

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

PREHEARING STATEMENT OF ENVIRONMENTAL DEFENSE FUND

**REGARDING PROPOSED REVISIONS TO: AMBIENT AIR QUALITY STANDARDS
REGULATION, REGULATION NUMBERS 3, 7, AND 11 FOR THE DENVER
METROPOLITAN & NORTH FRONT RANGE AREA OZONE ACTION PLAN**

Environmental Defense Fund respectfully submits this Prehearing Statement under Section 1.5.5(5)(c) of the Procedural Rules of the Colorado Air Quality Control Commission (Commission).

Executive Summary

Environmental Defense Fund supports the measures proposed for the state implementation plan (SIP) and the Ozone Action Plan. These measures represent an important step forward in reducing unhealthy ozone levels in the Front Range. We believe that these measures should not be weakened or delayed, and those included in the SIP are necessary to meet federal requirements. We are concerned that the plan does not go far enough, given the widespread occurrence of unhealthy ozone levels in our region, the razor-thin margin by which modeling indicates we will attain federal health standards, and the experience under the Early Action Compact (EAC) where emissions growth was not anticipated and compliance problems raised concerns about the effectiveness of control measures. Finally, we reiterate our belief that further measures will be necessary to reduce ozone levels and state our support for consideration of additional strategies in 2009.

Statement of Factual and Legal Issues

1. **Support of Measures in Ozone Action Plan**

Environmental Defense Fund supports the measures contained in the Ozone Action Plan proposed by the Regional Air Quality Council, the Air Pollution Control Division, and the North Front Range MPO. These measures represent a significant step towards cleaner, healthier air for our region. Environmental Defense Fund is concerned, however, that the measures will not be sufficient to protect public health from harmful levels of ozone pollution.

Earlier this year, the U.S. Environmental Protection Agency revised the national ambient air quality standard for ozone, setting a new standard of 75 parts per billion (ppb). EPA's decision was based on a finding that the standard set in 1997, at 0.08 parts per million (ppm), was not sufficient to protect public health with an adequate margin of safety. Governor Ritter also directed the RAQC to develop an ozone plan that would eliminate ozone levels above 0.08 ppm and would start reducing levels now so that we will make progress towards attaining the 75 ppb

standard. Despite the serious risk to public health, the proposed SIP and the Ozone Action Plan will likely leave our region well in excess of the 75 ppb standard. Indeed, based on 2008 data, numerous monitors all across the region show unhealthy ozone levels well above the 75 ppb standard.

Environmental Defense Fund is also concerned that the Ozone Action Plan does not go far enough to ensure attainment of the 0.08 ppm standard. Modeling 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 the level that would mean continued nonattainment of 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 being in nonattainment. The measures proposed for the SIP will give us an essential cushion that will enhance the prospects for approval of our plan by EPA, and the additional state-only measures will further buffer us from unexpected results that might otherwise increase unhealthy ozone levels. It is critical that these measures be approved by the Commission to demonstrate to the EPA and to the public that the State is appropriately carrying out its duty to protect public health.

However, experience with the Early Action Compact raises additional concerns. For the EAC, as for this Ozone Action Plan, modeling predicted that the region would barely come into attainment with federal health standards. Unfortunately the EAC failed to achieve that objective, and our plan runs the same risk by providing such a slim margin for error. Furthermore, the experience of the EAC demonstrates that we do not always get the reductions expected from proposed measures. As recently as April 2006, the Division raised concerns about compliance in the oil and gas industry. *See* Exhibit A – Presentation of Mike Silverstein, Air Pollution Control Division, to the RAQC, April 6, 2006. Widespread compliance issues were identified at that time by the Division, and additionally, unexpected growth in the oil and gas industry led to significantly higher uncontrolled emissions levels than expected. *See id.* Environmental Defense Fund appreciates the hard work done by the Division and industry to improve compliance, and we applaud the results. However we remain concerned that similar issues may arise once this plan is approved, particularly since we lack much of a buffer from additional strategies that might compensate for any unexpected issues with oil and gas emissions.

2. SIP Requires Implementation of Measures to Protect Public Health As Expeditiously As Practicable

The measures proposed for the ozone SIP are an essential part of federal requirements for SIP revisions to demonstrate to EPA that a region will come back into attainment with the NAAQS. The Clean Air Act requires, not just “attainment of the national ambient air quality standards,” but also “implementation of all *reasonably available control measures* [RACM] ***as expeditiously as practicable.***” 42 U.S.C. § 7502(c)(1) (emphasis added). The ozone SIP cannot simply rely on modeling that will show attainment by the required date. Measures that are reasonably available, such as the proposed oil and gas measures, must be implemented in the SIP as expeditiously as practicable.

EPA has interpreted this provision to mean that measures must be included if they will advance the attainment date, and federal courts have sanctioned this approach. *See Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002). However, courts have also made clear that EPA in approving a SIP, and by extension states that submit a SIP, must still “(1) demonstrate that it has examined relevant data, and (2) provide a satisfactory explanation for its rejection of those proposed RACMs and why they, individually and in combination, would not advance the [] area's attainment date.” *See Sierra Club v. EPA*, 314 F.3d 735, 745 (5th Cir. 2002). For our ozone SIP proposal, some of the measures have already taken effect and others will take effect before the attainment date at the end of 2010. The SIP must include those measures because there is no demonstration they would not advance the attainment date. Furthermore, additional measures that might otherwise be RACM (such as additional NOx controls or fuels strategies) cannot be excluded from the SIP without adequate explanations for why they are not RACM.

3. Plan for Future Action to Reduce Unhealthy Levels of Ozone Pollution

Environmental Defense Fund appreciates the commitment by the RAQC, the Division, and the North Front Range MPO to assess additional control measures in 2009 that can be implemented to further reduce unhealthy ozone levels across our region. As the modeling for this Ozone Action Plan has demonstrated, combining significant NOx emissions with VOC emissions provides the best opportunity to reduce ozone levels. We expect that in 2009 we can quickly build upon that modeling and an initial assessment of control strategy options to propose measures that will reduce NOx emissions and thereby reduce ozone levels across the Front Range. Other promising strategies for reducing emissions from fuels will be a critical component as we strive to come into attainment with the 75 ppb standard. We ask that the Commission, the Division, the RAQC, and the North Front Range MPO work together to ensure that these strategies are addressed in a timely manner. To the extent additional modeling is needed to assess the impacts of potential control measures, we respectfully request that this be concluded early in the process to inform future discussions with stakeholders.

Issues to Be Resolved by the Commission

1. Whether the SIP and Ozone Action Plan adequately protect public health from unhealthy ozone levels.
2. Whether the measures in the SIP provide adequate assurance that we will come into attainment by 2010 and include all reasonably available control measures implemented as expeditiously as practicable.
3. Whether the process for consideration of additional future strategies will allow for timely further process to continue reducing harmful ozone levels across the Front Range.

Exhibits

Exhibit A – Presentation of Mike Silverstein, Air Pollution Control Division, to the RAQC, April 6, 2006. This presentation describes concerns during implementation of the EAC due to unanticipated growth in flash emissions and broad compliance issues among the oil and gas industry.

No other exhibits are identified at this time, but we reserve the right to submit any exhibits in rebuttal testimony that may be needed to respond to statements from other parties or any alternative proposals submitted.

Witnesses and Time Allocation at Hearing

Kevin Lynch will testify for Environmental Defense Fund at the hearing. No other witnesses are expected at this time, though we reserve the right to identify additional witnesses before the hearing that might be needed to respond to statements from other parties or any alternative proposals submitted. Environmental Defense Fund respectfully requests 10 minutes of time at the hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin Lynch", with a stylized flourish at the end.

Kevin Lynch
Environmental Defense Fund

Dated this 13th day of November, 2008