an 83% RE on the grounds that it has not been adequately justified by the Division. *See* Letter from Callie A. Videtich, Director, Air Program, U.S. EPA Region VIII to Mr. Douglas Lempke, Administrator, Colorado Air Quality Control Commission (Oct. 9, 2008), Attachment at 2.

We are also concerned that failure to adopt a threshold emission approach, as proposed by the RAQC, will render a key provision of the ozone attainment plan unenforceable, and therefore

in violation of sections 172(c) and 110(a) of the Clean Air Act. According to EPA regulations, a proposed SIP must set forth a control strategy which includes:

- (a) A description of enforcement methods including, but not limited to:
 - (1) Procedures for monitoring compliance with each selected control measure [and]
 - (2) Procedures for handling violations . . .

40 C.F. R. § 51.111.

In addition to theoretical enforceability, a measure must also be practically enforceable. If a measure cannot practically be enforced because the sources are unidentifiable or cannot be located, or because it is otherwise impossible to ensure that the sources will implement the control measure, the measure cannot be adopted as part of a federally enforceable SIP. Indeed, where the emission reductions are required under a rule or regulation, they are not considered federally enforceable unless they meet all of the following requirements:

- They are independently verifiable.
- Violations are defined, as appropriate.
- The State and EPA have the ability to enforce the measure if violations occur.
- Those liable for violations can be identified.
- Citizens have access to all the emissions-related information obtained from the responsible party.
- Citizens can file suits against the responsible party for violations.
- Violations are practicably enforceable in accordance with EPA guidance on practicable enforceability.

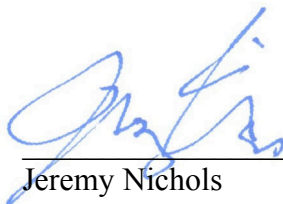
In this regard, a threshold control approach, which mandates controls on all condensate takes above a certain size, allows for easy inspections, monitoring and reporting. State and federal officials, as well as citizens, have access to all relevant compliance data on a tank-by-tank basis. Such an approach is far more likely to meet the federal enforceability requirements, and therefore is more likely to be approved as part of the SIP.

A system-wide approach, on the other hand, depends on monitoring and averaging emissions from all tanks within the defined system. This becomes increasingly difficult to track as tanks are added to the system, and reconciling emissions within the system for purposes of enforcement becomes a difficult accounting scheme. Indeed, the Division admits that tracking compliance of operators subject to a system-wide approach depends on “relatively complicated recordkeeping and reporting requirements.” Division Prehearing Statement at 5. In short, a system-wide approach is not practically enforceable and WildEarth Guardians strongly believes a threshold control approach is more effective. Failure to strengthen and revise these and other regulations jeopardizes federal approval of the SIP, and increases the likelihood that the State will be required to repeat this rule making process.

Finally, as discussed above, the Commission must adopt a plan that will assure compliance with the ozone NAAQS and protect public health. We believe that the RAQC’s proposal to graduate to a threshold control approach was based upon a sound reading of state and federal law, which requires enforceable RACT measures to be adopted. A system-wide

approach, which was adopted at a time in which the Denver Metro/Front Range area was considered in attainment for ozone, has outlived its time. In order to assure future compliance with the NAAQS, the Commission should adopt a more stringent, and more enforceable, measure for condensate tanks. The threshold control approach as proposed by the RAQC is reasonably achievable from both a technology and cost feasibility standpoint. Unfortunately, in its proposed alternative, the Division seems to have prioritized industry's desire for perceived "realistic" requirements at the expense of compliance with the law and protection of public health. See Division's Prehearing Statement at 1 and 6.

Respectfully submitted this 25th day of November 2008.



Jeremy Nichols
Climate and Energy Program Director
WILDEARTH GUARDIANS
Party Representative

AND

Sean Cumberledge
Katie Johnston
Ryan Malarky
David Mason
Student Attorneys

Michael R. Harris
Asst. Professor of Law & Director

ENVIRONMENTAL LAW CLINIC
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW