

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

IN THE MATTER OF PROPOSED REVISIONS TO THE PROCEDURAL RULES (5 CCR 1001-1)

PREHEARING STATEMENT OF THE COLORADO CHAMBER OF COMMERCE

The Colorado Chamber of Commerce submits this Prehearing Statement in in this proceeding to adopt revisions to the Colorado Air Quality Control Commission’s (“Commission”) Procedural Rules as provided in the Notice of Rulemaking Hearing dated August 15, 2024, and pursuant to the Commission’s current procedural rules, 5 CCR 1001-1, § V.E.4.c, and the Hearing Officer’s Order granting an extension of time for prehearing statements dated October 8, 2024 in this matter.

EXECUTIVE SUMMARY

The Colorado Chamber of Commerce (the “Chamber”) is the only state-wide chamber of commerce in Colorado and as such it represents hundreds of businesses of all sizes and sectors across the state, as well as trade associations, economic development organizations, and over 75 local chambers of commerce. Included among the Chamber’s membership are major operators in Colorado’s electricity generation sector, oil and gas exploration, production, and refining sectors, as well as numerous manufacturers and businesses in other key industry sectors. The Chamber works to improve the business climate in Colorado for all sizes of business from a statewide, multi-disciplinary perspective. The Chamber plays a vital role as a unified voice for business in Colorado. What the Chamber accomplishes is good for all businesses and good for the State’s economy.

Section I of this Prehearing Statement details the Chamber’s legal, policy, and factual issues with the Proposed Rules. The Chamber is not submitting redline language at this time; however, reserves the right to do so in future filings.

Chamber’s Request for Time

The Chamber anticipates it will need **25 minutes** for testimony at the hearing. The Chamber may request more time if additional testimony is required in rebuttal to other prehearing statements or alternate proposals.

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I. LEGAL, POLICY, AND FACTUAL ISSUES ARISING FROM THE PROPOSED RULES

The Chamber appreciates the Division’s efforts in developing and proposing revisions to the Commission’s Procedural Rules to improve access to the rulemaking process for interested members of the public and to enhance both the efficiency and effectiveness of the rulemaking process for all stakeholders, Parties, Division staff and the Commission. The Chamber and its members are regular and active participants in Commission rulemakings and have engaged with the Division and other parties to seek consensus where possible on various proposed rules and rule revisions. The Commission’s rulemaking proceedings have become increasingly complex in recent years with matters of first impression, challenging issues, and numerous parties and diverse stakeholder interests. These rulemaking proceedings have included a number of significant disputes, such as concerning whether proposed rule revisions are “alternate proposals” and whether they are even within the scope of the noticed rulemaking. These disputes have in turn caused the filing of motions to strike and for other relief and clarification by the presiding Hearing Officer.

The Chamber generally supports the Division’s July 30th Proposed Revisions because we expect they will have a positive impact on future stakeholder engagement and, ideally, consensus building in future rulemakings. The Chamber appreciates the work of Division staff and other Parties to craft these rule revisions focused on streamlining the prehearing process, providing opportunities for iterative dialogue and narrowing of issues prior to the hearing and intended to avoid or reduce the potential for procedural disputes in future rulemakings.

The Division submitted substantial revisions in its Prehearing Statement filed on Tuesday, October 8th (“October 8th Revised Proposal”). The Division’s October 8th Revised Proposal was based on the substantial stakeholder efforts leading up to and during the prehearing process. While the Chamber has initially reviewed the October 8th Revised Proposal, the Chamber is still studying the details and conferring with other stakeholders. As stakeholder discussions continue, the Chamber reserves its right to comment on any future revisions in its Rebuttal Statement and at the Hearing. The Chamber also wishes to note that many aspects of the rulemaking procedural rules are interrelated and there are still moving parts that could affect the Chamber’s position in this rulemaking. And there remain items of clarification, details and other potential changes that the Chamber’s members would like to see and that we plan to continue to discuss with the other Parties.

A. Pre-Petition Process

The Chamber is in support of a more robust pre-petition process as it will allow stakeholders and potential parties additional time to find alignment and better understand the issues at hand in any given rulemaking proceeding. The Division’s proposal is purportedly intended to encourage and better facilitate early consensus and a narrowing of issues prior to hearing. The Chamber supports that objective. In order for it to be more likely achievable, we suggest that the Division be as specific as possible in identifying the intended scope and nature of any rulemaking being proposed and that whenever possible, detailed draft rule language be made available in addition to supporting data and economic information. The process will not

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benefit, but in fact would suffer, from proposals with moveable concepts and broad scope approaches. Chamber members are most often the regulated entities in these rulemakings and the details and specific draft rule language matter greatly, affecting their ability to timely and effectively comply with the rules adopted. Broad suggestions or ideas will likely frustrate the process, and make rulemakings overly broad and difficult to navigate, as we have experienced in recent years, which we believe to be the opposite of the intent of this Rulemaking.

The Division's Proposal requires the proponent/Division to provide "rule concepts" at least 45 days prior to the request for rulemaking. We appreciate that, but this should be further fleshed out. In particular, "rule concepts" should be clarified – and, we believe, should entail draft rule language or strawdog language with enough specifics to enable stakeholders to assess potential applicability and impacts of the rule concepts. Additionally, we question whether the Division's proposed timing of providing rule concepts 45 days prior to when the request for rulemaking hearing is scheduled, is early enough to facilitate dialogue and narrowing of issues. Our understanding is that this deadline will be 45 days before the Commission meeting when it will consider the request for rulemaking. Under such timeline, the rule concepts would be provided only 15 days prior to when the request and rulemaking petition package must be finalized and submitted to the Commission – that is clearly insufficient to accommodate meaningful stakeholder input and iterative dialogue on the rule concepts. The Chamber supports the JIWG's proposal to change the rule concepts deadline to 75 days prior to the request for hearing. Having detailed rule concepts, and ideally draft rule text, as early as feasible in the stakeholder process will be critical to ensure the process is in fact designed to accommodate opportunities for iterative, meaningful dialogue and progress towards consensus, as well as potentially streamlining the prehearing process.

The Chamber appreciates and agrees with the Division's proposal to require a more thorough and robust pre-petition process and requests that the Commission adopt it with revisions to specify a well-defined scope and as much detailed draft rule language and supporting information as possible.

B. Alternate Proposal and "Redlines" Definitions, Timing and Scope Determination

The Division's July 30 Original Proposal broadened the definition of Alternate Proposal such that most substantive rule revisions would need to be packaged as an Alternate Proposal. Under that construct, we anticipate that most parties would end up filing Alternate Proposals in most rulemakings. This, combined with burdensome requirements of an Alternate Proposal package, would have increased burdens on all parties and commissioners.

The concept in the Division's October 8th Revised Proposal is a promising solution – it allows parties to file redlines, and an Economic Impact Analysis ("EIA") to the extent warranted, without the additional components that an Alternate Proposal would entail, and provides a process for a determination on whether the redlines are within the scope of the hearing and meet other threshold criteria.

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The Chamber supports the new approach in the Division’s October 8th Revised Proposal, including the new concept of “Redlines” and revised definition of Alternate Proposal and the new definition of “Redlines.” The Chamber would expand the Alternate Proposal definition slightly to also include rule revisions that parties request without submitting specific rule language. We believe that rule language and redlines that appreciably alter the Division’s proposal should be accompanied by economic support and additional detail and arguments. This will allow for fairness and equity across Parties and avoid some of the confusion created by the current definition in the Commission’s procedural rules.

The Chamber also agrees with the Division that Redlines should be submitted early in the process. Parties should not be allowed to file redlines on entirely new concepts after Initial Comments. The Chamber generally supports the Division’s July 30th original proposal’s sequential deadlines for Redlines (formerly Alternate Proposals) and Initial Comments, which we believe will enable Initial Comments and Position Statements to be more meaningful and accommodate more opportunities for dialogue and narrowing of issues prior to the hearing. Under the Division’s October 8th Revised Proposal, Redlines and Initial Comments will be subject to the same deadline. The Chamber would like to continue to discuss the concept of decoupling those early filings and explore possibilities to accommodate sequential filings, or to otherwise enhance the iterative nature of the prehearing process.

As to determinations on whether Redlines / Alternate Proposals are within the scope of the hearing, the Chamber supports the concept of allowing the Hearing Officer to make an initial determination with the opportunity of appeal to the entire Commission. We do not, however, support an automatic extension of time to accommodate that request. An appeal should not, by default, have the automatic effect of potentially delaying a rulemaking hearing or suspending subsequent filing deadlines. We acknowledge that this may require preparation of material that may not be ultimately presented to the Commission; however, that practice occurs in the current process, and we would not want delays to hinder a rulemaking moving forward. The Chamber prefers to leave flexibility for the Hearing Officer to decide – on a case-by-case basis – whether to shift deadlines to accommodate an appeal, and our view is that shifting deadlines should not become the norm.

We also support some guardrails and specificity around when an Alternative Proposal is sufficiently ripe to be within the scope of any given rulemaking. To facilitate this ripeness and scope determination, the Hearing Officer or Commission may refer to specificity in the hearing notice document and supporting documentation that is provided in the pre-petition process. This underscores the need for a robust and specific notice of hearing description and clear and complete documentation supporting a rule proposal. The Chamber also generally supports the proposed consideration of certain ripeness factors to be used in evaluating whether to consider certain alternate proposals. These factors are also being requested by the Joint Industry Working Group (“JIWG”) in this rulemaking and JIWG’s prehearing statement discusses them in more detail. The requested ripeness factors include:

- Any relevant pending litigation;
- Pending federal action on related requirements;

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- Consistency with the Commission’s regulatory agenda;
- The Division’s and regulated entities’ capacity to implement the rules;
- Consistency with the initiatives of other state agencies;
- The complexity and scale of the topics;
- Pending or anticipated legislation; and
- Any similar factors that impact whether the Commission should consider the topics during the pending rulemaking hearing or defer such consideration.

See the JIWG PHS at pp. 5.

C. Economic Impact Analyses

The Chamber generally supports the October 8th Revised Proposal revisions to Section V.D.1.b. which clarify that parties must, in accordance with the Colorado Air Pollution Prevention and Control Act, Section 25-7-110.5(4), C.R.S., evaluate the economic impact of their Redlines. Section 110.5(4) sets forth four options for an EIA. In stakeholder discussions, the question arose as to whether to require a specific type of EIA. While the Chamber does not wish to opine at this time on the options for EIAs in Section 110.5(4), we believe that more robust EIAs need to be undertaken in future rulemaking proceedings. EIA’s should contain more useful information and reflect a higher quality of analysis. Where reasonably practicable the proponent should pursue the option that provides more useful information to the stakeholders anticipated to be parties to a rulemaking. A more robust EIA will become even more important given that, under the October 8th Revised Proposal, parties filing Redlines may rely more heavily on the proponent’s EIA.

D. Errata Language

The Division has proposed to limit the use of Errata for submitting revised language to the Commission after the Position Statements are filed, unless any substantive change is agreed to by all Parties and the Division. *See* October 8th Revised Proposal, Section V.D.9. The Chamber does not support this limitation on the use of Errata. As the Colorado Legislature piles more and more rulemaking requirements on the Air Quality Control Commission and Division, these rulemakings pile up and often provide insufficient time for all parties to thoroughly understand and digest the issues at hand. As a result, productive discussions between all parties often proceed up until the Division’s final written response (or even oral testimony), resulting in much improvement for all involved. The proposed limitation on the use of Errata will lead to less meaningful, functional, implementable, and agreeable regulations, which we believe is contrary to the intent of this rulemaking.

E. Title V Permit Process, Section VII.D.14.

As the Colorado Chamber understands it, the Division’s revisions to Section VII.D.14 are intended to clarify the Title V operating permit process to ensure it is consistent with the federal Clean Air Act and the U.S. Environmental Protection Agency’s (“EPA”) regulations concerning state Title V permit programs. The intent of these revisions is also to be generally consistent with the Division’s common practice to act on a Title V permit (i.e., grant, deny or modify it)

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within 30 days following EPA's 45-day review, where EPA does not object. In fact, the Division usually issues a permit much sooner than 30 days in such circumstances.

As regulated entities subject to air permit requirements in Colorado, Chamber members appreciate having clear rules defining the Title V permitting process and timeline so that permittees and members of the public can better plan and anticipate what to expect. Thus, the Chamber generally supports the Division's intent to clarify the timeframe within which the Division will act on a Title V permit following EPA's review. However, the Chamber believes that additional revisions are needed to Section VII.D.14 to more clearly achieve the Division's intent and avoid unintended interpretations.

The Chamber suggests the following revisions to the Division's October 8th Revised Proposal. The Chamber understands these redlines are consistent with revisions being proposed by the JIWG as well:

"VII.D.14. The Division will make any responses to public comments available to interested persons at the time of permit issuance or denial. The administrative record will include the permit application and supporting data, the preliminary analysis/technical review document, the draft permit and any permit revisions, the final permit, comments and documentation received during the public comment period and public comment hearing, any applicant responses to comments, and the Division responses to comments. The Division must grant, deny, or modify the permit within thirty (30) days of the conclusion of the public comment period. ~~This thirty (30) day period does not begin~~ or for Title V operating permits, ~~until~~ after the conclusion of EPA's 45-day review period, whichever is later. This thirty (30)-day period does not apply if EPA raises objections to the permit."

Some stakeholders have discussed the need for such clarifying revisions with the Division. The Chamber and its members look forward to further discussing with the Division and other stakeholders.

Through discussions thus far, we understand the Division has considered (and may still be considering) whether to remove Section VII.D.14 entirely. But, notably, this timeframe following EPA's 45-day review without an objection is not memorialized elsewhere in state or federal regulations. In order to preserve the 30-day timeline, the Chamber favors retaining Section VII.D.14, with our minor clarifying revisions noted above.

The Chamber also considered whether Section VII.D.14 should be expanded to address other aspects of the Title V permit process, such as the process that would apply if EPA does object to a permit. While the Chamber is not necessarily opposed to adding more permitting process clarifications in state regulations, it is unnecessary at this time because most aspects of the Title V process are already spelled out in federal regulations (see, e.g., 40 C.F.R. §§ 70.7 and 70.8). Any additional permit process clarifications should be tackled in a future rulemaking focused on Title V permitting, rather than in this instance where the Division is proposing a surgical correction to existing rule language.

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If the Division or other parties raise issues or propose further rule revisions to this Section VII.D.14, the Chamber will consider those ideas and may comment further in its Rebuttal Statement or at the Hearing, as appropriate.

II. ISSUES TO BE RESOLVED BY THE COMMISSION

1. Whether to adopt the Division's proposed changes to the Procedural Rules and corresponding Statement of Basis and Purpose, as originally proposed on July 30th or as revised on October 8th.
2. Whether to adopt revisions to resolve the issues listed and explained in Section I above.

III. EXHIBITS TO BE INTRODUCED AT HEARING

The Chamber does not have any Exhibits to file at this time. The Chamber does not currently intend to introduce any exhibits or written testimony at the hearing, but reserves the right introduce exhibits or written testimony necessary to rebut any Alternate Proposals, rule revisions or issues raised by the Division or other parties to this rulemaking.

IV. WITNESSES AND PRELIMINARY DESCRIPTION OF TESTIMONY

Each of the following witnesses may testify on any of the topics and comments articulated in the Chamber's Prehearing Statement based on their history and experience participating in Commission rulemakings.

- Christy Woodward, Astute Regulatory Solutions, Regulatory Affairs Advisor to the Colorado Chamber of Commerce. Ms. Woodward will testify on all aspects of the rule proposal addressed in the Chamber's prehearing filings and may further testify in rebuttal to other Parties and the Division's prehearing filings and testimony at Hearing.
- John R. Jacus, Davis Graham & Stubbs LLP, Co-Chair of the Colorado Chamber of Commerce' Air Quality Committee. Mr. Jacus may testify on all aspects of the rule proposal addressed in the Chamber's prehearing filings and may further testify in rebuttal to other Parties and the Division's prehearing filings and testimony at Hearing.

V. WRITTEN TESTIMONY

The Chamber does not have any written testimony at this time, but reserves its right to provide written testimony in response to other parties' prehearing statements.

VI. TIME REQUESTED AT HEARING

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The Chamber anticipates it will need **25 minutes** for testimony at the hearing. The Chamber may request more time if additional testimony is required in rebuttal to other prehearing statements or alternate proposals.

VII. CONCLUSION

The Chamber appreciates the opportunity to submit this Prehearing Statement and respectfully requests the Commission thoughtfully consider and adopt the Chamber's proposed revisions to the Proposed Rules.

Respectfully submitted this 15th day of October, 2024.

/s/ Christy Woodward

Christy Woodward
Astute Regulatory Solutions, LLC

*Representative for the Colorado Chamber of
Commerce*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Prehearing Statement of the Colorado Chamber of Commerce was served on the Parties listed below via electronic mail on October 15, 2024.

Air Quality Control Commission

jojo.la@state.co.us
tom.roan@state.co.us
cdphe.aqcc@state.co.us
robyn.wille@coag.gov
laura.steele@coag.gov
john.watson@coag.gov

Air Pollution Control Division

michael.ogletree@state.co.us
jennifer.shea@state.co.us
jessica.ferko@state.co.us
jeramy.murray@state.co.us

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cory.haller@coag.gov
kacey.higgerson@coag.gov

American Petroleum Institute Colorado

schwartzk@api.org
paulesm@api.org
jbiever@williamsweese.com
dratliff@williamsweese.com

Colorado Chamber of Commerce

cochamberregaffairs@cochamber.com

Colorado Communities for Climate Action & Local Government Coalition

kkeefe@adcogov.org
sdaggett@adcogov.org
ccopeland@bouldercounty.gov
olucas@bouldercounty.gov
elizabethparanhos@delonelaw.com
jsmith@cc4ca.org
lex@cc4ca.org
skeane@kaplankirsch.com
rscott@kaplankirsch.com

Colorado Energy Office

keith.m.hay@state.co.us
cynthia.vitale@coag.gov
gabby.falcon@coag.gov
kacey.higgerson@coag.gov

Colorado Oil and Gas Association

william.groffy@coga.org
bw-aqcc-hearings@bwenergylaw.com
ccolclasure@bwenergylaw.com
bnichols@bwenergylaw.com

Community and Conservation Groups

eantafoya@greenlatinos.org
bhattlex@gmail.com
aschluntz@earthjustice.org
rjaffe@earthjustice.org

Environmental Defense Fund

ngu@edf.org
kschneer@edf.org
adegolia@edf.org

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tbloomfield@kaplankirsch.com
atynan@kaplankirsch.com

Oxy USA Inc.

angela_zivkovich@oxy.com
robert_mathes@oxy.com
erin_ramaker@oxy.com
ewaeckerlin@bhfs.com APCD Prehearing Statement 11
cshephard@bhfs.com

Regional Air Quality Council

msilverstein@raqc.org
tmoore@raqc.org
kreumannmoore@raqc.org

Weld County BOCC

bbarker@weld.gov
mconroy@weld.gov

/s/ Christy Woodward
Christy Woodward