BEFORE THE AIR QUALITY CONTROL COMMISSION
STATE OF COLORADO

PREHEARING STATEMENT OF COLORADO CHAMBER OF COMMERCE

IN THE MATTER OF PROPOSED REVISIONS TO REGULATION NUMBER 27

EXECUTIVE SUMMARY

The Colorado Chamber of Commerce ("Colorado Chamber"), through its undersigned counsel Holland & Hart LLP, hereby submits its Prehearing Statement in connection with the above-captioned hearing regarding the Air Pollution Control Division's ("Division") proposed revisions to Colorado Air Quality Control Commission ("Commission") Regulation Number 27 regarding greenhouse gas reductions (the "Proposed Rule"). The Colorado Chamber also submits an Alternate Proposal and accompanying documentation under separate cover and references the Alternate Proposal as appropriate in this Prehearing Statement.

The Colorado Chamber represents thousands of businesses of all sizes across our state, over fifty local chambers of commerce, as well as numerous trade associations & economic development organizations. Among the Colorado Chamber's membership are major employers and operators in Colorado's industrial manufacturing sector, including, for example, food production, cattle ranching, agriculture, dairies, breweries, bottling facilities, semiconductor manufacturers, oil and gas refineries, mineral extraction and processing facilities, and many members whose businesses and operations are actively engaged in air quality improvements and the reduction of emissions. Of the GEMM 2 facilities identified for specific greenhouse gas ("GHG") emission reduction measures in the Division's proposed revisions to Regulation No. 27, the Colorado Chamber counts among its current members ten of the eighteen facilities. The Colorado Chamber submits this Prehearing Statement and an Alternate Proposal because the Proposed Rule, and possibly alternate proposals advanced by other parties, will substantially impact these Chamber members, other manufacturing sector facilities in Colorado, and Colorado's economy.

Summary of Colorado Chamber's General Position and Contents of Prehearing Statement

The Colorado Chamber members were active participants in the Division-led stakeholder process for the development of the Proposed Rule. The Colorado Chamber appreciates the work that the Division has undertaken to revise Regulation Number 27 and generally supports many aspects of the Division's Proposed Rule. Nevertheless, the Colorado Chamber is concerned that the Proposed Rule goes beyond the statutory reductions called for in HB 21-1266 and lacks, among other things, the flexibilities and guardrails necessary to ensure that manufacturing not only remains in Colorado, but also thrives. Specifically, the Colorado Chamber addresses the following topics in this Prehearing Statement:

- The limited scope of this rulemaking should inform the Commission's overall approach.
- In the Final Rule the Commission should adopt language clearly stating that reductions in production at a GEMM 2 facility are not a compliance tool.
- The rulemaking must minimize carbon leakage and ensure facilities are not required to curtail production to comply with the requirements.
- The Proposed Rule's requirement to begin emissions reductions by 2024 is too aggressive, not statutorily required and should be eliminated.
- The Commission should retain, and strengthen, the Proposed Rule's cost effectiveness and technical feasibility guardrails.
- The over-prioritization of co-pollutant reductions impairs the Proposed Rule from achieving highly cost-effective and substantial GHG reductions.
- GHG emissions credit trading is an important policy tool, and the Commission should foster an affordable, viable, transparent and stable trading system in the Final Rule.
- The Commission should adopt the GHG reduction Fund as outlined by the Chamber. The GHG Reduction Fund is a crucial compliance component, together with the credit trading program it will provide a compliance alternative of last resort.
- The permitting prioritization provision in the Proposed Rule is a necessary provision that facilitates GHG reductions and success of the program.
- Current facility owners may not and should not be penalized for historic GHG emissions – the Division appropriately removed this provision from the Proposed Rule.
- The Proposed Rule appropriately accounts for recent changes to GEMM 2 facilities
- The Proposed Rule's noncompliance provisions are a departure from past precedent, too stringent and improperly address civil penalties.
- The Final Rule should make clear that when a facility meets its compliance target, they have fulfilled all obligations.

In this Prehearing Statement, the Colorado Chamber provides comments and proposed changes regarding several provisions of the Proposed Rule to address the concerns noted above. The Colorado Chamber notes that it has not commented or proposed revisions to the percent reductions or mechanisms for determining the percent reductions in this Prehearing Statement (with the exception of use of historic emissions as a basis for determining percent reductions). The Colorado Chamber has numerous members who each have their own individual positions on the percent reductions and mechanisms for determining the most appropriate and achievable percent reductions on a facility-by-facility basis. The Colorado Chamber's election not to comment on these issues, and instead leave to individual members, does not reflect either support for or opposition to the percent reductions and mechanisms for determining the percent reductions.

The Colorado Chamber provides a redline of its proposed changes to the regulatory text (Exhibit 001), and a redline of the proposed changes to the Statement of Basis and Purpose (Exhibit 002). The Colorado Chamber also submits an Alternate Proposal (with necessary exhibits) under separate cover. The Colorado Chamber respectfully requests that the Commission consider its comments and adopt the proposed changes in its redlines and Alternate Proposal.

Estimate of Time for Presentation

The Colorado Chamber estimates that it will need **ninety (90) minutes** for testimony at the hearing. The Colorado Chamber reserves the right to request more time if additional testimony is required to rebut other parties' statements or alternative proposals. This is a unique rulemaking, and as such, allocation of time warrants special attention. As noted above, the Colorado Chamber is representing the joint interests of ten GEMM 2 facilities that will be subject to the Proposed Rule to streamline filings for the benefit of the Commission and other parties. While the majority of those ten facilities are also submitting individual pre-hearing statements to address unique issues to those facilities, the Chamber is representing broad consensus issues of Colorado Chamber members. It is important that when allocating time for presentation, the Commission grants the Colorado Chamber sufficient time to address these joint issues.

PREHEARING STATEMENT OF COLORADO CHAMBER OF COMMERCE

I. FACTUAL AND LEGAL ISSUES RELATED TO THE PROPOSED RULE

A. The Limited Scope of this Rulemaking Should Inform the Commission's Overall Approach.

As the Commission considers revisions to Regulation Number 27, the Colorado Chamber wishes to underscore the limited scope of this rulemaking—both as to the number of facilities affected and their overall contribution to greenhouse gas emissions in Colorado. This rulemaking only applies to 18 facilities, all within Colorado, and these facilities only emitted approximately ***2% of overall statewide emissions*** in 2019.[1] Further setting this number in context, the entire industrial and manufacturing sector in 2019 emitted about 15.6% of state-wide GHG emissions, and the GEMM 2 facilities represent approximately one-eighth of the total industrial emissions.[2] State statute provides that the Commission consider "the relative contribution of each source or source category to statewide greenhouse gas pollution," the Colorado Chamber urges the Commission to consider this factor as it finalizes the rule for the GEMM 2 facilities.

Many of the GEMM 2 facilities have already expressed serious concerns about their ability to reduce emissions to the levels contained in the Proposed Rule. These facilities face a razors edge balancing act of implementing reductions that are economically feasible and don't result in shifting production or supply to other states or countries that do not have the same GHG policies as Colorado. Energy efficiency measures to reduce on-site heat and steam demands can only go so far, and facilities have already been incentivized to operate at high levels of efficiency to reduce fuel consumption costs. And certain practices, energy efficiency through cogeneration are not addressed in the Proposed Rule.

Making matters worse, the manufacturing sector is likely the most prone to emissions leakage from other sectors. Each of the GEMM 2 facilities competes in a national—if not global—market. If a facility must reduce production or substantially increase prices, another supplier can and will gladly fill in the gap, especially given the free flow of interstate commerce domestically. However, in many cases this supply can have additional emissions (through transport), could be less efficiently produced, or can impact consumers both through availability and costs. In contrast, other sectors that generate far greater GHG emissions do not face the same competitive pressures. Electricity suppliers have single-supplier service territories, and that secured customer base means there is no risk that out-of-state electricity suppliers would displace local supply. Likewise, the

[1] *See* Colorado 2021 Greenhouse Gas Inventory Update (Final Publication), at 26 (Sept. 2021), available at https://drive.google.com/file/d/1SFtUongwCdZvZEEKC_VEorHky267x_np/view (Exhibit 4-1 shows state-wide GHG emissions in 2019 of 126 million MTCO2e). In 2019, the total GEMM 2 group's emissions were approximately 2.5 million MTCO2e, which is just shy of 2% of 126 million MTCO2e in all of Colorado.

[2] *See id.* at 45, 59 (Exhibit 4-1 shows 15 MTCO2e in of GHG emissions from fuel use in the industrial sector in 2019, and Exhibit 6-1 shows 4.655 MTCO2e of GHG emissions from industrial processes in 2019). The total industrial emissions of 19.655 MTCO2e divided by state-wide emissions of 126 MTCO2e is 15.6%.

residential, commercial, and transportation sectors are inherently location-specific and not readily susceptible to emissions leakage.[3]

B. The Proposed Rule and its Economic Impact Analysis Must Account for and Minimize Carbon Leakage.

Carbon leakage is an unintended consequence of greenhouse gas regulation that occurs when one jurisdiction adopts more stringent GHG regulations than its neighbors or foreign competitors. The result of leakage is a shift of production to the less restrictive jurisdiction. That shift often results in potentially greater net GHG emissions undermining the intended benefits. As noted by the Division in the GEMM 1 rulemaking, "[g]iven the atmospheric nature of greenhouse gas accumulation and the global nature of climate change, leakage presents a particular challenge when regulating GHG emissions."[4] The intended climate benefits of this regulation will be limited or possibly negated if production or manufacturing in Colorado shifts to a less restrictive jurisdiction.

The Commission must adopt a Final Rule that achieves the most cost-effective reductions while also maintaining production and manufacturing levels in Colorado and preventing carbon leakage. Colorado has established itself as a national leader in GHG emissions reductions. However, this is a state rule, GEMM 2 facilities operate in states with less stringent GHG reduction requirements and a Final Rule that makes Colorado less competitive with other states will lead to facilities taking some or all of their production, and economic activity to those other states. A poorly crafted rule could have the unintended effect of driving manufacturing out of Colorado and thereby increasing GHG emissions while also eliminating Colorado jobs. The Chamber believes it is possible for Colorado to be both a leader in addressing climate change and maintaining a healthy and vibrant economy.

The Colorado Chamber contends many of the 18 facilities at issue are subject to a high potential for carbon emissions leakage. We disagree with the Division's SBAP that, "[t]he 18 facilities impacted by the GEMM 2 rule are not considered energy-intensive, trade-exposed sources" or "EITEs." The Colorado Chamber acknowledges that EITEs, as defined by Regulation Number 27, do not include these 18 facilities. However, the Division's statement is misleading because neither the Colorado General Assembly, the Commission, nor the Division have undertaken any analysis to determine which facilities or industries are in fact energy-intensive and trade-exposed. In fact, other state programs identify more than four types of manufacturing facilities as being energy-intensive, trade-exposed or both. In California, over 52 types of EITE facilities are manufacturing, including but not limited to: breweries; glass container manufacturing; food manufacturing; petroleum refining; dairy product manufacturing; and potash, soda, and borate mineral mining.[5] In Washington, the State identified over 13 types of EITE facilities, including: glass container manufacturing; computer and electronic product

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[3] Notably, however, petroleum refining (i.e., an input into the transportation sector) is susceptible to leakage because out-of-state suppliers can import gasoline into the state.

[4] *In the Matter of Proposed Amendments to Regulation Number 2022, October 22, 2021 Hearing*, APCD_PHS at 10 (Sept. 9, 2021).

[5] 17 Cal. Code Regs. § 95870, Table 8-1.

manufacturing; food manufacturing; and petroleum refining.[6] Thus, the mere fact that a facility is not one of the EITEs (as currently defined in limited fashion by Regulation Number 27) does not mean it does not suffer from concerns regarding external market pressures and emissions leakage.

Significant carbon leakage may result if GEMM 2 facilities are forced to curtail production in order to satisfy their annual GHG reduction obligations if there are no additional technically feasible and cost-effective onsite GHG reduction measures available and there are not enough credits in the trading market to satisfy compliance obligations. If GEMM 2 facilities were forced to reduce production as a result of this rule, carbon leakage may occur in at least the following ways: (1) the products being imported into Colorado were produced at another facility with a higher emissions intensity than a GEMM 2 facility; and (2) the product being imported into Colorado would have additional emissions associated with its transport. The out-of-state competitors of the GEMM 2 facilities span across various sectors and include both national and international competitors. Carbon leakage resulting from international imports could be even higher. The Chamber understands that individual companies may present specific details regarding potential carbon leakage for their particular facility and industry.

The Commission must ensure that it adopts the most cost-effective regulations by providing GEMM 2 facilities with the greatest flexibility possible to comply. The Final Rule should include a GHG Reduction Fund as an alternate path to compliance combined with a robust and viable credit trading market. The Final Rule should also clearly state GEMM 2 facilities will not be required to curtail production to comply with the provisions of the rule. The statute sets forth the specific factors the Commission can consider in adopting rules to meet the statutory target, the factors outlined C.R.S. § 25-7-105(1)(e)(II)—(VI). The statute does not provide the Commission with unlimited authority to achieve this goal.[7]

1. Requiring production curtailment is inconsistent with prior rulemakings and parts of the Proposed Rule.

HB 21-1266 assigned an emission reduction target and clearly defined the factors the Commission could consider when adopting rules to meet the target. Requiring facilities to shut in or reduce production is not one of those factors. The GEMM 1 rulemaking established GHG reduction targets for EITEs within the industrial and manufacturing sector, as defined by the Colorado General Assembly and interpreted by the Commission.[8] The GEMM 1 rule did not require EITE facilities to reduce production to meet that Rule's emission targets. Rather, the GEMM 1 rule requires that all EITE facilities reduce facility-wide emissions by five percent—the target set by HB 21-1266.[9] The GEMM 1 rule explicitly stated that its required emissions reductions should be met, " . . . **without requiring the source to reduce production to accomplish these reductions**."[10] In fact, the GEMM 1 rule not only does not require reductions in production, but it allows for increases in production. This was an appropriate mechanism to

[6] Washington Administrative Code § 173-446A-030, Table 030-1.
[7] C.R.S. § 25-7-105(1)(e)(XIII).
[8] *See* Regulation No. 27, Part A § I.B.
[9] *See id.*, Part A § V.A, Part B; C.R.S. § § 25-7-105(1)(e)(IX) (requiring five-percent reduction of GHG emissions from EITE sources).
[10] *Id.*, Part B (emphasis added).

ensure that the EITE facilities did not suffer from the potential for production curtailment and that emissions leakage therefore would not result. And, the need for this protection is not specific to EITEs. Many of the eighteen facilities also operate in industries that are energy intensive, trade exposed and/or subject to significant emissions leakage, as discussed above.

The Division's proposed baseline methodology requires facilities to select the "highest reported direct GHG emissions from either the 2021 or 2022 calendar year."[11] It contains a limited baseline adjustment "to account for capital investments between 2015 and 2021 that increased production capacity over thirty (30) percent but that had not been realized."[12] The Commission cannot require other facilities to reduce production.[13]

2. Requiring facilities to shut down or reduce production could result in a constitutional taking.

"Both the federal and the Colorado constitutions include takings clauses."[14] Under the Colorado and federal takings clauses, when a government regulation "places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred depending on": the character of government action; the economic impact on the claimant; and the degree of interference with reasonable investment-backed expectations.[15]

The parties to this rulemaking have reasonable investment-backed expectations in the continued use of their facilities for their subject purpose. The Proposed Rule may have impacts on a GEMM 2 facility's ability to continue to operate its facility and realize the full economic potential of its property. To avoid an unconstitutional taking of property, the rule must provide a guaranteed mechanism for the GEMM 2 facilities to meet its requirements without forced curtailment of production.

C. The Commission cannot (and should not) adopt a rule that is impossible to comply with.

As noted elsewhere in this Prehearing Statement, it is unclear whether all operators can comply with the rule as proposed by the Division without curtailing production. To avoid promulgating a rule that could force cuts in production and jobs the Commission should adopt the Colorado Chamber's proposed GHG Reduction Fund, which would avoid any argument that the Commission passed a rule that some facilities cannot comply with. Though there is limited case law on this issue, the United States and Colorado Supreme Courts have had the opportunity to consider the impossibility of compliance with statutes and regulations in at least two cases. In *Missouri Pac. R. Co. v City of Omaha*, the Court held that "there is no doubt as to the power of a

[11] Proposed Rule § II.X.
[12] *Id.*
[13] *See Transactive Corp.*, 91 F.3d at 237.
[14] *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 63 (Colo. 2001).
[15] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

court of equity to relieve the railroad company from the infliction of unwarranted penalties if it should turn out to be physically impossible, as the company insists, to comply with the ordinance in this respect."[16] Further, in the case of a Colorado statute requiring livestock transportation companies to transport livestock at an average required speed and within a required time, the court held that a "statute may be inapplicable and unconstitutional, if, because of the location of the railroad and the difficulties attending its operation, it would be practically impossible with due regard to the safety of its employees and the public, to comply with its provisions."[17] And, in coming to its conclusion, nowhere did the court hold that the transportation company should simply not transport livestock (*i.e.*, curtail operations) in order to comply.

D. The Proposed Rule's Requirement to Begin Emissions Reductions by 2024 Is Infeasible, is not Statutorily Required, and Should be Eliminated.

Depending on whether a facility falls under Section I.A.1 through I.A.4 of Part B, the Proposed Rule would require various reductions (up to 1.5% off the existing baseline) in GHG emissions beginning in 2024. The Colorado Chamber urges the Commission to revise this provision of the Proposed Rule because it imposes a timeline that is not statutorily required, and if required, would be infeasible for most facilities to achieve.

Further, considering the significant reductions GEMM 2 facilities have already achieved relative to the 2015 baseline, no additional reductions are necessary to "secure" the "meaningful emission reductions" anticipated by the statute. However, if interim requirements are imposed, they should apply no sooner than 2026 and facilities must be able to generate credits for:

(1) emissions below the highest of the 2021/2022 baseline for 2024 and 2025; and

(2) for emissions below the interim requirements for 2026 through 2029.

1. Imposing Emissions Reductions in 2024 Is Not Required by Statute.

The statute does not require any additional interim reduction requirements beyond those already achieved. Because no further statutory obligation remains for the Division and Commission, there is simply no reason to force an unworkable interim compliance deadline on GEMM 2 facilities which could trigger immediate noncompliance.

The relevant statutory phrase says that the rules must "be designed to accelerate near-term reductions, and secure meaningful emissions reductions to be realized beginning no later than September 30, 2024."[18] Notably, the term "secure" in this context has been met, where the current emissions profile from GEMM 2 facilities (*i.e.*, GEMM 2 2021/2022 emissions) have been actively and aggressively reduced by approximately 12% as compared to the 2015 baseline. When interpreting a statutory term, Colorado courts look to the "ordinary" and "natural" meaning as set forth in dictionary definitions. Merriam-Webster defines "secure" as "to relieve from exposure to danger ... act to make safe against adverse contingencies" or "to put beyond hazard of losing or

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[16] 235 U.S. 121 (1914).
[17] *Freeman v. Boyer Bros*., 82 Colo. 509, 528 (1927).
[18] C.R.S. § 25-7-105(1)(e)(XIII).

of not receiving"; "to make fast"; and "to get secure usually lasting possession or control of." Synonyms include "defend," "guard," "keep," "protect," and "safeguard."

Reductions achieved since 2015 are mainly due to projects that are permanent in nature, including, for example, facilities' permanent conversions from coal to natural gas-fired combustion equipment, or retirement of hydrofluorocarbons, or HFCs. The permanency of such projects ensures that "meaningful" emission reductions since 2015 have in fact been "secured."

H.B. 21-1266's provisions to secure meaningful early reductions apply to the entirety of the industrial manufacturing sector,[19] and not just these 18 GEMM 2 facilities.[20] The sector includes, for example, oil and gas sources, gas distribution utilities, GEMM 1 facilities, and others, from which meaningful emissions have already been secured as well, including in some cases via already-adopted Commission regulations.[21]

It is also important to note that the September 30, 2024, date in the statute should not be interpreted to modify the statutory phrase instructing that the rule "be designed to accelerate near-term reductions." The September 30, 2024 date is most plainly read as only applying to "secure meaningful emissions reductions" This is because the entire sentence in the statute directs that the rules should: "[1] include protections for disproportionately impacted communities and prioritize emission reductions that will reduce emissions of co-pollutants that adversely affect disproportionately impacted communities, [2] be designed to accelerate near-term reductions, and [3] secure meaningful emission reductions from this sector to be realized beginning no later than September 30, 2024."

In a list of instructions, as here, the qualifying phrase "to be realized beginning no later than September 30, 2024" could apply to either the third instruction or all of them. It would make little sense to apply the qualifying phrase to only a subset of the instructions. Thus, because it does not make sense to speak of including protections to be realized or realizing a prioritization of emission reductions, the qualifying phrase does not apply to the first instruction. If it does not apply to the first instruction, then the qualifying phrase does not apply to the second instruction that the rules "be designed to accelerate near-term reductions."

The Colorado Chamber contends that no requirement before 2030 should be imposed. If, however, the Commission decides to impose interim requirements, for the reasons stated no requirements should be imposed before calendar year 2026. Accordingly, some facilities may well implement an initial measure by September 30, 2024, in order to test and tune the measure(s) necessary to achieve a reduction for the 2026 compliance year. The Commission can therefore

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[19] C.R.S. § 25-7-105(1)(e)(XIII) (". . . the Commission shall adopt rules to reduce statewide greenhouse gas emissions from the industrial and manufacturing ***sector*** in that state by at least twenty percent by 2030 below the 2015 baseline established pursuant to section 25-7-140(2)(a)(II) . . . .").
[20] *See id.*
[21] For example, in 2020, the Commission adopted rules to phase out Hydrofluorocarbons ("HFCs") in order to reduce HFC emissions (which have a high global warming potential) in Colorado. *See* Reg. 22, Part B, Section I.

reasonably establish a 2026 compliance year even if it incorrectly determines that some incremental emissions reductions could begin by September 30, 2024.

If the Commission incorrectly concludes that incremental emissions reductions must occur by September 30, 2024, then the Proposed Rule is unnecessarily stringent because it requires reductions in all of 2024 (rather than just September 30 and after). It establishes a retroactive January 1, 2024, deadline. A prorated emission reduction requirement alone, but certainly in conjunction with other aspects of the Proposed Rule, would be marginally helpful but it would not totally address other significant problems with the proposal. However, at a minimum we respectfully request the Commission prorate the required reductions for 2024 to only require one-quarter of the reductions that would be imposed in 2025 through 2029.

2. Capping Emissions Beginning in 2024 Presents an Infeasible Timeline

The statutory basis for the GEMM 2 rules, Section 25-7-105(1)(e), C.R.S., requires the Commission to "adopt rules to reduce statewide greenhouse gas emissions from the industrial and manufacturing sector . . . taking into account the factors set out in subsections (1)(e)(II) to (1)(e)(VI) of this section."[22] Section 25-7-105(1)(e)(IV), C.R.S., provides that "[i]n carrying out its responsibilities under this subsection (1)(e), **the Commission shall consider** . . . the costs of compliance; economic and job impacts and opportunities . . . and **the time necessary for compliance**." (Emphasis added)

Pursuant to this clear directive, the Commission must consider the time necessary for compliance. In so doing, it must determine a reasonable time necessary for the GEMM 2 facilities to achieve compliance with new GHG caps. However, the Proposed Rule does not include a technical feasibility analysis. Nor does it include any evidence or specific information indicating that the GEMM 2 facilities can meet the first-of-their-kind GHG emission caps beginning in 2030, much less 2024.

Imposing interim reductions at or up to 1.5% below 2021/2022 levels beginning in 2024 presents an impossible timeline for many facilities, and the Commission should not adopt this proposed provision. While the hearing for this matter is set for September 21–22, 2023, the rule would impose an initial cap in 2024—just three months after the rulemaking hearing. Setting aside that the rule would still be subject to review by the Attorney General and would require the statutory timeline for effectiveness under the Colorado Administrative Procedures Act, GEMM 2 facilities would have only three months between the end of the rulemaking hearing to plan, develop, and implement projects to reduce emissions in order to meet the 2024 emissions caps.

For emissions reduction measures that require construction, this is simply an impossible timeline. For most businesses, the timeline to finance, design, plan, permit, and construct a project can take years in normal circumstances. However, the GEMM 2 facilities are not just most businesses—they run large, complex, and integrated facilities where the downtime of one process can result in downtime across an entire facility. For this reason, careful advanced planning is essential. Even under the best of circumstances, construction projects can be delayed for reasons

[22] C.R.S. § 25-7-105(1)(e)(XIII).

outside of a facility's control, including supply chain issues, permitting delays, or inclement weather.

And even for emissions-reduction measures that only require modest undertakings (i.e., projects with limited design and construction), the proposed timeline leaves no time to test the effectiveness of the new measure(s). This is especially important for efficiency-enhancing projects where validation testing is required, and the actual performance can differ from the expected performance in ways that *ex ante* modeling cannot always identify. Moreover, some tuning of efficiency measures is often required after initial testing to understand why a measure may not be performing as initially expected. Thus, for many emissions-reductions measures that do not require construction, three months still presents an impossible timeframe for compliance.

The Proposed Rule's provision regarding permitting shows why imposing an interim requirement starting in 2024 is impossible. The proposed permitting provisions for emissions reduction measures would require that "a complete permit application [be submitted] to the Division at least 12 months prior to the start of construction or . . . modification." Proposed Rule, Part B, III.D. Even if a facility were to submit such an application immediately after the rulemaking hearing concludes in September, the rule does not contemplate that construction would begin until late September 2024, well after a project would need to be in place for satisfying the 2024 cap. The Division's recent removal of language in the provision "prioritizing" permit applications for manufacturing stationary sources will only exacerbate compliance issues that are baked into this rule, and while this provision will not solely alleviate those issues it would certainly provide some relief.

Thus, any interim requirement before 2026 would likely be very difficult to meet through on-site reductions (primarily due to timing and other factors). And if these reductions cannot be achieved, then operators would be at the mercy of the credit market in order to comply. However, few facilities would be able to generate credits during these years and it may be unknown (particularly in advance) which facilities will in fact generate credits for those early years. This is exacerbated by the Division's new proposal to prohibit an entity from generating credits until meeting its 2030 target. However, even without that problematic requirement, it is unclear that there would be sufficient credits for operators to meet the proposed reduction requirements in 2024 given all the above constraints to achieving on-site reductions in that time frame and the likely lack of credits. It is not as simple as capping emissions at the highest of 2021/2022, since reduction projects or strategies may be needed in some instances to meet those thresholds. In some instances, 2021 or 2022 may not be representative of an immediately achievable compliance limit for every facility. 2021 or 2022 is simply an emission level at a snapshot in time without a standard deviation or safety factor incorporated.

If a cap were set at an actual emission level, such as at a 2021 emission level, it would essentially restrict the facility to operate at the production and operational parameters that were run in 2021, and it assumes weather will be the same as in 2021. If production or operational levels cannot be feasibly sustained at 2021 levels or if a facility otherwise needs flexibility, a facility may need to undertake projects or make operational changes in order simply to ensure it can meet its 2021 emission cap each year. In addition, some types of facilities plan operational levels years in advance – they may have contractual obligations or otherwise lack flexibility to ensure they can operate at levels to meet an emission cap set at a 2021 emission level.

On top of these feasibility constraints, the 2024 emissions cap would interfere with achieving a high level of overall emissions reductions. The interim 2024 requirement would cause facilities to prioritize an extremely expedited set of modest measures to achieve the interim goal. Only after achieving this requirement (if feasible) would they then be able to turn to more ambitious emissions-reductions projects. However, such projects can have years-long timeframes and may not be implementable during the period 2025 to 2030. The Colorado Chamber submits that 2026 is the earliest year for which a hard emissions cap would be reasonably feasible. Setting the first compliance year at 2026 will give facilities approximately just over two years to design, plan, build, and permit any projects required to reduce emissions to have the projects in the ground by January 1, 2026. This is still an aggressive timeline—two years still may not leave time for all these steps.

Thus, it is critical, as proposed in the Chamber's redline, that facilities can achieve their interim reduction through any of the compliance mechanisms; whether on-site, through credits, through sister facilities, or through the GHG Reduction Fund. For the interim requirements, there can be no prioritization because there is simply not enough time to implement projects on-site. Thus, flexibility for compliance must be provided.

3. Facilities should be able to generate credits for compliance with their interim requirements

If the Commission elects to pursue interim requirements, then the Commission must ensure the development of a complete and robust credit market available at the beginning of any such compliance period. One important way to do that is to eliminate the provision in the Proposed Rule precluding facilities from generating GHG credits until the facility has achieved its 2030 requirements. By imposing such a restriction on GHG credit development, the Commission reduces the likelihood that there will be credits in the market to meet the interim reduction requirements in the early years of the program. Because the Division has not conducted (and has not had facilities conduct) a comprehensive review of the technically feasible and cost-effective projects available to parties, the Division does not yet know whether operators can meet their reductions through on-site projects. And the Colorado Chamber understands that some GEMM 2 facilities will state clearly in this rulemaking that they cannot meet their proposed reduction requirements through on-site projects alone.

Furthermore, for the reasons stated above, it even may be difficult for operators to meet a 2026 interim requirement (even where the facility has technically feasible and cost-effective projects on-site sufficient to meet the interim requirements) due to permitting, timing, supply chain and other constraints, as noted above. Thus, compliance (with both the interim and 2030 requirements) will be based upon the development of credits. By limiting when credits can be generated, the Division will improperly and unnecessarily create even less liquidity in the market.

The Commission should ensure and adopt provisions allowing facilities to generate GHG credits by voluntarily reducing emissions below the highest of their 2021/2022 emissions for any years in which there is no interim requirement. For example, if the Commission adopted interim requirements to start in 2026, then the Commission should allow credits to be generated in 2024 and 2025 for such voluntary reductions. This will help to develop the credit market for those first

years in which any interim requirements are imposed and will help to provide a compliance mechanism should certain projects be delayed.

4. Recommendation

The Commission should not impose any interim requirements because they are impracticable, not required by the statute, and inequitable. If the Commission does propose an interim requirement, the interim requirement should begin no sooner than calendar year 2026. However, operators should be able to generate credits in 2024 and 2025 for emissions below the highest of their 2021/2022 emissions. By providing credits for voluntarily reducing below the highest of 2021/2022 emissions, the Commission would both incentivize early reductions, but would also assist in building up the credit market for use once the interim requirements become effective in 2026. Finally, as addressed elsewhere, once the interim requirements apply, a facility should be able to generate credits for GHG emissions reductions beyond the interim requirement.

E. The Commission Should Expand and Strengthen the Proposed Rule's Cost-Effectiveness and Technical Feasibility Guardrails.

The Colorado Chamber supports the Proposed Rule's inclusion of cost-effectiveness and technical feasibility guardrails and urges the Commission to maintain and strengthen those measures. From a legal and policy standpoint, this approach is well supported, and the Commission should retain these guardrails in any final rule.

1. Legal and Policy Considerations

Beginning with legal considerations, the statutory provision being implemented here requires consideration of costs and cost-effectiveness. C.R.S. § 25-7-105(1)(e)(XIII) requires that the Commission take into account the factors set forth in "subsections (1)(e)(II) to (1)(e)(VI)." Notably, subsections (1)(e)(II), (1)(e)(V), and (1)(e)(VI) all reference "cost-effectiveness" or "cost-effective." And although subsections (1)(e)(II) and (1)(e)(V) provide that the Commission "may" consider those factors, subsection (1)(e)(VI) instructs that the Commission "shall" consider both the "costs of compliance" and "whether . . . more cost-effective emission reductions are available through program design."

The statutory authority governing the Commission's rulemakings goes even further by directing that the Commission adopt the "most cost-effective" alternative in C.R.S. § 25-7-110.8(1)(d)–(e). (Emphasis added) This statutory command should be read in harmony with C.R.S. § 25-7-105(1)(e)(XIII).23 C.R.S. § 25-7-110.8's requirements apply to this rulemaking because this rulemaking does not adopt by reference applicable federal rules, and the Commission has discretion under state law to adopt a wide range of alternative rules to achieve 20% emissions reduction.

[23] *See Union Pacific R. Co. v. Martin*, 209 P.3d 185, 189 (Colo. 2009) (stating that courts "assume the existence of other parts of the same statutory scheme and create a single, harmonious whole"); *Kinder Morgan CO_2 Co. v. Montezuma Cnty. Bd. Comm'rs*, 2017 CO 72, ¶ 24 (Courts should construe "statutes related to the same subject matter alongside one another, with the goal of giving consistent, harmonious, and sensible effect to all of their parts.").

When promulgating any regulations under the Colorado Air Act, the Commission must consider the "degree to which any particular type of emission is subject to treatment, and the availability, technical feasibility, and economic reasonableness of control techniques."24 The Division's Proposed Rule wholly fails to satisfy the inquiry required by the Colorado Air Act. This is because the Division's proposal puts the cart before the horse by first identifying the reduction target that will apply to each individual source before identifying whether there are any technically feasible and cost-effective control technologies available to each source to meet the proposed reduction levels. The Chamber and its members support flexibility, but not uninformed flexibility that has the potential to provide no path to compliance.

These legal provisions reflect the critical public policy goals that cost-effectiveness serves. Pursuing emissions reduction goals in a cost-effective manner ensures that for a given cost, the most emissions reductions are secured, or conversely, that a given benefit is achieved at the lowest possible cost. This is an important goal because it recognizes that resources are limited and therefore regulations should pursue (or require) actions with the greatest positive impacts and lowest costs before requiring other reductions. The same general rationale applies to feasibility; it makes little sense to require a facility to make reductions that are not technically feasible. This achieves no benefit and would result in the facility needing to reduce production, which would in turn lead to emissions leakage when another supplier from out of state fills the gap in supply to the market.

The sector-oriented approach taken in C.R.S. § 25-7-105(e) also reflects this rationale because the legislature determined that emissions reductions from the electric sector would be more cost-effective and feasible. State law therefore established a larger percentage reduction requirement for the electric sector than the industrial and manufacturing sector.[25]

2. The Proposed Rule Appropriately Does Not Require Facilities to Meet Their 2030 GHG Reduction Requirement Solely from On-Site Measures

With these background principles in mind, the Chamber supports that the Proposed Rule will not require emissions reductions exclusively from on-site reductions at individual facilities beyond a cost-effectiveness and feasibility backstop. Cost-effectiveness is an important backstop because some facilities may not be able to meet their assigned emissions reduction requirements without extremely expensive measures or, as a last resort, reductions in production. Production cuts will serve no broader emissions reductions benefit because out-of-state suppliers will increase their operations—and emissions—to fill the demand. And as discussed above, the Commission should prevent this rule from resulting in or requiring production reductions to achieve compliance with any final rule. For these reasons, we support those portions of the Proposed Rule's provisions that employ a cost-effectiveness and feasibility backstop for on-site emissions reductions measures and request additional provisions (and clarity) to ensure compliance with any final rule.[26]

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[24] C.R.S. § 25-7-109(1)(b)(IV).

[25] *See* C.R.S. § 25-7-105(1)(e)(VIII), (XIII) (establishing 80% reduction requirement for the electric sector, as compared with the 20% requirement for the manufacturing and industrial sector).

[26] *See* Proposed Rule, Part B, Section III.A. (requiring that facilities implement technically feasible, cost-effective on-site reduction measures).

3. The Division has not proposed a feasible alternative to its proposed reductions percentages

The Division must implement the mandate under section 25-7-105(1)(e)(XIII) for the Commission to "adopt rules to reduce statewide greenhouse gas emissions from the industrial and manufacturing sector in the state by at least twenty percent by 2030 below the 2015 baseline established pursuant to section 25-7-140(2)(a)(II)." The Division's proposed approach is to (1) identify the specific facilities that will be subject to the rule, (2) come up with a methodology for determining the percent reduction each specific facility needs to obtain, and then (3) require a facility to prepare a plan, for the Division's review and approval, evaluating whether, and how, the facility can achieve the prescribed reduction through on-site measures that are technically feasible and cost-effective.

The problem with this approach is that it is impossible for the proposed rules to comply with the requirements of the Colorado Air Act to consider the "degree to which any particular type of emission is subject to treatment, and the availability, technical feasibility, and economic reasonableness of control techniques."[27] The reason is simple: the Division does not know which companies have GHG reduction measures and which do not and in what amounts as needed to meet their reduction requirements and/or generate credits.

The Division acknowledges this in its Proposed SBAP. Because the Proposed Rules "exceed the requirements of the federal act or differ from the federal act," the Commission must identify "[w]hether demonstrated technology is available to comply with the proposed requirement."[28] The Division explains in the Proposed SBAP that:

> Regulation Number 27 does not require the use of any specific technology but instead serves as a mechanism to assure reductions are achieved by specific manufacturing sources by setting individual GHG reduction targets for applicable facilities and allowing a variety of compliance mechanisms to reach those targets. For applicable facilities, Regulation 27 does not require the use of any specific technology but instead serves as a mechanism to evaluate the control technologies regulated entities can employ that may have additional co-benefits. The GHG reduction plans are used to conduct this evaluation and must include analyses of, but not necessarily implementation of, transformative technologies. All GHG reduction plans will be based on demonstrated and available technologies.[29]

The Division's proposal first prescribes a specific reduction percentage that each source must achieve <u>before</u> identifying "the availability, technical feasibility, and economic reasonableness of control techniques" that are available to each source to achieve that reduction.[30]

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[27] C.R.S. § 25-7-109(1)(b)(IV).
[28] C.R.S. § 25-7-110.5(5)(b)(X).
[29] Division Proposed SBAP at 8.
[30] C.R.S. § 25-7-109(1)(b)(IV).

And the Division cannot rectify this deficiency by simply asserting—with no basis in fact or in the record—that all "future GHG reduction plans will be based on demonstrated and available technologies."[31] The Division also cannot rely on the cursory and vague statements in its Initial EIA that "[f]acilities have various compliance pathways available to them."[32] The Division provides no factual basis for this statement.[33] Because there is none.

Rather, the order of operations proposed by the Division makes it impossible for the rulemaking record to comply with the requirements of the Colorado Air Act because there is no actual analysis of the available, technically feasible, and economically reasonable control techniques that sources can rely on to implement the rule. Without an understanding of the technical feasibility and economic reasonableness of projects available to each company to meet their obligations, the Division cannot know whether operators can in fact comply with this rule.

For example, the Regional Haze program required States to conduct an analysis of technical feasibility and costs ***prior*** to establishing the emission limits each source must comply with. The Regional Haze program required States to submit implementation plans containing emission limits representing Best Available Retrofit Technology ("BART") for each source that was reasonably anticipated to cause or contribute to visibility impairment.[34] A BART determination was required to "be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source."[35] For each analysis, the State was obliged to consider, among other factors, the technology available and the costs of compliance.[36]

A similar process is conducted in the Reasonably Available Control Technology ("RACT") framework. The federal Clean Air Act requires all nonattainment SIPs to provide for the implementation of RACT.[37] EPA has defined RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available *considering technological and economic feasibility*. Therefore, depending on site specific considerations, such as geographic constraints, RACT can differ for similar sources."[38] Both the Regional Haze and RACT frameworks appropriately require an analysis of technical feasibility and costs to dictate the emissions limits to be established through the application of

[31] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (Agencies must "consider[] the relevant factors" and "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation omitted)).
[32] EIA at 3.
[33] *Sierra Club v. FERC*, No. 20-1512, 2023 WL 3667435, at *14 (D.C. Cir. May 26, 2023) (An agency decision supported by "bare conclusion[s], without any support or explanation, is insufficient to pass muster.").
[34] 40 C.F.R. § 51.308(e).
[35] 40 C.F.R. § 51.308(e)(1)(ii)(A).
[36] 40 C.F.R. § 51.308(e)(1)(ii)(A).
[37] 42 U.S.C. § 7502(c)(1)
[38] 45 Fed. Reg. 59,329, 59,331 (Sept. 9, 1980).

BART or RACT, respectively. Thus, States and sources are provided with more regulatory certainty that compliance with these emission limits is feasible.

Here, the Division has not undertaken, or required operators to undertake this analysis. Thus, the Division cannot know which and how many facilities can achieve their proposed reductions on-site through technically feasible and cost-effective measures. For this same reason, the Division does not know how many facilities will require GHG credits and how many credits will be available. Thus, the Colorado Chamber does not believe that the Division can demonstrate that the credit market will be sufficient to ensure that all companies have adequate and economically reasonable credits available to them in any given year. Thus, as currently crafted, the Division's Proposed Rule does not have any mechanisms by which to ensure operator can in fact comply without potentially reducing production (which is not a technically feasible or cost-effective alternative). The Colorado Chamber's proposal to include a GHG Reduction Fund in its alternate proposal attempts to rectify this issue to ensure that there is a feasible and cost-effective path to compliance for all GEMM 2 facilities.

F. The Over-Prioritization of Co-Pollutants Impairs the Proposed Rule from Achieving Highly Cost-Effective and Substantial GHG Reductions.

The Proposed Rule undermines the core purpose of GHG reductions by over-emphasizing co-pollutants contrary to the text of statute. The Proposed Rule does more than prioritize co-pollutants; it makes them a central part of the rule. This is inappropriate because GHG emissions reductions are the core aim of the statute. The Proposed Rule would undermine that core purpose by over-emphasizing co-pollutants and losing sight of cost-effective GHG emissions reductions.

1. Part B, Section II.A.3.a

Under the Proposed Rule, a facility must choose the emissions reductions measure that will maximize the reductions of co-pollutants if the measure is estimated to yield total GHG reductions within five percent of another measure and is equal to or less than the 2030 social cost of GHGs. Proposed Rule, Part B, Section II.A.3.a. As a legal matter, it is unclear why this provision is required at all given that the relevant statutory provision only calls for prioritizing co-pollutant emission reductions *in disproportionately impacted communities*.[39]

The Proposed Rule's requirement to maximize co-pollutant reductions loses sight of the broader goal of achieving GHG reductions. Under the Proposed Rule a facility would be required to undertake a more expensive, potentially operationally complex project generating less GHG emissions reductions (but slightly more co-pollutants than a simple cost-effective GHG emission-reduction measure). This inverts the statutory intent by making GHG reductions the "co-benefit" of reducing other emissions.

Additionally, the Proposed Rule completely disregards the other important factors (beyond simply cost-effectiveness and technical feasibility) that might influence which GHG reduction measures a facility chooses to implement. For example, the implementation timeline is an important consideration. Facilities could be forced to select a project with slightly greater co-

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[39] C.R.S. § 25-7-105(1)(e)(XIII).

pollutant reductions, which project could take longer to implement and thus delay GHG emission reductions that could have been achieved sooner if the selection of reduction measures was not dictated by co-pollutants.

The Colorado Chamber recommends that the Commission revise Part B, Section II.A.3.a of the Proposed Rule to require that facilities must only adopt an alternate measure that provides GHG reductions with 5 percent greater GHG emissions than the preferred measure if it would provide *significantly* greater reductions of a co-pollutant, is equal to or less than the 2030 social cost of GHGs, and the facility could not provide good cause for not adopting it.

2. Part B, Section II.A.5.a

Under the Proposed Rule, even if a facility cannot reach its GHG reduction requirement with technically feasible and cost-effective on-site measures, then it must implement additional measures that would "reduce the largest amount of harmful air pollution" at a cost up to 150 percent of the 2030 social cost of GHGs if it is within one mile of a disproportionately impact community and is within fifteen (15) miles of a residential community.[40]

Setting aside the vagueness and overbreadth of this language, the Colorado Chamber again highlights that the Proposed Rule exceeds the statutory standard of prioritizing co-pollutant reductions that affect disproportionately impacted communities. Requiring the "largest amount" of reduction reverses the focus of the rulemaking and makes co-pollutant reductions of paramount importance, not GHG reductions. Notably, the existing GEMM 1 rule does not overemphasize co-pollutant reductions, and it is unclear why the Commission should deviate from that precedent here when both rulemakings implement the same statutory provision. The GEMM 1 rule reflects the principle aim of GHG reductions while still prioritizing co-pollutants. The Chamber therefore recommends an approach similar to the one used currently in Regulation Number 27 for the GEMM 1 facilities.

The Colorado Chamber also requests the Commission adopt a provision in the rule that would allow an operator to satisfy its co-pollutant reduction obligations at a "sister" facility, if that operator, in compliance with Section III.A. of the Proposed Rule, elects to meet its GHG reduction target through offsite reductions at another facility in Colorado owned and operated by the owner of the GEMM 2 facility. A failure to include this provision would conflict with the purpose of proposed Section III.A.1., which allows the operator to achieve GHG emissions reduction, as well as co-pollutant reductions, at another facility owned or operated by the owner and operator of the GEMM 2 facility. This is a concept that has long been discussed throughout the stakeholder process and was in nearly every prior version of the Division's draft rule. The Colorado Chamber believes this provision was excluded in error, and respectfully requests it be added back into the rule.

G. GHG Reduction Plan Section

A GEMM 2 facility should not be required to list GHG reduction measures that would be redundant with or incompatible with one another in the GHG Reduction Plan. For example, a

[40] Proposed Rule, Part B, Section II.A.5.

GEMM 2 facility should not be required to list two mutually exclusive control measures that would be implemented on the same piece of equipment. The Final Rule should not require a facility to implement two GHG reduction measures that would conflict with one another and not yield substantial GHG reductions. It is particularly important to understand how these GHG projects interact with each other (or rather when they cannot be completed together) because the Division's proposal requires operators in certain instances to achieve reductions in the co-pollutants for all the listed projects within a certain cost threshold. However, if these projects could not all be completed together, then combining the co-pollutant reductions from two projects that are mutually exclusive would overstate the co-pollutant benefits that could occur on-site. As described above, the Colorado Chamber has specific and detailed concerns with the current co-pollutant prioritization model, but even if that model stays, then it needs to be clear that companies cannot be forced to get co-pollutant reductions from mutually exclusive or redundant projects.

A GEMM 2 facility within 1 mile of a disproportionately impacted community and also withing 15 miles of a residential community should be provided flexibility in addressing co-pollutants in a DIC community. They should be exempted from compliance with a showing of good cause for not adopting a measure, even if it provides significantly great reductions in co-pollutants for among other reasons that there would be an unreasonable burden on competitiveness, a longer timeline for implementation, a required measure will not achieve compliance while an alternative measure would achieve it, or the measure could result in interruption in operations. If a measure is to be adopted from its GHG reduction plan in a DIC community and there is another measure that achieves GHG emission reductions within 5 percent above the proposed measure, has 50 percent greater net reductions in co-pollutants, and the cost per ton of reductions is equal to or less than the 2030 social costs of GHGs but within 10 percent of the cost of the option with the greater co-pollutant reduction, then that measure should be chosen.

If a GEMM 2 facility is unable to timely permit a proposed GHG reduction measure, then that measure should not be considered technically feasible. The Division has experienced historic and ongoing construction permit and modeling delays. A GEMM 2 facility should not have to face potential penalties and enforcement for failure to implement a GHG reduction measure for reasons beyond the GEMM 2 facility's control. The Final Rule should include a provision clarifying that a GEMM 2 facility is not considered out of compliance if a GHG reduction measure cannot be implemented pursuant to the timelines set forth in the GHG Reduction Plan due to permitting delays.

In addition, the Colorado Chamber proposes to change the submittal deadline for GHG reduction plans for glass manufacturing facilities from September 30, 2025 to June 1, 2027, in Section II.A. The proposed June 1, 2027 deadline will apply only to the GEMM 2 glass manufacturing facilities. The proposed deadline aligns with the current implementation timeline for Colorado's Producer Responsibility recycling program which is critical to inform the potential supply of recycled glass, *i.e.*, cullet, as relevant to an important GHG reduction measure for the GEMM 2 glass manufacturing facilities.

H. GHG Emissions Credit Trading Is an Important Policy Tool, and the Commission Should Foster a Stable Trading System in the Final Rule.

The following sections of this Prehearing Statement, I and J, address different aspects of the rule but the Chamber's comments on these sections should be read in harmony. The Chamber is concerned that the Proposed Rule as drafted will lead to a compliance trainwreck. The rule requires early reductions that will be almost impossible to meet, certainly impossible to meet in a manner that will avoid unnecessary cost and potential job losses. However, even if the rule had extended timelines the required reductions by 2030 are steep and there are GEMM 2 facilities that may not be able to meet their assigned targets. With commendable foresight the Division is appropriately recommending the establishment of a credit program to assist with compliance. Yet that credit program under the best of circumstances is too limited to be the only alternative to onsite reductions. However, as drafted, the credit program has too many restrictions to be effective. Below we outline the deficiencies in the proposal, but to summarize our concerns the Proposed Rule does not encourage appropriate market liquidity, creates disincentives for the establishment of credits, and does not provide pricing protections (a common feature of cap and trading programs). However, a credit program combined with a GHG Reduction Fund that would allow a company that could not meet their target or access credits either because they are not available or unaffordable, to pay into the GHG Reduction Fund at an appropriate price for funding GHG reduction projects would ensure the availability of a path to compliance. A well-designed credit program that operates with the GHG Reduction Fund would go a long way to avoiding what would otherwise be a trainwreck. The alternative is a Proposed Rule which *at the moment of adoption* could place companies at imminent risk of noncompliance and could result in production moving outside of Colorado with attendant job losses. Such an outcome would be contrary to the statute text and its intent.

The Chamber strongly supports the inclusion of provisions to allow GHG credit generation, trading, appropriate pricing and use for compliance. Emissions trading is a widely accepted tool that has a strong track-record in other contexts. As EPA notes, "Reducing emissions using a market-based system provides regulated sources with the flexibility to select the most cost-effective approach to reduce emissions, and has proven to be a highly effective way to achieve emission reductions, meet environmental goals, and improve human health."[41] Emissions trading has garnered broad support, including from environmental groups like the Environmental Defense Fund, as a providing "a strong incentive to save money by cutting emissions in the most cost-effective ways."[42] Environmental Defense Fund has further noted that trading incentivizes early reductions so that regulated companies can either sell allowances or bank them for future use.[43]

Despite emissions credit trading's clear benefits, the Colorado Chamber urges the Commission to recognize that 18 GEMM 2 facilities plus 4 GEMM 1 facilities trading in the market may lead to a very "thin" market with few buyers and sellers. This may result in relatively

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[41] EPA, *Acid Rain Program*, https://www.epa.gov/acidrain/acid-rain-program (last visited June 15, 2023).

[42] Environmental Defense Fund, *How Cap and Trade Works*, https://www.edf.org/climate/how-cap-and-trade-works (last visited June 15, 2023).

[43] *Id.*

few trades, lack of consistent price discovery, volatility of prices, and potentially significant sell-side and buy-side market power.

On top of the small overall number of players in the market, there are also wide variances in total quantity of GHG emissions across the different facilities. Some of the smallest GEMM 2 facilities emit just over the 25,000-ton applicability threshold, while the largest GEMM 2 facility emits nearly a million tons. These size variances can aggravate the problems with the thin market, by accentuating market power concerns or leading to instances where smaller facilities simply have not generated enough GHG credits to be useful for the larger facilities, thus reducing opportunities for trading.

Because of these potential issues resulting from a thin market, the Colorado Chamber respectfully requests the Commission place as few impediments on emissions trading as possible. To that end, the final rule should: (1) allow five years of banking; (2) provide that emissions credits are generated one-for-one—meaning each additional ton of reduction generates one ton of credit; (3) not limit trading of GHG credits to facilities within one mile of a DIC or within a DIC; (4) include EITE sources in the available trading program; (5) be open to adding other sectors to the trading program, including oil and gas sources; (6) develop a plan for linkage to other cap and trade programs; (7) institute appropriate pricing protections in the credit program and (8) revise language defining GHG credits as real, additional, quantifiable, permanent, verifiable and enforceable.

1. Eliminate Language in GHG Credit Definition Regarding Real, Additional, Quantifiable, Permanent, Verifiable and Enforceable

The Colorado Chamber has significant concerns with the Proposed Rule's requirement that GHG credits generated by GEMM 2 facilities be "real, additional, quantifiable, permanent, verifiable, and enforceable."[44] This requirement conflates two distinct concepts: *over-compliance credits*, as opposed to *emissions offsets*. The critical difference is that an over-compliance credit is generated based on going above and beyond a regulated source's reduction requirement (i.e., over-complying). An offset, by contrast, is generated from a source not subject to a compliance obligation. In offset circumstances there are concerns, for example, that the reduction is not "verifiable" because it occurs outside of the regulated setting and its built-in verification procedures. The same concerns do not apply for over-compliance credits where a sector-wide cap is in place because the Proposed Rule already provides for verification.

An important distinction between these types of credits is that credits for over-compliance with the GEMM 2 rule are retrospective while emissions offsets are forward-looking. Retrospective credit are known quantities. The emission reductions have already happened by the time credits are issued and cannot be undone. Overcompliance credits are awarded only for a single year, after that year has passed. Overcompliance credits for the next year will be awarded only if the emissions reduction is repeated in the next year. Conversely, emissions offsets give credit for future reductions, typically to allow permit applicants to obtain permits for future activities. For example, under Clean Air Act Section 182, New Source Review permits for major sources of VOCs and NOx in ozone nonattainment areas cannot be granted unless the new or modified

[44] Proposed Rule, Part A, Section II.Z (definition of "GHG credit").

source's future emissions are offset by VOC and NOx reductions from other sources in the nonattainment area. These emissions offsets must occur every year after the new or modified source is constructed. Overcompliance credits require much less regulatory oversight because there is no risk that the emissions reductions might cease happening.

As drafted, the Division's proposal has provisions to ensure that facility reductions are; "real, quantifiable, permanent, verifiable, enforceable, and provide additional emissions reductions beyond a facility's compliance obligation." The single-year emissions reductions that receive overcompliance credits for GEMM 2 purposes are inherently real, quantifiable, permanent, and verifiable for that (past) year. Enforcement is irrelevant because the past emissions reduction cannot be undone. The only confirmation needed before GHG credits are awarded is for the Division to review the facility's emissions report and determine whether and to what extent the facility over-complied.

Overcompliance credits are also inherently "additional." Credits are only issued if the facility's single-year GHG emissions were less than allowed by the GEMM 2 rule during that year. The Division's proposal in Part A, Section II.BB to require GHG credits to be "additional" creates confusion. The term "additional" is often used in regulatory programs for forward-looking emissions credits to mean that the emissions reduction is not required by any other applicable statute or regulation. Such a requirement is not appropriate for retrospective overcompliance credits. For purposes of achieving the GHG reduction targets in the GEMM 2 rule, a reduction is "additional" if the facility emitted fewer metric tons of CO2e than the rule allows. Facilities that reduce on-site GHG emissions demonstrate compliance with the GEMM 2 rule by showing their actual GHG emissions reductions achieved the targets established in Part B, Section I.A. There is no requirement to show that the on-site GHG reductions were not mandated by any other statute or regulation. GEMM 2 facilities that rely on overcompliance GHG credits pursuant to Part D should be treated in the same way.

Denying GHG credits for GHG reductions that are mandated by another applicable statute or regulation would undermine the Part D GHG credit trading system by creating uncertainty and deterring investment. If the Commission wishes to encourage owners and operators to invest in early overcompliance with the GHG reduction targets, the Commission must provide assurances that such investments will be eligible to generate credits. Including an additionality requirement in the Part A, Section II.BB definition of GHG credits would make these investments quite risky. The excess GHG reductions could become worthless if the Commission adopts another applicable GHG rule, even one that does not directly target GEMM 2 facilities.

Similarly, for another example, the permanence requirement is inapt for an over-compliance credit. A single tranche of emissions offsets is often generated from a project that has a multi-year lifespan (e.g., preserving a forest that would have been logged), thus making it important that the reduction generating offsets is permanent (i.e., the forest is not logged five years later). By contrast, GHG credits will only be generated on an annual basis for the particular compliance year, making concerns about permanence unfounded. If the source that generated over-compliance credits in one year then increases emissions in the next year, the same concern is not present because it is still bound by its annual emissions cap for that next year and all years following that. This contrasts with the hypothetical forest that was not cut down but does not have another mechanism to ensure it is not cut down five years later. Furthermore, in the context of

greenhouse gases (which have varying timeframes for duration and lifespan in the atmosphere – but spanning decades), removal or elimination of greenhouse gas emissions in one year has an impact for years to come. As such, combined with the arguments above, any reduction in a given year should be sufficient to generate credit.

The Colorado Chamber believes that striking the requirement for additionality and related requirements from Part A, Section II.BB is consistent with the Division's proposed language in Part D, Sections III.A and III.B regarding the generation and issuance of credits.

The Colorado Chamber therefore requests that the Commission remove the language defining GHG credits to be real, additional, quantifiable, permanent, verifiable, and enforceable because it would unnecessarily increase administrative burdens and may potentially add additional barriers to what will already be a thin credit market.

2. The Commission should allow manufacturing sources to generate GHG credits immediately

The Division proposed in Part D, Section III.A.1, and III.B.1 to allow manufacturing stationary sources to generate and be issued GHG credits beginning in 2024, which the Division proposes as the first year during which GEMM 2 facilities will have a GHG compliance requirement. The Colorado Chamber agrees that sources should be able to generate GHG credits immediately.

The Colorado Chamber is separately proposing to shift the compliance deadline for interim GHG reductions from 2024 to 2026. Even with this change, the rule should promote early GHG reductions by allowing sources to generate and be issued credits in 2024 and 2025. We therefore propose to add a new Part D, Section III.A.3, stating that GEMM 2 facilities will generate credits in 2024 and 2025 if their annual direct GHG emissions are less than the facility's GHG baseline emissions.

3. The Commission should allow the Colorado credit trading program to link with credit trading programs in other jurisdictions

One potential way to ensure the availability of credits is to allow operators to purchase and sell credits into other trading markets. The larger number and broader type of entities that can trade with one another leads to improved liquidity. This can help balance industry requirements while the market in Colorado becomes more robust and the ability to obtain GHG reductions increases (to the extent that becomes technically feasible and cost-effective). And linkage can dampen carbon price volatility caused by regional variations. The Quebec Cap and Trade System recognized this need in its FAQs, stating "market linking is essential for Quebec since a standalone local market would not have the requisite size needed for viability in the medium and long terms. As the number of partners in the system increases so does the number of emissions allowances. This makes it easier for emitter and participants to acquire emission units at lower cost."[45] Though

[45] Quebec Greenhouse Gas Emission Allowances FAQ (July 2021), available at: https://www.environnement.gouv.qc.ca/changements/carbone/documents-spede/questions-

the Colorado Chamber recognizes that the Commission cannot likely institute this linkage to other trading markets at this time, the Commission directs the Division to explore and develop a proposal to link Colorado's trading program with other trading programs to enable Colorado facilities to buy and sell credits with other jurisdictions by 2026. The Commission does not intend that the Division return to the Commission in order to do so, but if revisions to the rule are necessary, the Commission intends that only the functionality of the credit trading program would be at issue – that such a rulemaking would not be an opportunity to re-visit allocated percentages absent a significant demonstration that there are insufficient mechanisms to comply with the regulation or that the emissions reductions cannot be achieved (including through use of linkage to other trading markets).

The Colorado General Assembly even contemplated this linkage in the governing statute, stating that:

> In implementing this subsection (1)(e), the commission shall adopt rules to reduce statewide greenhouse gas emissions from the industrial and manufacturing sector in the state by at least twenty percent by 2030 below the 2015 baseline established pursuant to section 25-7-140(2)(a)(II), *<u>taking into account the factors set out in subsections (1)(e)(II) to (1)(e)(VI) of this section</u>*.[46]

One such subsection is C.R.S. 25-7-105(e)(V) which states that:

> The *<u>implementing rules and policies may include</u>*, in addition to renewable energy development strategies, *<u>regulatory strategies that have been deployed by another jurisdiction to reduce multi-sector greenhouse gas emissions</u>*, that facilitate adoption of technologies that have very low or zero emissions, and *<u>that enhance cost-effectiveness, compliance flexibility, and transparency around compliance costs, among other regulatory strategies. The commission may coordinate with other jurisdictions in securing emission reductions, including in satisfying future federal regulations. The commission may account for reductions in net greenhouse gas emissions that occur under coordinated jurisdictions' programs if the commission finds that the implementing regulations of each coordinated jurisdiction are of sufficient rigor to ensure the integrity of the reductions in greenhouse gas emissions to the atmosphere</u>* and may account for carbon dioxide that electricity consumption in this state causes to be emitted elsewhere. (Emphasis added).

Thus, the Commission has the authority to allow for linkage and trading with other jurisdictions, and the Colorado Chamber requests that they do so here.

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reponses-en.pdf Quebec Greenhouse Gas Emission Allowances FAQ, 13 (July 2021), available at: https://www.environnement.gouv.qc.ca/changements/carbone/documents-spede/questions-reponses-en.pdf

[46] C.R.S. § 25-7-105(1)(e)(XIII (emphasis added).

4. The Commission should adopt a pricing mechanism to ensure a stable credit market

As noted above, the Division has conducted no technical feasibility and cost-effective analyses (or required any companies to do so) to determine those measures that can be implemented to meet the required proposed percentage reductions. Thus, the Division does not have specific information including whether any particular facility can achieve the emissions reduction percentages allocated to them on-site. Under the Proposed Rules, for facilities that do not have sufficient emission reduction projects to achieve the entirety of their reduction obligations on-site, the ability of operators to comply with the rule relies solely on the existence of a viable credit trading program. The Division has indicated to industry participants that it believes based on information provided to it, that there will be sufficient credits in the market for those facilities that cannot achieve their reduction obligations on-site. However, to date, the Division has not provided this information, and it is difficult to understand how the Division has this information given that neither the Division nor the facilities have been required to conduct an analysis of technically feasible and cost-effective projects. Without this information, the Colorado Chamber does not understand how the Division knows: (1) how many credits may be generated; and (2) how many credits may be needed. Further, while the Colorado Chamber generally supports a credit trading aspect to this Proposed Rule, additional protections must be included to: (a) ensure that credits are available, affordable, and generally aligned with the cost of other United States credit trading programs to protect the competitiveness of Colorado industries; and (b) provide an additional compliance pathway like the GHG Reduction Fund in the event that the credit trading market does not come to fruition, is insufficient for all facilities to meet their obligations, or results in credit prices that are inflated.

In particular, the limited liquidity in this limited credit trading program has the potential to create concerns over whether the credit market will appropriately balance the costs of credits. The GEMM 2 program is only comprised of 18 facilities. By contrast, other GHG programs have significantly greater participants in the credit trading market. For example, Regional Greenhouse Gas Initiative (RGGI) has approximately 1000 participants, California's Cap and Trade Program has approximately 785 participants; Output-Based Pricing System (OBPS) has approximately 1500 participants; and Alberta's Technology Innovation and Emissions Reduction (TIER) has approximately 460 participants.

In a market with a substantial number of entities requiring credits and substantial number of entities generating credits, there is a natural ability for market forces to appropriately determine the price of the credits – and typically ensures that low cost projects are implemented and credits are affordable and reasonable. Here, there are not sufficient entities and there is no guarantee that those generating credits will not seek to make significant profits off of those entities requiring credits.

The credit trading program proposed here has significant differences from other trading programs: (1) it is limited in the entities that can participate; (2) it is limited in the sources and projects that can generate credits; (3) there is not an auction process that would facilitate competition and market forces driving appropriate credit prices; and (4) there are no price containment provisions, among other differences. Collectively, those issues present potential

difficulties for both those generating credits and those purchasing credits to understand how the credit program will work.

The Colorado Chamber does not attempt to wholly revise the credit trading program, but proposes certain parameters around the credit trading system to provide some protections. The Colorado Chamber has drawn from information in other trading programs (such as California, Washington and Oregon). However, the Colorado Chamber notes that provisions and parameters from those programs cannot simply be pulled wholesale into this Proposed Rule. However, the Colorado Chamber believes looking at those programs for both the average auction price and other information can help inform how the Commission might incorporate certain protections into the rule.

Further, many other existing cap and trading programs have a price ceiling or other mechanism that provides protection against runaway compliance credit prices. Washington and California's Cap and Trade programs have both an allowance reserve and a hard price ceiling. Price ceilings offer an unlimited number of allowances for sale at a given price, placing an upper bound on allowance prices. The other cap and trading programs all have an allowance reserve. Allowance reserves offer credits at or above a given price – often serving as a soft price ceiling. The Final Rule does not need to adhere to the precise methodologies utilized in other cap and trade programs to ensure protections against runaway prices (because to do so would be pulling only pieces of a comprehensive cap and trading program into this limited trading program), but the Commission must incorporate some mechanism to prevent overpricing. However, the Colorado Chamber also recognizes that the credit prices also have to incentivize the generation of credits.

The Colorado Chamber is continuing to evaluate pricing frameworks that can be integrated in the Final Rule. The Chamber believes that a credit pricing approach should be designed to both ensure that operators who have low cost GHG reduction projects are not receiving outsized windfall gains at the expense of facilities that cannot generate emissions reductions on site and are reliant on the credit trading market and ensure that operators are incentivized to undertake projects to generate credits.

II. The Final Rule Should Adopt a GHG Reduction Fund.

In prior drafts of the Proposed Rule released to stakeholders, the Division included the GHG Reduction Fund as an alternative mechanism for compliance. The SBAP submitted by the Division acknowledges that a fee fund may be necessary as a last-resort alternative compliance mechanism, stating that: "[t]his state-managed fund could serve as a compliance option of last resort for any GEMM 2 facility unable to comply by other means laid out in the rule allowing the facility to instead pay fees to this fund on a per ton of CO2e basis up to the amount required to achieve the facility's reduction requirement for that year." However, the Division's request is that the Commission task them with studying the viability of a fee fund instead of implementation.

1. The Commission should not wait to establish a GHG Reduction Fund

The Chamber agrees that the GHG Reduction Fund should be an alternative compliance mechanism of last resort (either to an insufficient number of credits or to credits that are excessively priced if this Commission does not include a pricing cap as the Colorado Chamber has

proposed). We are concerned that without this alternative mechanism there could be a compliance train wreck if required reductions cannot be found at GEMM 2 facilities and the credit market is not viable. We are asking the Commission to direct the Division to establish a fee fund consistent with what we propose in our redline and Alternate Proposal. The establishment of a GHG Reduction Fund would allow the Division and affected stakeholders to immediately collaborate on its development and, if necessary, return to the Commission with any revisions. The collaboration between the Division and stakeholders on the implementation would be productive because it would focus on how to implement an established program. Both sides would be motivated to identify deficiencies and if necessary, return to the Commission for necessary remedies. We are concerned that an evaluation alone may never result in the establishment of what the Chamber and its members believe is a crucial component for actually achieving compliance. Further, without adoption of that now, facilities are faced with a rule that may not be achievable and will be making decisions based on the rule adopted – not some uncertain and potential revisions to the rule in the future.

The Proposed Rule places the Commission in a unique and unenviable position because as drafted, the rule does not provide a clear and assured path to compliance. The Chamber believes this is a unique circumstance facing the Commission. Historically the Commission has not adopted rules with no clear path to compliance for all regulated entities. While the Chamber supports the GHG credit trading program, it is risky to rely on credit trading as the only alternative compliance pathway to direct on-site GHG reductions. Colorado does not have a history of successfully implementing credit trading programs. In 1980, Colorado promulgated emissions reduction credit rules in Regulation 3, Part A, Section V. In 2018, the Division recognized that the program had been dormant and that emissions reduction credits might become more necessary as the ozone nonattainment area was reclassified to progressively higher levels of nonattainment. The Division published an "Emission Reduction Credits Instruction and Support Manual" in June 2018. To the Chamber's knowledge, based on conversations with staff, the Division has not issued any emission reduction credits since publishing the 2018 manual. The lack of a functional credit trading program and lack of any banked credits creates additional uncertainty. GEMM 2 facilities that cannot achieve direct onsite GHG reductions during the first GEMM 2 compliance year might have no other options to comply with the GHG reduction targets, unless the Commission establishes the GHG Reduction Fund.

For this and other reasons the Commission should not, and arguably cannot, wait to establish this necessary compliance alternative. If a fee fund is not established in this rulemaking it may never be established given the other important issues that the Commission and Division face. However, if it is established the Division and stakeholders in the process of implementation can identify deficiencies and remedies and come back to the Commission with targeted adjustments. Those details can be determined and completed following adoption of this rule. However, the Commission should not delay in ensuring that the GHG Reduction Fund is incorporated as a last resort compliance path.

2. The Commission should adopt the Chamber's Alternate Proposal to establish a GHG Reduction Fund

For the reasons set forth above, the Commission should adopt the Chamber's Alternate Proposal to establish a state-managed fund. The Chamber has provided proposed rule and SBAP

redlines that address the incorporation of a state-managed fund (CCC_ALT_EX-001, CCC_ALT-EX-002).

The Chamber has provided proposed rule and SBAP redlines that address the incorporation of this state-managed fund. This state-managed fund will be a compliance alternative of last resort that can only be used if a regulated entity has completed all on-site technically feasible and cost-effective projects, and if there are no GHG credits available (or if the Commission fails to adopt the proposed cost cap, if there are no credits available at or below $89 per ton). Understanding the priority that legislation and this Commission place on ensuring equity in the development and implementation of these rules, the proposal prioritizes funding of GHG mitigation sources located within one mile of a disproportionately impacted community, aligning with the statutory directive prioritizing emission reductions in disproportionately impacted communities. The Chamber also proposes parameters around the credit trading program to ensure that it is both viable and not financially punitive.

The Chamber proposes that the state-managed fund be set at $89 per ton of CO2e, which is the social cost of CO_2 for the year 2030 (with a 2.5% discount rate). The Chamber strongly disagrees with the Division statement in the SBAP that "[i]n order to ensure this is a matter of last resort, the Commission expects that fees would need to be set above any cost-effectiveness thresholds for onsite or offsite reductions." Instead, the Commission can simply establish this as a last resort option that cannot be used prior to exhausting the technically feasible and cost-effective onsite projects and use of the credit market (containing the price map as proposed for revision by the Chamber). Establishing the state-managed fund at the social cost of GHGs (as proposed by the Chamber) is appropriate. The social cost of GHGs is an established benchmark and if after the fund is established there is a mismatch between the cost of projects and the contribution being made, that disparity can be addressed. It's important to emphasize that the incentive for facilities is to fund actual projects and not just pay into the fund. Under the Chamber's proposal, contributions from facilities will be ongoing until a project, and the term of the project, is identified and implemented. There is common interest among all parties for a fund that is able to finance projects at a level to achieve the required reductions. However, the Chamber anticipates that those entities that would apply for state-managed fund money would have cost-effective projects that can be completed or have projects that are close to the social cost of GHGs that can be supplemented by the state-managed fund. Further, a fund is not intended to be a penalty – but rather another mechanism for achieving cost-effective and technically-feasible reductions. At this point, charging more than the social cost of GHGs would appear punitive and not a mechanism to achieve compliance. If the Division finds that the GHG Reduction Fund is not sufficient to generate the dollars necessary to obtain the necessary reductions, the Division can return to the Commission to revise it or revise the proposed rule to ensure that such additional reductions are obtained. If the amount being paid into the fund is demonstrated to be insufficient for this compliance alternative to effectively operate, we would agree to work with the Division in evaluating and recommending revisions. significant given the uncertainties for compliance with this proposed rule.

The Chamber wants to emphasize that:

- The incorporation of a state-managed fund does not alter whether the Division can demonstrate that the industrial and manufacturing sector has or will achieve its sector-wide targets by 2030.

- The industrial and manufacturing sector reduction targets cover a significant number of different sectors within that group. The Division will be in the position of confirming and determining compliance with the legislative mandates irrespective of the existence of a state-managed fund.

- Even within the GEMM 2 rule, the absence of the state-managed fund does not ensure compliance with the reduction obligations contained in the rule – it simply results in the adoption of a rule that may be punitive in nature to companies that cannot comply with it if the credit market fails.

- The GHG Reduction Fund is a last resort that simply provides an additional avenue to obtain GHG reductions (if needed) – it does not decrease the emissions reductions that would otherwise be achieved under the rule. In fact, it serves as a pathway for obtaining additional GHG emission reductions.

The GHG Reduction Fund is a compliance alternative that at worst may prove unnecessary and at best makes the difference in a facility's decision to reduce emissions or cease production in Colorado. This GHG Reduction Fund could have the effect of ensuring that Colorado does not export emissions and will provide another compliance pathway in this difficult industry to achieve reductions. If the Division is correct that the credit market will be robust and affordable, it will never be needed. However, if the Division is incorrect in its assessment of the credit market, the regulated community should not suffer an inability to meet the requirements of the rule.

B. The Permitting Prioritization Provision in the Proposed Rule Is a Necessary Provision that Facilitates GHG Reductions.

The Proposed Rule originally incorporated a provision providing for the Division to prioritize permit applications if a manufacturing stationary source requires a construction permit or permit modification to comply with applicable GHG emissions reductions requirements. The Division's most recent redline revised the language in Part B, Section III.D. to no longer prioritize Division permitting and no longer automatically grant a compliance extension. The Colorado Chamber emphasizes that this is a crucial provision, and the Commission should adopt the originally proposed language.

Permitting approvals can often take more than a year to process, even when the permit application is complete and properly filed by the applicant. Thus, without the proposed permitting prioritization, manufacturing stationary sources may be caught in the catch-22 situation where they require a construction permit or permit modification to undertake a reduction measure, but they are hamstrung by protracted permitting timelines. In addition, the Colorado Chamber notes that given the Division's current permitting regime and its implementation of that permit program, there may be projects that while technically feasible and cost-effective cannot be permitted by the

Division in a reasonable and/or timely and/or effective manner. In such an instance, the project should be deemed technically infeasible upon demonstration to the Division.

The permitting prioritization provision takes a reasonable approach to mitigating this concern. On the one hand, it provides *ex ante* assurances to manufacturing stationary sources that they will be granted a compliance extension, which reduces risk and eliminates the potential catch-22. On the other hand, and as the title of the subsection states, it incentivizes the Division to prioritize permit applications for manufacturing stationary sources, which will ensure that emissions-reductions projects can be undertaken quickly. Accordingly, the Colorado Chamber expects this provision will garner broad support, from manufacturing stationary sources, environmental groups, and local governments alike.

C. Current Facility Owners May Not and Should Not be Penalized for Historic GHG emissions – the Division Appropriately Removed this Provision from the Proposed Rule.

The Colorado Chamber supports the Division's removal of the third factor for determining a GEMM 2 facility's GHG reduction obligation (original Proposed Rule, Part B, Section I.A.6). This factor considered the year of operation when an individual GEMM 2 facility began emitting GHGs into the atmosphere. This provision created an unlawful retroactive scheme of liability by penalizing current owners for a facility's past operations. Even if it were lawful, the provision was flawed in other ways. The age of the "facility" does not necessarily indicate past contributions to GHG pollution or global warming. More relevant is how long a GHG emission unit has been operating, and, when the unit was replaced, reconstructed, or otherwise modified over time.

The Colorado Chamber has major concerns with the policy implications of this provision. It would penalize companies for their past operations that were authorized by state-issued permits and favors new facilities over established facilities that contributed to Colorado's economy over a longer period of time. It ignored investments and upgrades made by companies that further contributed to the economy and workforce in Colorado. It could have had the effect of discouraging investors from acquiring older facilities to make improvements, implement modern energy efficiency projects or implement cutting edge decarbonization projects.

D. The Proposed Rule Appropriately Accounts for Recent Changes to GEMM 2 Facilities

The Colorado Chamber supports the Division's proposed changes to the rule that recognizes recent investments in production capacity. These changes are important for facilities that invested to grow their businesses in Colorado after 2015 as well as facilities that made investments in production capacity but had not realized increased production by 2022 from those investments. Likewise, the Proposed Rule should accommodate pending capital projects that commenced construction prior to the adoption of the GEMM 2 rules.

The Proposal uses the highest of a facility's 2021 or 2022 emissions as the default "GEMM 2 facility GHG baseline emissions" from which additional reductions in Part B, Section I, may be required. To the extent that this approach of using a recent year as the starting point further reductions is adopted, the Colorado Chamber concurs with the Proposal's use of the highest of

2021 or 2022, as described in the Part A, Section II.V. definition of “GEMM 2 facility GHG baseline emissions.”

It is important to use the highest of 2021 or 2022, rather than 2021 across the board for all 18 facilities, or 2022 for all 18 facilities. No one year is representative; the choice between two is better, though still not ideal. There are natural fluctuations in production that depend on many factors, e.g., weather, contracts, supply chain, etc. A fluctuation each year is normal – emissions are not stagnant. The extent of normal fluctuation varies depending on the type of source and other factors.

While the Colorado Chamber generally supports this approach of using the highest of one of two years, it is imperfect. One of two years of actual emissions is not representative of an achievable limit. Hence, the need for a reasonable amount of time to begin any interim requirements, 2024 is too soon; 2026 is the soonest that any interim cap should become effective.

E. The Proposed Rule Noncompliance Provisions are Too Stringent and Improperly Address Civil Penalties

The Proposed Rule’s noncompliance provisions in Part A, Section IV are too stringent and include unnecessary provisions. In order to address noncompliance, the Proposed Rule requires a downward adjustment for the following mitigation year by two times the amount by which the facility exceeded it compliance limit, submission of GHG mitigation plan, necessary corrective actions and payment of civil payments.

The Proposed Rule’s noncompliance provision assumes the availability of cost-effective GHG reduction measures and a robust credit trading system. As discussed previously, the Colorado Chamber is concerned that many facilities will have difficulty obtaining onsite reductions. Furthermore, members of the Colorado Chamber are concerned that the credit market will be “thin” given the limited number of regulated entities and lack of cost-effective opportunities to make reductions and generate credits. For this reason, the Colorado Chamber recommends the Commission’s strike the noncompliance provisions and instead adopt a GHG Reduction Fund.

The enforcement of emission reduction requirements and possible imposition of civil penalties against any facility that falls short is not a proper subject for treatment in the text of Regulation 27 and should be struck. The State Air Act already provides the Division with the authority to enforce its regulations and establishes the factors to be considered in evaluating enforcement and potential penalties.

Finally, no existing Commission regulation appears to be as proscriptive as what is in the Proposed Rule. In particular we could find no precedent for a penalty that would increase the required reductions. This has the potential to compound a problem that a facility cannot address, the inability to reduce emissions enough to meet their targets and a credit market that, as we fear, does not generate sufficient credit. The commission should accept the Colorado Chambers strike of the entire Part A, Section IV and rely upon existing enforcement policies.

F. The Proposed Rule should be revised to ensure accurate accounting of progress towards the 2030 sector target and statewide goals.

The Chamber supports Proposed Rule, Part B, Section IV.B. aimed at accurate accounting. The Colorado Chamber proposes additional revisions to capture other circumstances that may trigger the need for an emissions adjustment in the future. The Chamber's redline changes to Part B, Section IV.B. allow for future adjustment of 2015 emission levels in the event that an update or correction is needed. Further, the Chamber's revisions reflect the potential that EPA updates the methodologies for reporting GHG emissions (it is undertaking this task for the petroleum and natural gas sector currently) and that emissions are reflected as increasing based on those calculation and methodology changes. Operators cannot be forced to undertake further reductions simply due to a change in emissions calculation methodologies. The Chamber's revisions are needed in order to ensure that accurate inventories are in place to determine progress towards the industrial and manufacturing sector's 2030 target and the statewide goals.

G. Additional Issues and Concerns

The Colorado Chamber provides a list of additional issues and concerns that are addressed in the redline changes:

1. Severability Provision

The Commission should strike the severability provision in Part A, Section I.C as it is both unnecessary and unjustified. Should a reviewing court hold that any of the provisions are inoperative, unconstitutional, void, or invalid, the court rather the agency will determine whether the invalid provision(s) can be severed from the remainder of the rule. As a matter of fact, many of the provisions contained in the Proposed Rule are inextricably linked to one another and cannot readily be severed.

Striking the severability provision would be more consistent with past practices of the Commission. A review of Commission severability provisions shows that in only four regulations has the Commission adopted a severability provision; Common Provisions, Regulation Number 2, Regulation 20, and Regulation 22. The Regulation 2 provision allows for severability, "unless it appears to the court that the valid provisions of the regulation are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the Commission would have enacted the valid provisions without the void one." While the other two regulations, 20 and 22, which address the regulation of low emission vehicles and greenhouse gas reporting respectively do have severability provisions that are similar to what the Division proposes here but those regulations are less complicated or apply to completely different industries. Unlike those regulations, the proposal before the Commission is complicated and interconnected, and the Commission should not presume to know how all possible court decisions could impact the ability to implement or comply with whatever remains of a rule. The Commission should not include any severability provision in this regulation and in the event that any provision of the rule is struck down by a court it should take time to review the decision of the court and then tailor a revision that addresses the findings of the court to ensure that the requirements can be implemented reasonably and consistent with the intention of the legislature.

2. Confidential Business Information

The Commission should ensure sensitive business information is adequately protected from disclosure, especially for privately held companies. The Colorado Chamber is concerned that as written the credit market disclosure requirements in Part D, II.C. unnecessarily expose confidential business information from certain GEMM 2 facilities. The Colorado Chamber requests that the Commission adopt revisions to the disclosure requirements providing that they apply strictly to publicly held companies. In addition, the Colorado Chamber requests that the Commissions adopt revisions to the disclosure requirements that explicitly outline how documents or other information submitted to the Division under any Part of the Final Rule should be marked to receive protection under C.R.S. § 24-72-204 of the Colorado Open Records Act.

3. Definition of 2030 Social Cost of GHGs

The Colorado Chamber supports setting the cost, in dollar figures, of the "2030 social cost of GHGs" in the rule's definition section. Because GHG plans must be developed prior to 2030, a set price is required to provide certainty for planning purposes and cost analysis. For projects begun prior to 2030, the Colorado Chamber wishes to emphasis that the rule conservatively overprices these projects. The Colorado Chamber also supports the Division's revision to clarify that the "social cost of GHGs" is based on the Interim Federal Interagency Working Group document dated February 2021. The Colorado Chamber also requests that the Commission ensure the consistent use of terms "2030 social cost of GHG" and "social cost of GHGs" throughout. Because reductions in the Proposed Rule are based upon a CO2e basis, the 2030 social cost of GHGs should focus on cost only with respect to CO2e equivalent of $89 a ton.

4. Definition of Colorado EnviroScreen

The Colorado Chamber supports clarifying that the definition of "Colorado EnviroScreen" means a version specific to a specific date. The Colorado Chamber recommends the final rule adopt the date of the rulemaking for consistency with the definition of "Disproportionately impacted community." The Colorado Chamber requests that the Division take all appropriate measures to ensure that this version is preserved and accessible for future reference.

5. Compliance Certification

The Commission should strike the compliance certification provision in Part A, III, which is both unnecessary and overly broad. The certification language in Part A, Section III.B is also inconsistent with typical certification language.

6. Timing for Audit Review

Operational certainty for GEMM 2 facilities will in large part determine whether this rule is successful. If a facility experience delays in their audit review that could result in cascading missed deadlines. The Division should require that the independent third-party review of GHG reduction plans is completed within three months of receipt.

III. ISSUES TO BE RESOLVED BY THE COMMISSION

1. The Colorado Chamber requests that the Commission resolve the issues explained above and identified in the attached exhibits.

2. The Colorado Chamber requests that the Commission adopt the redline changes to the regulatory text and the redline changes to the Statement of Basis and Purpose (also contained in the Colorado Chamber's Alternate Proposal).

3. The Colorado Chamber requests that the Commission adopt its Alternate Proposal.

IV. EXHIBITS AND WRITTEN TESTIMONY

The Colorado Chamber does not intend to introduce any additional exhibits other than the redlines of the regulatory text and Statement of Basis and Purpose at the rulemaking hearing. The Colorado Chamber currently does not intend to submit any written testimony at the hearing. However, the Colorado Chamber reserves the right to introduce additional exhibits or submit written testimony in rebuttal to the prehearing statements or alternate proposals submitted by the Division or other parties.

V. WITNESSES AND PRELIMINARY DESCRIPTION OF TESTIMOY

1. Doug Benevento, Lynn Kornfeld, and Aaron Tucker Legal Counsel, Holland & Hart LLP, Attorneys for the Colorado Chamber. Mr. Benevento Ms. Kornfeld, and Mr. Tucker will testify regarding the issues raised in the Prehearing Statement.

2. Meghan Dollar, Senior Vice President of Government Affairs, Colorado Chamber of Commerce.

3. Witnesses identified by any member of the Colorado Chamber.

VI. ESTIMATED TIME ALLOCATION AT HEARING

The Colorado Chamber estimates it will need 90 minutes for testimony at the hearing. The Colorado Chamber may request more time if additional testimony is required to rebut other parties' statements or alternative proposals.

Respectfully submitted this 25th day of July 2023.

/s/ Doug Benevento

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PREHEARING STATEMENT OF THE COLORADO CHAMBER OF COMERCE AND EXHIBITS via electronic mail to each of the following parties this 25th day of July 2023 addressed as follows.

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