

**REGIONAL AIR QUALITY COUNCIL'S REBUTTAL STATEMENT**

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

The Regional Air Quality Council ("RAQC") wishes to respond to specific issues and alternative proposals raised by various parties in their Prehearing Statements filed for this hearing:

**A. System-wide Approach for Controlling Condensate Tank Emissions**

**1. Division's Alternative Proposal #1**

In its Alternative Proposal #1, the Air Pollution Control Division ("Division") discards the proposed "threshold" approach for controlling condensate tank emissions in favor of maintaining the existing system-wide approach. The Division proposes increasing the current 75% system-wide control level to 80% beginning May 1, 2009 and 81% beginning May 1, 2010 as State Implementation Plan ("SIP") control measures. In addition, as state-only enforced measures, the Division proposes increasing the system-wide control level to 90% by May 1, 2011 and to 95% by May 1, 2012.

The Division's analysis shows the 81% system-wide control requirement achieves emissions reductions exactly equivalent to the emissions reduction from the proposed >10 tpy threshold control level proposed in the SIP. The 90% and 95% system-wide control levels achieve equivalent emission reductions as the >5 tpy and >2 tpy threshold levels proposed as state-only requirements.

The Division's Alternative Proposal #1 also removes control for pneumatic-actuated devices as part of the federally-enforceable SIP since the Division believes USEPA's expectations for demonstration of benefits through enforceable surveillance made the program infeasible as a SIP measure. However, the Division maintains the program as a proposed state-only measure.

The Regional Air Quality Council will consider the merits of the Division's Alternative Proposal #1 at its next regularly scheduled meeting on December 4 and provide its position at the December 11 hearing.

**2. Well Operators' Alternative Proposal for Condensate Tank Controls in the NAA**

Noble Energy, Anadarko Petroleum, and Williams Production (collectively the "Well Operators") have filed an Alternative Proposal that also maintains the current system-wide approach and

increases the control level to 85% for all tanks greater than 1 tpy, beginning May 1, 2010. The Well Operators do not specify increased levels of control in future years, though we understand they are considering an increased level of control in future years.

The Well Operators maintain their Alternative Proposal will achieve greater reductions in VOC emissions in the SIP in a timelier manner and is less costly and burdensome for the industry and the State to implement. The Well Operators also maintain their proposed approach will increase operational flexibility, provide incentives for over-control, and reduce the cost of data management.

An emissions analysis shows the Well Operators' 85% control proposal will result in an additional 13 tons per day reduction when compared to the Division's 81% control SIP proposal, but will provide 24 tons per day less emissions reduction when compared to the Division's 95% control state-only proposal.

The Regional Air Quality Council will consider the merits of the Well Operators' Alternative Proposal, along with the Division's Alternative Proposal #1, at its next regularly scheduled meeting on December 4 and provide its final position on these proposals at the December 11 hearing.

**B. Division's Alternative Proposal #2 – Removing Additional Control Measures from the State Implementation Plan (SIP)**

At the direction of the Air Quality Control Commission ("Commission"), the Division has prepared an Alternative Proposal #2 that removes most of the additional, quantifiable control measures from the proposed SIP, but maintains them as measures adopted and enforced through exclusive state authority. The Commission is considering provisions of State statute (C.R.S. 25-7-105.1) that restrict certain items from being submitted to the USEPA for inclusion in the federally-enforceable State Implementation Plan. Alternative Proposal #2 relies upon current Federal measures already in place and state measures already included in the existing ozone SIP to demonstrate attainment of the 1997 ozone standard at a level of 84.9 ppb, consistent with the "base case" modeling included in the proposed SIP.

As it pertains to this attainment SIP, relevant provisions of C.R.S. 25-7-105.1 state:

"(1) To the extent that any provision of this article or any standard or regulation pursuant thereto is not required by ... Part D (nonattainment) ... 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."

The central questions are (1) what is *required* by the Clean Air Act regarding a demonstrated level of attainment and (2) is an additional margin of safety to ensure an adequate demonstration of attainment and ultimate EPA approval considered *more stringent* than any requirements of the federal act. The Clean Air Act is not clear or compelling regarding either of these questions, leaving the policy decision up to the Commission.

Clearly, a modeled attainment demonstration of 84.9 ppb, supported by the Weight of Evidence analysis, could be argued by some as an adequate attainment demonstration. However, the Regional Air Quality Council was concerned that stopping at a level of 84.9 ppb left little margin for safety and was not acceptable from a public policy standpoint. The RAQC considered additional reasonable measures that could be implemented before the 2010 ozone season and chose to include some of these additional measures in the SIP and also chose to recommend others be adopted as state-only measures. The RAQC also concluded additional reasonable measures in the SIP would increase the likelihood of ultimate EPA approval. The RAQC was concerned that, without additional measures providing an additional margin of safety, EPA approval may be jeopardized if the SIP relied on an attainment demonstration that left no room for error.

No SIP developed for the Denver area since 2000 has included an attainment/maintenance demonstration that intentionally and consciously stopped at the maximum attainment level. Each contained attainment/maintenance demonstrations that achieved varying levels below the standard or necessary attainment level. These include the carbon monoxide maintenance SIPs approved by the Commission in 2000 and 2005, the PM-10 maintenance SIPs approved by the Commission in 2001 and 2005, and the ozone maintenance SIP approved by the Commission in 2001. None of these SIPs were challenged in the legislature or by other parties for violating state law by "going too far." The Commission obviously exercised its policy judgment in approving these plans.

The Regional Air Quality Council will consider the merits of the Division's Alternative Proposal #2 removing measures from the proposed SIP at its next regularly scheduled meeting on December 4 and provide its final position at the December 11 hearing.

### **C. WildEarth Guardians Analysis of Clean Air Act Requirements**

In its prehearing statement, WildEarth Guardians make several claims the proposed SIP fails to meet key requirements of the Clean Air Act. In particular, WildEarth Guardians provide several legal arguments challenging the SIP, claiming among other things:

1. The proposed SIP must meet the current ozone standard of .075 ppm promulgated by EPA in March 2008;
2. The proposed SIP must include Reasonably Available Control Technology (RACT) requirements for all major sources of VOCs and NO<sub>x</sub>;
3. The proposed SIP fails to demonstrate reasonable further progress;
4. The proposed SIP fails to ensure maintenance of ambient air quality standards;
5. The SIP does not include Section 110(a)(2) transport requirements; and
6. The Motor Vehicle Emission Budgets included in the SIP do not comply with the conformity provisions of the Clean Air Act (176(c)(1)(A)).

Unfortunately, WildEarth Guardians' claims are based on faulty legal analysis and conclusions. To set the record straight, the Regional Air Quality Council staff, with many years experience implementing the provisions of the Clean Air Act and EPA regulations, will respond to WildEarth Guardians' specific claims.

The proposed SIP must meet the current ozone standard of .075 ppm promulgated by EPA in March 2008

WildEarth Guardians claim Section 110 (l) of the Clean Air Act requires this SIP to comply with the .075 ppm standard promulgated by EPA just nine months ago. This claim is false and is a misrepresentation of Section 110(l). Sections 107(d) and Section 182 are the appropriate sections of the Clean Air Act that govern the process and timelines for complying with the newly promulgated ozone standard. The Governor must first recommend designations within one year from promulgation, EPA has another year to promulgate final designations, and then states have three years to develop a state implementation plan revision. Therefore, based on these timelines, a SIP to meet the .075 ppm is not required until March 2013.

Nothing in the proposed SIP before the Commission violates section 110(l) and interferes with the ultimate attainment of the .075 ppm standard. In fact, the opposite is true and the measures included in the SIP and as state-only measures will only contribute to timely attainment of the new standard.

The proposed SIP must include Reasonably Available Control Technology (RACT) requirements for all major sources of VOCs and NOx;

WildEarth Guardians claim the SIP fails to comply with the RACT requirements of Subpart 1 of Part D of the Clean Air Act. This argument is flawed in two regards.

First of all, the courts have been clear that ozone nonattainment areas are governed specifically by the ozone-specific provisions of Subpart 2 of Part D. In two separate court decisions, the courts have been clear that EPA must implement the new 1997 8-hour ozone standard under the provisions of Subpart 2, not Subpart 1. The courts concluded "Congress has expressed its clear intent that the mandatory control scheme it set forth in Subpart 2 was to be used to regulate ozone (*American Trucking Association v. EPA*). This conclusion was also upheld by the U.S. Supreme Court.

Under Subpart 2, the Denver area will be classified as a "marginal" ozone nonattainment area and is subject to the provisions of Section 182(a). The only RACT requirement under Section 182(a) is the so-called "RACT fix-up" required to correct RACT deficiencies at the time of enactment of the Clean Air Act in 1990. The State completed this "fix-up" many years ago. Therefore, the Denver/North Front Range is not subject to any additional specific RACT requirements in this SIP.

The Clean Air Act does in fact include specific RACT requirements for ozone nonattainment areas classified moderate and above in Sections 182(b) through (e). The fact that Congress included these specific RACT requirements in these sections indicates clear Congressional intent that similar additional RACT requirements do not pertain in Section 182(a) marginal areas.

Even though the Denver/NFR nonattainment area is not subject to the Subpart 1 RACT requirements, WildEarth Guardians interpretation that Subpart 1 would require application of RACT on *all* sources is still not accurate. EPA's long-standing interpretation of the RACT requirements of section 172(c)(1) indicates that Subpart 1

areas need only adopt such RACT and other reasonably available control measures (RACTM) that are necessary to contribute to timely attainment of the standard. EPA's interpretation has been upheld in several recent court cases (see 70 FR 71653, November 29, 2005).

Therefore, since the SIP as proposed to the Commission contains sufficient measures to demonstrate timely attainment of the ozone standard, it also arguably meets the RACT requirements of Subpart 1.

*The proposed SIP fails to demonstrate reasonable further progress*

WildEarth Guardians claim the SIP must meet the "reasonable further progress (RFP)" requirements of Subpart 1 (section 172(c)(2)) of the Clean Air Act. Again, this is an erroneous conclusion.

Section 182(a), which again governs marginal ozone areas under Subpart 2, does not include any requirement for showing reasonable further progress. This is likely due to the fact that since the attainment timeframe is so short (three years), RFP makes no practical sense. Moderate and above areas, which have longer attainment deadlines, do in fact include a specific and quantifiable RFP requirement under sections 182(b) through (e). As a result, it is clear Congress did not intend to impose an RFP requirement on marginal areas.

*The proposed SIP fails to ensure maintenance of ambient air quality standards*

WildEarth Guardians claim the SIP must include a demonstration that the ozone standard will continue to be maintained for at least 10 years beyond 2010. This claim is once again inconsistent with the specific requirements of the Clean Air Act.

First of all, section 182(a) contains no specific requirement for demonstrating maintenance of the standard for a 10-year period beyond the attainment date. The statutory construction of Subpart 2 is based on the premise that national and regional control programs will continue to reduce ozone precursor emissions beyond the attainment date. If this is not the case, then Subpart 2 contains a "bump up" provision whereby marginal areas that fail to attain the standard by the required date are reclassified to a moderate classification and have to meet the additional control requirements of section 182(b).

The 10-year maintenance plan provisions of the Clean Air Act are contained in section 175A. Under this section, areas that demonstrate attainment of the standard must complete such a plan demonstrating continued compliance with the standard for at least 10 years before the area can be redesignated to attainment status.

*The proposed SIP does not include Section 110(a)(2) transport requirements*

The Division has proposed a separate, statewide SIP revision to meet the requirements of section 110(a)(2), which requires provisions prohibiting any source or emission activity in the state from contributing significantly to nonattainment in any other state. The Division's proposed SIP revision demonstrates that sources in Colorado do not contribute to nonattainment conditions in surrounding states.

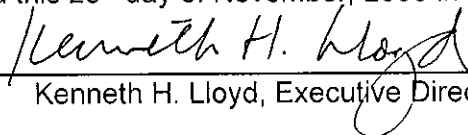
The Motor Vehicle Emission Budgets included in the SIP do not comply with the conformity provisions of the Clean Air Act (176(c)(1)(A)).

The conclusion drawn by WildEarth Guardians is erroneous. Over the past 15 years EPA has developed exhaustive regulations governing the implementation of the transportation conformity provisions of the Clean Act. The motor vehicle emission budgets developed as part of this proposed ozone SIP are entirely consistent with the applicable provisions of EPA regulations. EPA staff has continually provided guidance on interpreting these regulations to help establish approvable emission budgets.

D. Witnesses

The Regional Air Quality Council may also call Mr. Dennis McNally of Alpine Geophysics or Mr. Ralph Morris of Environ Corp. to offer rebuttal testimony on the air quality modeling performed for the Ozone Action Plan.

Submitted this 25<sup>th</sup> day of November, 2008 in Denver, Colorado



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