

**BEFORE THE COLORADO AIR QUALITY CONTROL COMMISSION
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**

IN THE MATTER OF PROPOSED REVISIONS TO COLORADO AIR QUALITY CONTROL
REGULATIONS NUMBER 11, 20, AND 22

**THE COLORADO ASSOCIATION OF COMMERCE & INDUSTRY d/b/a
COLORADO CHAMBER OF COMMERCE PREHEARING STATEMENT**

The Colorado Association of Commerce and Industry d/b/a the Colorado Chamber of Commerce (“Colorado Chamber”) respectfully submits this Prehearing Statement in the matter of proposed revisions to Colorado Air Quality Control Regulation 22 pursuant to the Department of Public Health and Environment, Air Quality Control Commission Procedural Rules, 5 C.C.R. 1001-1.

I. EXECUTIVE SUMMARY

The Colorado Chamber recognizes the pollution, emission, and air-quality challenges facing the Front Range corridor and is eager to work with the Air Quality Control Commission (the “Commission”) and the Air Quality Control Division (the “Division”) to tackle those challenges in a common-sense manner that supports, rather than curtails, economic opportunity. Unfortunately, the Employee Traffic Reduction Program found in the Proposed Revisions to Regulation Number 22 (the “Proposed ETRP”) fails to meet that standard. Rather than moving forward in a manner that balances these important priorities, the Proposed ETRP will require businesses up and down the Front Range into a largely one-size-fits-all approach that will unnecessarily harm the state’s economic interests. The rule also fails to account for differences between businesses and communities in the regulated area, and will thus exacerbate inequities across the Front Range, for both employers and employees.

Moreover, design choices central to the Proposed ETRP are woefully unsupported. And, in other cases, the ambiguities in the Proposed ETRP will lead to significant implementation challenges. Those deficiencies further reduce the benefits of the Proposed ETRP, especially when the flaws in the Division’s Economic Impact Analysis are properly examined.

All told, the Proposed ETRP will likely lead to a significant increase in costs to employers without capturing any commensurate benefit. Accordingly, the Colorado Chamber urges the Air Quality Control Commission to reject the Proposed ETRP as currently drafted.

General Position. The Colorado Chamber opposes adoption of the ETRP as drafted in the Proposed Revisions to Regulation Number 22.

Content of Prehearing Statement and Testimony. The Colorado Chamber represents hundreds of businesses of all sizes throughout the state of Colorado and in the area that will be subject to regulation under the Proposed ETRP, as well as numerous trade associations and economic development organizations. Drawing on the experience and expertise of its members, the Colorado Chamber raises in this Prehearing Statement several issues for consideration by the Air Quality Control Commission including the equity and impracticability issues that will be caused by the Proposed ETRP, significant policy design issues with the Proposed ETRP, and material flaws in the Division’s Economic Impact Analysis. Because of these issues, the Colorado Chamber opposes adoption of the Proposed ETRP as drafted.

Estimate of Time Necessary for Presentation. The Colorado Chamber estimates that it will need 30 minutes for its presentation to the Commission and rebuttal, and any cross-examination.

Planned Witnesses. The Colorado Chamber does not intend to call witnesses but reserves the right to cross-examine any witness and provide testimony and exhibits as rebuttal.

II. DISCUSSION

a. The Proposed ETRP raises significant equity concerns.

The Proposed ETRP stops short of imposing statewide commuting rules and only regulates “Large Employers” in the Denver Metro North Front Range ozone nonattainment area (the “8-Hour Ozone Control Area”). But a closer look at the Proposed ETRP reveals that the proposed regulation is incredibly broad in scope and does nothing to account for the significant differences in businesses, business settings, and commuting resources spread across the 8-Hour Ozone Control Area. That lack of nuance and one-size-fits-all approach poses serious equity concerns, imposing much heavier burdens on businesses—and their employees—in rural areas or areas with constricted housing markets than businesses located in more urban, accessible, or densely populated areas. The Commission should thus reject the Proposed ETRP as drafted and urge the Air Quality Control Division to develop a more nuanced approach to the issue of Front Range commuting habits.

Despite being a contiguous geographic area, the 8-Hour Ozone Control Area captures an effective cross-section of every type of Colorado community: urban, rural, and mountain. It includes everything from the urban core of Denver, to the residential suburbs of Douglas and Arapahoe Counties, to the foothill communities scattered throughout Jefferson, Boulder, and Larimer Counties, to the rural plains of Weld and Adams Counties. And with those diverse communities comes a wide and varying range of commuting needs and resources. For instance, while public transit—one of the key strategies suggested by the Proposed ETRP, *see* Proposed § III.C.1.o.(xi)—is reasonably available in downtown Denver via the Regional Transportation District, transit options all but disappear in the more suburban and rural parts of the 8-Hour Ozone Control Area. *See, e.g.,* Regional Transportation District System Map, <https://www.rtd->

denver.com/rider-info/system-map. Similarly challenging in more rural parts of the 8-Hour Ozone Control Area—where employees often live many miles from their place of work or face extreme weather conditions for much of the winter—are the “active commute” options contemplated by the Proposed ETRP, *see* Proposed § III.C.1.o.(vii). Businesses located in expensive or competitive housing markets, like Boulder, will face different but related challenges as commuter rates are likely much higher given the inability of many employees to purchase or rent homes in those markets.

These challenges highlight the shortcomings of the Proposed ETRP’s blunt approach to a diverse set of communities. The bottom line is that although the Proposed ETRP contains upwards of fifteen proposed strategies for incentivizing employees to avoid single-occupancy vehicle (“SOV”) trips, Proposed § III.C.1.o, many of those strategies will simply be unavailable to large numbers of regulated employers. And the strategies that are technically feasible to regulated employers in parts of the 8-Hour Ozone Control Area may prove to be the most onerous and expensive for them to deploy. For example, businesses that are not able to rely on public transit, “active commute” options, or moving toward a “flexwork” or work from home environment, are largely left to measures that will increase costs on their employees—like raising on-site parking fees, Proposed § III.C.1.o(iv)—or that will increase costs on the business itself—like the suggestion that businesses could invest in zero emission vehicles for employees to use while commuting, Proposed § III.C.1.o(x). Those costs are material and warrant rejection of the Proposed ETRP on their own. However, the more salient point is that those higher cost “solutions” will likely be borne disproportionately by rural businesses and communities or by certain types of businesses (like hospitality or service-oriented businesses). Those inequities have no justification.

And, critically, the Air Pollution Control Division just this year implicitly acknowledged the need for a more carefully tailored regulatory approach, abandoning efforts to impose a statewide regulatory regime in the face of feedback raising these very concerns. *E.g.*, Dennis Webb, “State Reins in Target Area of Rule to Cut Employee Traffic, Emissions,” Grand Junction Sentinel, <https://bit.ly/2TEKUpK> (Apr. 6, 2021). But even the Division’s “reined in” approach is too broad and should be rejected.

If the Commission nonetheless decides to move forward with an ETRP that governs the entirety of the 8-Hour Ozone Control Area, the Commission should adopt several targeted exemptions to blunt the disparate impacts likely to follow from the Proposed ETRP. The Commission can and should exempt from the requirements of the Proposed ETRP businesses that have limited access to the lowest cost options presented by the Proposed ETRP—like public transportation, active commuting, and flexible schedules or remote work capabilities.

b. The Proposed ETRP fails to account for essential workers and other businesses whose workers can only work onsite.

Critically, the Proposed ETRP also fails to account for the businesses and industries for which the majority of the alternatives to SOV vehicles, including use of public transit or work from home policies, are impossible. There are numerous businesses and industries for which compliance will necessarily interfere with businesses’ ability to perform their core functions. For example, in the construction industry, workers regularly and consistently move between job sites

and suppliers during the day, must commute to work with job-specific equipment and tools, and are often located in areas without robust mass transit networks. Likewise, manufacturing jobs require employees to work during non-standard hours at the business facility and often have multiple shift changes throughout a 24-hour period making use of public transportation or other alternatives more difficult.

Because certain industries cannot complete their core functions under the requirements of the ETRP, the Commission should exempt those employers/employees for whom work from home is impossible from compliance with the ETRP. Alternatively, the Commission could provide flexibility for employers to identify certain employees as “essential” if, based on the businesses’ operations and employees’ roles, the employer cannot complete its core functions while simultaneously including those employees in their ETRP compliance. Likewise, the Commission should exempt those employees deemed “essential” by the State of Colorado during the COVID-19 pandemic. The designation of “essential” by the state implicitly recognized that certain workers are unable to work remotely and are key to the continued functioning of Colorado’s communities, and that recognition should carry over to the ETRP.

c. The Proposed ETRP lacks a reasoned basis for certain policy design choices or is silent on key details.

One of the most critical policy design choices of the Proposed ETRP is that it covers entities with as few as 100 employees. Proposed § III.B.7 (“Large Employer” means an employer that employs 100 or more employees reporting or assigned to a single worksite.”). That critical design choice, however, is not supported by any apparent reasoned basis. Instead, the Proposed Statement of Basis & Purpose for the Proposed ETRP states only that the 100-employee threshold was “influenced by EPA guidance.” But the cited guidance—dating back to 1992—provides no basis for that 100-employee threshold beyond sourcing it to a long-outdated version of the Clean Air Act. Employee Commute Options Guidance, ANR-443, at 4, <https://bit.ly/3dTBHRk> (Dec. 1992).

The lack of any real justification for placing the regulatory threshold at 100 employees is highlighted by the fact that it contradicts the foundational analyses of the Regional Air Quality Council (“RAQC”), which spearheaded the development of the Proposed ETRP and originally contemplated a definition of “Large Employer” addressing only employers with more than 250 employees. *E.g.*, Draft RAQC ETRP Cost Benefit Analysis, <https://raqc.egnyte.com/dl/WoJba7x8eC/> (Mar. 9, 2021). The 100-employee threshold also conflicts with RTD’s EcoPass pricing, which generally provides deeper discounts for employers with 250+ employees, but not for those with 100 to 249 employees. *E.g.*, EcoPass Central Pricing Chart, <https://bit.ly/3r6bgNH> (accessed July 8, 2021).

As currently drafted, the Proposed ETRP will sweep within its reach hundreds of businesses that are significantly smaller than those originally contemplated by the RAQC. Absent a reasoned basis for that policy design choice, the Commission should decline to place an increased burden on the Front Range’s small businesses and small business employees and limit the ETRP to businesses with more than 250 employees.

The Proposed ETRP survey requirement also presents issues. First, the ETRP lacks any statistical basis for its requirement that employers achieve 75% compliance with the employee survey. ETRP Plan, Proposed § III.C.1.h. This level of compliance is extremely high, and likely impossible for many larger employers and employers whose employees do not regularly utilize computers for their work. A more reasonable threshold for survey participation would be 50%. However, any completion threshold should have a statistical basis demonstrating that the required threshold is reasonable. In addition, the ETRP fails to account for differences between current travel patterns and those that existed prior to the beginning of the Covid-19 pandemic. Currently, many employers still have employees working fully or partially from home, but intend to have those employees return to in person work in coming months. A survey based on current travel patterns would likely be immediately outdated and inaccurate, creating administration issues that are not addressed in the current Proposed ETRP.

And, the Proposed ETRP says nothing about what enforcement mechanisms the Division will have at its disposal, beyond the requirement that a non-compliant large employer modify an unsatisfactory ETRP Plan, Proposed § III.D.3, or that a non-compliant large employer implement an Alternative Compliance Plan, Proposed § III.D.4. Before adopting the Proposed ETRP, the Commission should provide clarification on the enforcement authorities that will be available to the Division, including any applicable penalty structure.

The lack of justification for bringing hundreds of small businesses into this regulatory scheme through the 100-employee threshold combined with the Proposed ETRP's failure to address several key ambiguities further reinforces that the Proposed ETRP is far too broad a tool for the nuanced issue of employee commuting. Once again, these deficiencies weigh in favor of rejecting the Proposed ETRP.

d. The Proposed ETRP is supported by a flawed Economic Impact Analysis.

According to the Air Quality Control Division's Economic Impact Analysis ("EIA"), the Proposed ETRP will reduce greenhouse gas emissions by 751,752 tons/year in 2025 and will reduce ozone precursor emissions by 579 tons/year. ACQD May 11, 2020 EIA at 26. But baked into those conclusions are several untenable assumptions. And the specificity of those purported reductions stands in stark contrast with the massive uncertainty the ACQD included in its estimates for the costs of the Proposed ETRP, ranging from about \$19M for all employers at the low end to more than \$350M at the high end. But even that massive range of possible costs fails to account for all the costs that will likely flow from the Proposed ETRP. As a result, not only are the benefits of the Proposed ETRP likely over-forecast, but the costs are undercounted.

The EIA is flawed from the start, beginning with the assumption that "initially all employees at an ETRP-affected worksite are making SOV commute trips to work every day[" ACQD May 11, 2020 EIA at 22 (emphases added). This assumption is clearly not reflected on the ground. Instead, thousands of employees already use commuting options other than SOV in the 8-Hour Ozone Control Area. But because the EIA begins with the assumption that all employees commute via SOV without the Proposed ETRP, the EIA gives credit to the Proposed ETRP for

emissions savings already in place. This inflates the potential benefit of the Proposed ETRP significantly.¹

The EIA similarly inflates the benefit of the Proposed ETRP by assuming that ETRP-affected employers “will achieve the SOV commute rate reduction goal of 25% in 2023 and 40% in 2025, as required under the proposed rule.” ACQD May 11, 2020 EIA at 22. But that assumption fundamentally misrepresents what the Proposed ETRP requires. Indeed, the Proposed ETRP language says nothing about actually reducing SOV commute rates. *See* Proposed ¶ III.D.1. Instead, the Proposed ETRP requires that large employers develop and put into place an ETRP Plan that, if successfully utilized by employees, will result in the required SOV rate reductions. *Id.*

The regulatory language creates the distinct possibility that large employers will be forced to invest time and money in the development of the required ETRP Plan and the associated investments in employee commuting options (rendering the large employer complaint with the Proposed ETRP) without any guarantee that a reduction in employee SOV rate will follow. Indeed, many employees may simply prefer to continue their pre-ETRP commuting habits despite an employer’s full compliance with the regulations. Such a result would levy all the costs of the Proposed ETRP on large employers without capturing any of the benefits. Of course, this is not to say that the Proposed ETRP should be revised to mandate actual reductions in SOV commute rates, as such a change would lead to significant challenges and put an employer’s compliance with the regulation in direct tension with the individual choices of its employees. Instead, the key point is that the benefits the Division assumes will flow from the Proposed ETRP are far from required, much less guaranteed. This point is underscored by the fact that, based on the RAQC’s own analysis, similar ETRP programs in other jurisdictions have led to—at best—mixed results. *See* Travel Demand Management Ordinances: Best Practices, Regional Air Quality Council, <https://bit.ly/2TSb7Rv> (accessed July 7, 2021).

The likely illusory nature of many of the claimed benefits of the Proposed ETRP is further exacerbated when the tradeoffs of certain proposed ETRP strategies are properly considered. For example, the strategies related to the use of zero-emission vehicles fail to account for the fact that zero-emission vehicles must be charged. If charged at an employee’s home, the cost of charging is borne by the employee. If charged at a worksite, that cost might be borne by the employer. But in either event—and more importantly—the added demand for electricity will itself have an impact on the state’s emissions and, if adopted at a large scale, the availability of electricity in the state.

The issue of shifting costs and emissions from one source to another isn’t just limited to the strategies involving zero-emission vehicles. To be sure, park-and-ride, carpooling, and ride-sharing strategies will all continue to result in at least some emissions meaning that even if all regulated employers actually reduced SOV commute rates to 60 percent by 2025, that reduction will not equate to the 40 percent cut in emissions contemplated by the EIA. *See* ACQD May 11, 2020 EIA at 26. Put otherwise, rather than eliminate emissions as claimed by the EIA, many

¹ In fact, the EIA itself acknowledges this reality but elects not to account for it in its final conclusions. *See* ACQD May 11, 2020 EIA at 27-28 (“It is possible that some of these GHG reductions may have already occurred through existing voluntary commute reduction efforts[.]”).

strategies in the Proposed ETRP may merely shift emissions away from employee SOV commutes to other sources.

Moreover, the direct costs to individual employees are not adequately reflected in the EIA. For many individuals, a SOV is not simply how they get to work. It's also how they get their children to school and appointments, respond to family emergencies, and maintain a complex family schedule. Imposing costs on the use of an SOV through the measures proposed in the rule will impose added time and/or cost on individual employees and their families, many of whom will struggle to absorb those costs.

Finally, the Colorado Chamber believes that the EIA grossly underestimates the impacts the Proposed ETRP will have on the Division. According to the EIA, the Division acknowledges that additional staff time will be likely be required to implement the Proposed ETRP but claims that the Division will not need any additional resources or staff. That suggestion does not withstand scrutiny. As recognized by the Proposed Statement of Basis & Purpose, there are nearly 2,800 "large employers" within the 8-Hour Ozone Control Area. Under the Proposed ETRP, that means that the Division will receive many thousands of employee surveys and ETRP Plans in the coming years. Even if the Division only summarily reviews those submissions—itsself a problematic approach to any regulatory regime—it is easy to see that the large volume of regulated employers will necessitate increased resources at the Division.

If the Commission is not persuaded that these flaws and uncertainties justify outright denial of the Proposed ETRP, the Commission should direct the Division to include in the Proposed ETRP a sunset provision terminating the requirements of the Proposed ETRP after three years unless the Colorado General Assembly passes legislation extending the ETRP. In conjunction with this sunset provision, the Commission should require the Division to prepare a report to the General Assembly at the end of the three-year period providing an update on the implementation of the ETRP. Combined, the sunset provision and report from the Division will provide an opportunity for the General Assembly and the diverse array of interested stakeholders to evaluate the operation of the Proposed ETRP and consider whether its actual benefits justify the associated costs.

The Division's EIA is based on unfounded assumptions, fails to account for the unintended consequences of the Proposed ETRP, and underestimates the costs of the proposed regulatory scheme. As a result, the EIA provides little support for the Proposed ETRP. Properly considered, it is far less clear that the benefits of the Proposed ETRP will outweigh the costs.

e. An incentivized voluntary program would avoid numerous legal and practical concerns, while delivering air quality benefits.

Rather than proceeding with this flawed and costly Proposed ETRP, the Commission should direct the Division to develop a voluntary program, which replaces mandatory compliance with incentives for participation. Colorado could follow the lead of other states and provide tax incentives for companies to participate in a voluntary ETRP program. Imbedded in a voluntary program could be a carbon offset market, whereby businesses can purchase credits to cover SOV utilization when necessary.

The Proposed ETRP will damage the Colorado economy, and disparately burden certain communities and industries. Rather than adopting this proposal, the Commission should instruct the Division to develop a flexible and voluntary program that generates air quality and climate benefits without the extreme costs.

III. ISSUES TO BE RESOLVED BY THE COMMISSION DURING THE HEARING

1. Whether the Division should revise the Proposed ETRP Rule to provide exemptions to employers in locales and industries that do not have reasonable access to alternative transportation and cannot reasonably adopt “flex work” policies.
2. Whether the Air Quality Control Commission should change the definition of “large employer” to include only businesses with more than 250 employees.
3. Whether the survey compliance rate should be reduced to 50%, or other number justified by a statistical analysis.
4. Whether the survey will account for differences in pre-pandemic and current employee travel patterns.
5. Whether the Proposed ETRP should be revised to sunset after three years to allow for a reevaluation of the costs and any benefits of the Proposed ETRP’s requirements.
6. Whether an exemption should be provided for “essential workers” and those employers and industries that work non-standard hours, cannot complete their jobs without SOVs, or otherwise need SOVs to complete their work effectively.
7. Whether the Division should revise the Economic Impact Analysis to reflect the true costs, and speculative benefits, of the ETRP Rule.

IV. CONCLUSION

The Colorado Chamber supports efforts to address air quality and pollution concerns along the Front Range corridor. But any such efforts must support rather than undermine employers. Because the Proposed ETRP fails to deliver on that standard without any real benefits, the Colorado Chamber opposes the Proposed ETRP as drafted.

Respectfully Submitted this 9th day of July, 2021

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