BEFORE THE AIR QUALITY CONTROL COMMISSION
STATE OF COLORADO

REBUTTAL 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 Rebuttal Statement under Section 1.5.5(5)(d) of the Procedural Rules of the Colorado Air Quality Control Commission (Commission).

INTRODUCTION

The prehearing statements and alternative proposals filed in this proceeding have raised several important questions about what control measures are reasonably available to reduce harmful ozone pollution and also about whether these measures should be included in the State Implementation Plan (SIP) approved by the Commission. This rebuttal statement builds on the arguments made during our prehearing statement and also responds in detail to the alternate proposals submitted by other parties.

Colorado must submit to EPA a SIP meeting requirements set forth in Part D of Subchapter I of the Clean Air Act, 42 U.S.C. §§ 7501-7515. The SIP must provide for attainment of the standards "as expeditiously as practicable." *Id.* § 7502(a)(2)(A). For Colorado, the SIP must demonstrate attainment by 2010, or sooner if practicable. In addition to demonstrating timely attainment, all nonattainment area plans must provide for implementation of all "reasonably available control measures [RACM] as expeditiously as practicable." *Id.* § 7502(c)(1). EPA has construed this requirement as imposing a duty on nonattainment areas to carefully consider all available control measures and either adopt them or justify their rejection. 57 Fed. Reg. 13498, 13560 (Apr. 16, 1992).

Each of these requirements fits with the ultimate goal of the Clean Air Act and the NAAQS, which is that states should take reasonable and available steps to protect the public from unhealthy levels of air pollution. The initial proposal and alternate proposals include several control measures that are reasonably available and can be implemented in 2009 or 2010, and therefore these must be implemented as expeditiously as practicable and included in the SIP. The SIP cannot exclude measures as not reasonably available at the same time that the Ozone Action Plan proposes those measures be implemented as state-only rules in the 2009-2010 time period – if the measures are reasonably available and can be implemented by 2010, they must be included in the SIP because they are required by the Clean Air Act.

POSITION ON PROPOSAL AND ALTERNATE PROPOSALS

Environmental Defense Fund, along with the other parties to this rulemaking, participated in the extensive and thorough public process through which the Regional Air Quality Council (RAQC), the Air Pollution Control Division (Division), and the North Front Range Transportation and Air Quality Planning Council (NFR) developed the initial proposed Ozone Action Plan for Colorado. During this comprehensive process, all parties had the opportunity to raise concerns, discuss potential control strategies, and evaluate the technical elements needed in the SIP for compliance. The RAQC, the Division, and the NFR heard these concerns and developed a plan that balances the competing concerns in a way that will enhance protection of public health and start the region down the path towards achieving the 75 ppb ozone standard. Environmental Defense Fund supports the initial proposal put forward by the aforementioned group because we believe it represents the best path forward at this time while also recognizing the need for further efforts to continue reducing ozone levels. We respectfully request that the Commission adopt the initial proposal, after including some of the relatively minor changes which are included in the Division's Alternative #1 and in the RAQC's Alternative Proposal. However, several elements of the Division's Alternative #1 are of concern to us.

Environmental Defense Fund does not support the elements of the Division's Alternative #1 which abandon the threshold approach for condensate tank controls in favor of retaining the current system-wide approach with only small increases in the control threshold. Environmental Defense Fund continues to have concerns about the enforceability of a system-wide approach. While Environmental Defense Fund has long been a proponent of flexibility mechanisms, we are not yet convinced that the oil and gas industry in Colorado, as a whole, has demonstrated a past history of compliance with condensate tank control requirements that would justify the system-wide approach. Instead, Environmental Defense Fund continues to believe that a threshold for controls, phased in to cover progressively smaller sources, provides the best means of ensuring that emissions reduction goals are achieved and that public health is adequately protected.

If the Commission decides that a system-wide approach is most appropriate for condensate tanks, we respectfully request that the control requirements be set such that they are consistent with the RACM requirements in federal law. Although the Division has proposed, in Alternative #1, to set the system-wide control requirement at 81%, we note that the Well Operators, who would be directly affected by this control measure, have proposed 85% as the appropriate control requirement in their Alternate Proposal for System-Wide Tank Controls in the NAA. The Division apparently chose the 81% control level to make emissions reductions comparable to the reductions achieved by the initial proposal in 2010, yet no demonstration has been made that 85% control would not be reasonable, as the Well Operators have suggested. Furthermore, these controls must be adopted as expeditiously as practicable. Implementing these controls in time for the 2009 ozone season would meet the "as expeditiously as practicable" requirement and also provide important protections for public health in 2009, as required by the Clean Air Act. Thus, we believe that 85% control at a minimum represents RACM in this case. In order to include less than 85% control as RACM, the SIP would have to contain a demonstration that that level of controls is not reasonably achievable in the given timeframe. Environmental Defense Fund requests that if a system-wide approach is used, it is set at 85% control beginning in May 2009 and continuing through 2010. We also believe that continuing to increase the control requirement (to 90% in 2011 and 95% in 2012) would represent significant further progress to

ensure that we maintain compliance with the ozone standard beyond 2010, and we thus would support that portion of the Division's Alternate #1 if the system-wide approach is favored by the Commission.

Because all RACM must be included in the SIP, Environmental Defense Fund opposes the Division's Alternative Proposal #2, which would exclude control measures that are in fact reasonably available from the SIP. The Clean Air Act requires that all RACM must be included in the SIP, particularly those that can be implemented in 2009 or 2010. *See* 42 U.S.C. § 7502(c)(1). The issue of the Commission's authority to include control measures is discussed in more detail in the following section.

Finally, Environmental Defense Fund supports the Well Operators' Alternative Proposal for the NFR Vehicle I/M Program. Implementing this program beginning in 2010 would ensure that the SIP conforms to the Clean Air Act's requirement that all RACM be implemented as expeditiously as practicable. As Environmental Systems Products has noted in this proceeding, this RACM can be implemented starting in 2010.

COMMISSION AUTHORITY TO ADOPT MEASURES IN SIP

One critical question that has arisen is the authority of the Commission to adopt measures in this SIP. This issue was raised by the Commission at the request for hearing and was also presented as the explanation for why the Division has presented its Alternative Proposal #2. The issue involves the meaning and application of C.R.S. § 25-7-105.1(1), which states:

> To the extent that any provision of this article or any standard or regulation promulgated pursuant thereto is not required by Part C (prevention of significant deterioration), Part D (nonattainment), or Title V (minimum elements of a permit program) of the federal act, or is not required by section 111 of the federal act, or is not required for sources to participate in the early reduction program of section 112 of the federal act, or is not required for sources to be excluded as a major source under this article, or is otherwise more stringent than other requirements of the federal act, such provision, standard, or regulation is hereby declared to be adopted under powers reserved to the state of Colorado pursuant to section 116 of the federal act. Any such provision, standard, or regulation adopted exclusively under state authority shall not constitute part of the state implementation plan.

As an initial matter, Environmental Defense Fund agrees with the statement made by the RAQC in its prehearing statement that these general provisions "do not constrain the Commission from using its judgment to conclude what is necessary to adequately demonstrate attainment of the standard with an appropriate margin of safety." Indeed, these provisions do not discuss the authority of the Commission but rather address the ultimate enforceability of any provisions that are not required by Part D of the Clean Air Act or are otherwise more stringent than other requirements of the Act. Therefore, Section 25-7-105.1 does not in any way limit the authority or the discretion of the Commission in deciding what measures are necessary to comply with federal requirements. Furthermore, the measures that have been proposed for the SIP *are* required to comply with Part D of the Clean Air Act.

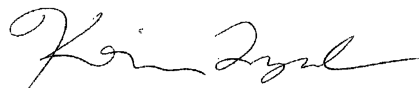
The Clean Air Act requires attainment with the ozone standard "as expeditiously as practicable" and also requires "the implementation of all reasonably available control measures as expeditiously as practicable." 42 U.S.C. § 7502(a)(2)(A), (c)(1). EPA's regulations detailing SIP requirements further require that "Each plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements." 40 C.F.R. § 51.112(a). This broad language highlights the duty of the state to ensure that its SIP will be adequate to attain and maintain the ozone NAAQS and, when combined with the overarching requirement to achieve attainment and implement RACM as expeditiously as practicable, makes clear that the SIP must include those measures identified in the initial proposal which can be implemented in 2009 or 2010.
If the SIP does not include RACM, this would raise serious questions about the approvability of the SIP by EPA. These approvability issues are only made more important by the uncertainty surrounding the 2010 ozone modeling and the extremely slim margin by which the modeling predicts attainment in 2010. Additionally, the lack of contingency measures makes the inclusion of federally-enforceable RACM even more critical to ensure approvability of the SIP. EPA guidance on modeling for SIP demonstrations highlights these concerns, as well as past experience with the Early Action Compact.

If no RACM are included in the SIP, then the SIP relies exclusively on the 84.9 ppb modeled attainment demonstration. Close examination of this demonstration reveals the uncertainties in the modeling and the small margin for error. The 84.9 ppb value for the 2010 Base Case design value was calculated by taking the current base case design value (based on 2005-2007 monitoring data) and multiplying that by the Relative Response Factor (RRF) – a number intended to show the relative movement of ozone values near the monitor based on changes in the emissions inventory in 2010 due to controls already on the books. Because the current base case design value for the Rocky Flats North monitor is 85 ppb, the RRF must be less than 1 to predict attainment in 2010. The initial modeled RRF for Rocky Flats North was greater than 1, meaning the area would not be in attainment at that monitor. *See* Presentation by Ralph Morris, 2010 8-Hour Ozone Design Value Projections for the Denver 8-Hour Ozone SIP and 2010 Base Case Simulation (June 4, 2008). Shortly thereafter, a change to the emissions inventory in 2010 was made, with the result that the new RRF for Rocky Flats was less than 1, and the monitor was predicted to show attainment in 2010. The Division's Alternate Proposal #1 indicates that the RRF for Rocky Flats North is 0.9994. Thus the 2010 Design Value calculates to 85 ppb * 0.9994 = 84.949 ppb, which rounds to 84.9 ppb. If the RRF were increased only slightly, to 0.9995, then the 2010 Base Case Design Value would be 84.9575, which would round to 85.0 ppb. As we saw when the emissions inventory was changed after June 4, 2008, it does not take much of a change to move the RRF by such a small amount. Any number of concerns might change the RRF at Rocky Flats North. Our projected emissions growth may be too low, as happened previously with oil and gas emissions under the Early Action Compact. EPA might decide that our control effectiveness for existing controls is too high, resulting in less emissions reduction by 2010. Any of these or similar issues would call into serious question the approvability of our SIP, if we do not include a buffer by including RACM in the SIP. Implementing the measures as state-only controls in the Ozone Action Plan would not correct this deficiency because the SIP itself would not demonstrate compliance and implement all RACM.

Additionally, recent EPA guidance recognizes the uncertainty in modeling and thus requires that a SIP not rely exclusively on a modeled attainment demonstration. The modeled attainment test is one component of an attainment demonstration, but states "should always perform complementary analyses of air quality, emissions and meteorological data, and consider modeling outputs other than the attainment test." EPA, Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze at 17 (2007). While only basic supplemental analyses are needed where the future design value is less than 82 ppb, a more thorough weight of evidence determination is needed when the future design value is between 82 and 87 ppb. *Id*. "The further the attainment test is from being passed, the more compelling contrary evidence produced by corroboratory analyses must be." *Id*. For the Colorado SIP, because the future design value is so close to the NAAQS, at 84.9 ppb, we need additional measures to adequately demonstrate that we will attain the standard despite the uncertainty in the modeling. Including the identified RACM in the SIP would provide significant additional arguments for the weight of evidence analysis. The need for including additional measures in the SIP is also emphasized by the experience with the Early Action Compact, where despite modeling predicting attainment, the standard was nevertheless violated.

Environmental Defense Fund believes that all of these concerns lead to the conclusion that control measures must be included in the SIP in order to adequately demonstrate compliance with the NAAQS and to protect public health. Including those measures in the SIP would provide an essential buffer to address the uncertainty in the modeling and to ensure the approvability of the SIP by EPA. Environmental Defense Fund therefore respectfully requests that the Commission does include control measures in the SIP, as initially proposed by the RAQC, the Division, and the NFR.

Respectfully submitted,



Kevin Lynch
Environmental Defense Fund

Dated this 25th day of November, 2008