

BEFORE THE AIR QUALITY CONTROL COMMISSION
STATE OF COLORADO

IN THE MATTER OF PROPOSED REVISIONS TO REGULATION NUMBER 23
NOVEMBER 17 to 19, 2021 HEARING

**PREHEARING STATEMENT OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND
ENVIRONMENT, AIR POLLUTION CONTROL DIVISION**

The Colorado Department of Public Health and Environment, Air Pollution Control Division (“Division”) hereby submits its Prehearing Statement (“PHS”) in this matter, discussing the policy, factual, and legal grounds for the proposed revisions to Regulation Number 23 which addresses Colorado’s obligations related to regional haze.

I. EXECUTIVE SUMMARY

A. Summary of Proposal

The Division is proposing revisions to Regulation Number 23 to address Colorado’s obligations related to Regional Haze, as directed by § 25-7-211, C.R.S. These revisions are expected to also achieve the co-benefit of reducing greenhouse gases (“GHGs”) contingent upon Public Utility Commission (“PUC”) approval of electric generating unit (“EGU”) closures and generator fuel switching proposed in pending resource plans, as directed by SB 19-096,¹ HB 19-1261,² and HB 21-1266,³ and are consistent with SB 19-236.⁴ The proposed revisions complete the second phase of the Regional Haze rulemaking process for those sources identified during the initial screening process that were not addressed during the phase 1 rulemaking conducted in 2020.

The U.S. Environmental Protection Agency (“EPA”) promulgated the Regional Haze rule in 1999, and subsequently revised it in 2017, which requires each state to reduce

¹ SB 19-096, Concerning the Collection of Greenhouse Gas Emissions Data to Facilitate the Implementation of Measures that Would Most Cost-Effectively Allow the State to Meet Its Greenhouse Gas Emissions Reduction Goals, and, in Connection Therewith, Making an Appropriation, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (codified as § 25-7-140 C.R.S.).

² HB 19-1261, Concerning the Reduction of Greenhouse Gas Pollution, and, in Connection Therewith, Establishing Statewide Greenhouse Gas Pollution Reduction Goals and Making an Appropriation, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (codified as §§ 25-7-102, -103, -105, C.R.S.).

³ HB 21-1266, Concerning Efforts to Redress the Effects of Environmental Injustice on Disproportionately Impacted Communities, and, in Connection Therewith, Making an Appropriation, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021) (relevant portions codified as §§ 24-4-109, 25-7-105, C.R.S.) (“HB 21-1266”).

⁴ SB 19-236, Concerning the Continuation of the Public Utilities Commission, and, in Connection Therewith, Implementing the Recommendations Contained in the 2018 Sunset Report by the Department of Regulatory Agencies and Making an Appropriation, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (relevant portions codified as §§ 40-2-124, -125.5) (“SB 19-236”).

emissions of visibility impairing pollutants that negatively impact class I areas and incorporate any necessary emission reductions in a state implementation plan (SIP) to address Regional Haze.⁵ Regional haze is visibility impairment caused by multiple emission sources over a broad geographic area. The Regional Haze Rule aims to continue progress towards improving visibility at the 156 mandatory class I areas nationwide for the most impaired days and maintain the best visibility for the clearest days. Colorado has twelve class I areas (four national parks and eight wilderness areas) at which visibility must be evaluated. EPA intended that the Regional Haze rule be evaluated periodically over a period of 60 years with a goal of achieving natural visibility conditions by 2064.

During the first implementation period, often referred to as round 1, states were required to establish Best Available Retrofit Technology (“BART”) and Reasonable Progress (“RP”) requirements. Colorado accomplished this with two separate SIP submittals to EPA in 2008 and 2009, and subsequently adopted revisions in 2011, 2014, and 2016. EPA approved Colorado’s Regional Haze SIP in several actions, last approved on July 5, 2018.⁶

During this second implementation period (aka round 2), states must evaluate their progress in meeting natural visibility conditions in class I areas and submit a SIP revision to EPA by July 31, 2021. Colorado has historically, and continues, to collaborate with other western states and EPA through the Western Regional Air Partnership (“WRAP”) to develop the necessary data products to support the second 10-year planning period Regional Haze SIP, including emission inventories, meteorological weighted emission impact analyses, particulate matter (“PM”) source apportionment, and visibility modeling. During round 2, however, the complexity of the Regional Haze technical analysis coupled with coordination among so many states, tribes, federal land managers (“FLMs”), and EPA has produced delays in the release of some of the data products that are instrumental to completing the Regional Haze SIP. Final data products were just recently completed from this coordinated process.

The delay in necessary data and modeling products has significant implications for several states, including Colorado, in meeting the round 2 SIP submittal due date. While Colorado has actively worked to timely evaluate potential emission reduction strategies for stationary sources, Colorado could not fully evaluate progress against the visibility goals without all of the modeling and data analysis products. This delay also created challenges for Colorado to satisfy FLM consultation directives, provide information to stakeholders, and finalize the analyses to be included in the SIP. Further, Colorado’s rulemaking process itself demands at least a three-month timeframe in addition to a required legislative review process for any SIP submittal. All of this means that Colorado was not able to fully address all SIP requirements and submit the round 2 SIP to EPA by the July 31, 2021 due date. EPA is aware of these challenges and has been notified of the delay in submittal.

⁵ See 40 CFR §§ 51.300-51.309.

⁶ Approval and Promulgation of Air Quality Implementation Plans; Colorado; Regional Haze State Implementation Plan, 83 Fed. Reg. 31332 (July 5, 2018).

Additionally, EPA issued a Regional Haze clarification memo on July 8, 2021,⁷ only 23 days before the due date for the round 2 SIP submissions. While Colorado believes that the technical analyses, rule proposal, and SIP revisions are aligned with the EPA Regional Haze clarification memo, the timing of its release does not allow for substantial changes in the planning process or SIP adoption proposed for consideration before the Air Quality Control Commission without creating significant delays (well beyond the SIP due date of July 31, 2021), requiring additional or new analyses, and elevating the risk of a Federal Implementation Plan being imposed upon Colorado.

The Division has not proposed any unit retirements, fuel switching, or changes to permitted fuel consumption limits as a RP control strategy. Therefore, no proposed control strategies for this Regional Haze SIP revision can be stated to directly reduce GHG emissions. However, the proposed revisions are expected to achieve the additional co-benefit of reducing GHG emissions contingent upon PUC approval of the proposed EGU closure and fuel switching dates in Public Service Company of Colorado's ("PSCo") pending Electric Resource Plan/Clean Energy Plan, docket number 21A-0141E. In HB 19-1261, the General Assembly declared that "[c]limate change adversely affects Colorado's economy, air quality and public health, ecosystems, natural resources, and quality of life[,]" acknowledged that "Colorado is already experiencing harmful climate impacts[,]" and that "[m]any of these impacts disproportionately affect" certain disadvantaged communities.⁸ Colorado's statewide GHG reduction goals require the Commission to implement regulations to achieve a 26% reduction of statewide GHG emissions by 2025; 50% reduction by 2030; and 90% reduction by 2050 as compared to 2005 levels.⁹ HB 21-1266 further clarified timelines for electric generating utilities to submit Clean Energy Plans and placed additional GHG reduction requirements on the industrial sector, which also affects sources subject to this phase 2 rulemaking. To clarify, this phase 2 rulemaking addresses Regional Haze SIP requirements under the Clean Air Act, while achieving GHG co-benefits. The data collection, development, and evaluation of the first Clean Energy Plan is currently underway.¹⁰ The development of rules to achieve industrial GHG reductions is being conducted simultaneously with this regional haze rulemaking process and emissions reductions are quantified in the Final Economic Impact Analysis.

Colorado continues to separately develop GHG emission reduction strategies to address these objectives and statutorily mandated reduction goals. The potential EGU

⁷ APCD_PHS_EX-012 (Memorandum from Peter Tsirigotis, Director, EPA, to Regional Air Division Directors, Regions 1-10 (July 8, 2021)).

⁸ § 25-7-102, C.R.S.

⁹ § 25-7-102(g), C.R.S.

¹⁰ See SB 19-236. Section 40-2-125.5(4)(a) requires PSCo, a "qualifying retail utility" as defined in statute, to file the first electric resource plan that includes a clean energy plan outlining how PSCo intends to achieve the clean energy targets established in § 40-2-125.5(3). This is currently under review at the PUC in Docket No. 21A-0141E. Other utilities have announced their intent to voluntarily submit Clean Energy Plans in the near future.

retirements and fuel switching aid in securing timely and significant GHG reductions and require an analysis of the social cost of greenhouse gases pursuant to § 25-7-105(1)(e), C.R.S.

In HB 21-1266, signed into law on July 2, 2021, the General Assembly, determined that “[s]tate action to correct environmental injustice is imperative, and state policy can and should improve public health and the environment and improve the overall well-being of all communities... [and that e]fforts to right past wrongs and move toward environmental justice must focus on disproportionately impacted communities and the voices of their residents.”¹¹ Thus, the state must meaningfully engage disproportionately impacted communities as partners and stakeholders in government decision-making, especially when evaluating potential environmental and climate threats to these communities. The Division has endeavored to meaningfully engage with these communities even though the vast majority of outreach and planning for this rule began more than two years ago, long before the establishment of HB 21-1266 just three months ago.

B. History of Rulemaking Stakeholder Process

The Division held six regional haze public meetings on June 10, August 1, October 3, 2019, January 9, March 27, and July 28, 2020. The Division also met with the FLM agencies in June 2019 and in August and October 2020 in preparation for the phase 1 hearing.

Specific to its August 2021 rulemaking proposal for this universe of regulated sources being considered in phase 2, the Division held public listening sessions on January 7 and February 10, 2021 with the North Denver area communities; March 4 and March 11, 2021 with the Pueblo area communities; and August 10 via Zoom platform to discuss the upcoming proposal. The Division has also participated in ongoing WRAP meetings, held meetings with FLM agencies in April, May, and June 2021 to discuss SIP progress and technical analyses, and also met with other state agencies, EPA Region 8 staff, and stakeholders subject to this rulemaking.

Since submitting its request for hearing to the Commission, the Division has met regularly and often with stakeholders, which has resulted in identifying primary issues as well as changes to the Request Proposal as described in this Prehearing Statement and as included in the PHS Proposal. The Division will further continue its efforts in coordinating with stakeholders to narrow the contested issues to be heard by the Commission in November.

¹¹ HB 21-1266, § 2(IV).

C. Contents of Prehearing Statement

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D. Summary of Exhibits

On the APCD PHS Exhibit List enclosed with this Prehearing Statement, the Division has identified potential exhibits in support of its petition for rulemaking in addition to citations provided in this Prehearing Statement. The Division’s exhibits include documents and data used to support its compliance with federal and state regulations, data submitted to or collected by the Division to administer its air quality program, and studies and reports relating to the proposed rules. The Division is also submitting the current proposed revisions to Regulation Number 23, along with a revised Statement of Basis and Purpose and Final Economic Impact Analysis.

Many of the Division’s exhibits are cited in this Prehearing Statement as support for specific positions; however, a citation to one exhibit is not intended to preclude the Division’s reliance on another exhibit for the same position. Further, not all exhibits are cited specifically in this Prehearing Statement but represent the collection of studies and data relied upon to prepare this proposal. The Division will supplement its exhibits to respond to other Parties’ prehearing statements, as necessary.

E. Estimate of Time Necessary for Presentation

The Division estimates that it will require approximately 3.5 hours during the hearing to: present its case in chief (90 minutes), cross-examine witnesses (45 minutes), and

present its rebuttal (75 minutes).

II. DISCUSSION OF PROPOSED REVISIONS AND BRIEFING OF LEGAL AND FACTUAL ISSUES BEFORE THE COMMISSION

A. Proposed Requirements for Regional Haze Limits - Reasonable Progress

The Division requests that the Air Quality Control Commission consider adopting new requirements within Regulation Number 23 and the Round 2 Regional Haze SIP.

The new Regulation Number 23 requirements will further reduce emissions of visibility impairing pollutants from stationary sources to improve visibility in Colorado's twelve class I areas and assure achievement of Regional Haze RP goals.

For the second implementation period, phase 2 hearing, the Division evaluated units at 17 facilities:

- Colorado Springs Utilities (“Utilities”) Nixon Power Plant Coal Handling;
- Utilities Front Range Power Plant (“FRPP”) Turbines 1 and 2;
- Utilities Clear Spring Ranch Sludge Handling and Disposal Facility, 4 digester gas-fired boilers and 2 flares;
- PSCo Comanche Station Unit 3;
- PSCo Hayden Station Units 1 and 2, coal ash and sorbent handling and disposal, and fugitive dust from unpaved roads;
- PSCo Cherokee Station Turbines 5 and 6;
- PSCo Pawnee Station Unit 1 and the cooling tower;
- Manchief Generating Station Turbines 1 and 2, co-located with PSCo Pawnee Station;
- CEMEX Lyons Portland cement manufacturing facility in Lyons, CO plant Kiln, Quarries, and Raw Materials Grinding;
- Holcim Florence Portland cement manufacturing facility in Florence, CO plant Kiln, Quarry, and Finish Mills;
- GCC Pueblo Portland cement manufacturing facility plant Kiln and Clinker Cooler;
- MillerMolson Coors Boiler Support Facility Boilers 1, 2, 4, & 5;
- Evraz Rocky Mountain Steel Mill Electric Arc Furnace (“EAF”), Ladle Metallurgy Station (“LMS”), Ladle Preheaters, Round Caster, Rotary Furnace, Quench Furnace, Tempering Furnace, Rod/Bar Mill Furnace, Rail Mill Furnace, Vacuum Tank Degasser (“VTD”) Boiler, Haul Roads;
- Rocky Mountain Bottle Company Furnaces B+ and C;
- Suncor Energy Denver Refinery Plant 1 and 2 Fluid Catalytic Cracking Units (“FCCU”), Plant 1 and 2 Sulfur Recovery Complexes (SRCs), Plant 1 Main Plant Flare, Process Heaters H-11, H-17, H-27, H-28/29/30, H-37, H-101, H-401/402, and H-2101, and Boilers 4 and 505;
- Denver International Airport (“DIA”) Boilers, Cooling Tower, Emergency

- Generators, and Miscellaneous Engines; and
- Craig Cooling Towers 1, 2, and 3.

As part of this process, the Division reviewed and conducted analyses of the projected costs of RP controls, as well as additional information regarding the four factors for RP, which includes documentation provided by the sources and other stakeholders. Through a combination of emission limit tightening, work practice and control requirements, the Division projects total emission reductions of up to 3,986 TPY for visibility impairing pollutants (NO_x, SO₂, PM) from additional control strategies and proposed EGU retirements and repowering in phase 2 that are currently being considered by the PUC. The Division also anticipates GHG co-benefits from the EGU retirements and repowering.

Highlighted issues and proposed revisions are described briefly below.

1. Proposed EGU Closure Dates

A potential issue was raised during the request for party status with how the Division has applied proposed closure dates for electric generating units in the 4-factor analyses and how proposed retirement dates and fuel conversion dates have been included in the proposed regulation, which are subject to PUC approval.¹² This has been raised by the party that includes Sierra Club, who the Division notes is already an intervening party in the proceeding currently in progress before the PUC. The Division will continue to work with the parties to this rulemaking in an attempt to resolve this concern.

2. Cost Considerations in 4-factor Analyses

The Division anticipates that cost considerations and cost effectiveness of control strategies will be issues to be discussed among parties leading up to and during the rulemaking hearing.

The Division is using \$10,000 per ton of regional haze pollutant as the nominal cost threshold to determine cost effective control strategies for Round 2 RP. This threshold is applied to the individual pollutants in the control strategy analyses, specifically NO_x, PM, and SO₂. This threshold value is an increase from Round 1 and reflects the fact that with each successive round of planning, less costly and easier to implement strategies have already been adopted. Colorado has maintained this threshold throughout the planning process despite the fact that each of the Class I areas in Colorado is below the URP for 2028. We believe that this is consistent with the discussion in the July 8, 2021 EPA Regional Haze clarification memo.¹³

The Division also expects questions and additional discussion with parties regarding interest rates and cost estimates used in the 4-factor analyses. The Division hopes to

¹² NPCA-Sierra's Petition for Party Status, at 3-5.

¹³ See APCD_PHS_EX-012 (Memorandum from Peter Tsirigotis, Director, EPA, to Regional Air Division Directors, Regions 1-10 (July 8, 2021)).

resolve many of these questions through ongoing collaborative conversations and review of any additional technical information that may be supplied by the parties.

3. Fuel Conversions Occurring Between Round 1 and Round 2

The Division is including additional revisions to Regulation 23 and the associated SBAP language with this PHS Proposal to identify and clarify fuel conversions that occurred after Round 1, but were not required by the Round 1 planning process. Specifically, the boilers at the Miller MolsonCoors Boiler Support Facility, formerly CENC, were converted from coal to gas-fired operation. Round 1 evaluated control strategies for the boilers while operating on coal and the Round 2 Technical Support Document (“TSD”) evaluated potential control strategies after the units were converted to gas-fired operation. Fuel conversion dates, and the Boiler 3 retirement date, have been included in the rule as well as clarification of monitoring and recordkeeping requirements associated with gas-fired operation.

4. Alternate Proposals for Additional Control Strategies

Based on the information supplied when party status was requested, the Division is anticipating alternate proposals that may impact up to three (3) facilities included in the scope of this rulemaking hearing. Specifically, Suncor, GCC Pueblo, and Holcim Florence have been identified as facilities where a possible alternate proposal is being explored by Sierra Club and National Parks Conservation Association.¹⁴ Because the proposal(s) have not yet been submitted, the Division cannot take a position at this time regarding the merits of the potential proposal(s). Upon submission of any alternate proposal in this hearing, the Division will review the proposal, and the supporting information on which it was developed, for completeness with respect to technical information, feasibility and cost analysis, and any emissions reduction strategies and regulatory requirements that may be proposed.

5. Uniform Rate of Progress (“URP”)

As stated in EPA’s 2017 Regional Haze Rule, “[t]he rate of progress in some Class I areas may be meeting or exceeding the [URP] that would lead to natural visibility conditions by 2064, but this does not excuse [Colorado] from conducting the required analysis and determining whether additional progress would be reasonable based on the four factors.”¹⁵ This was further clarified in the memorandum issued by EPA on July 8, 2021.¹⁶ Colorado has performed a detailed analysis for each of the facilities identified for Round 2 RP review even after the modeling results indicated that all of Colorado’s

¹⁴ NPCA-Sierra’s Petition for Party Status, at 5.

¹⁵ Protection of Visibility: Amendments to Requirements for State Plans, 40 Fed. Reg. 3,078, 3080 (Jan 10, 2017).

¹⁶ See APCD_PHS_EX-012 (Memorandum from Peter Tsigotis, Director, EPA, to Regional Air Division Directors, Regions 1-10 (July 8, 2021)).

class 1 areas are below the URP for 2028. The rule and SIP proposal use the detailed analysis performed for each facility as the basis for the development of the requirements and do not rely on the URP for determining cost effective RP control strategies.

6. EPA Startup, Shutdown, and Malfunction Memorandum

On September 30, 2021, EPA issued a new memorandum that withdrew a previous 2020 memorandum by the prior administration.¹⁷ The September 30th memorandum references 2015 requirements associated with the use of Startup, Shutdown, and Malfunction (“SSM”) provisions in SIPs. The Division is currently reviewing the memorandum and the newly reinstated 2015 requirements as they pertain to this rulemaking and SIP approval, specifically analyzing the use of EPA-approved consent decree requirements within the SIP. The Division acknowledges that several consent decrees, which are issued and enforced by the EPA, are the source of emissions limits and SSM conditions incorporated into this proposed revision to Regulation 23. Additional revisions to Regulation 23 and the SIP may be necessary as a result of this review and forthcoming discussions with EPA.

7. Consistency

The Division updated the SIP, proposed language in Regulation 23, and the SBAP for consistency and clarity. In particular, through preliminary conversations with EPA Region 8 staff, the Division determined it had incorrectly highlighted portions of section 7.3 in the SIP. Highlighted portions were meant to denote sources that had been acted on by the Commission in the phase 1 hearing in November 2020, but all of this section was inadvertently highlighted. This has been corrected in the revised SIP document. The Division will continue to make revisions to the appropriate documents to ensure consistency as issues are resolved during the rulemaking process.

III. LIST OF ISSUES TO BE RESOLVED BY THE COMMISSION

1. Whether the proposed rules are consistent with the provisions of the Clean Air Act and implementing regulations regarding regional haze and SIP revisions, 42 U.S.C §§ 7410 and 7491 and 40 C.F.R § 51.300, *et seq.*
2. Whether the proposed rules and revisions are consistent with the legislative purpose of the Air Pollution Prevention and Control Act, as stated in § 25-7-102, C.R.S.
3. Whether the proposed rules and revisions comply with the requirements of

¹⁷ APCD_PHS_EX-013 (Memorandum from Janet McCabe, Deputy Administrator, EPA, to Regional Administrators (Sept. 30, 2021)).

- the State Administrative Procedure Act, §§ 24-4-101, C.R.S. et seq., the Commission's Procedural Rules, and other applicable law.
4. Whether the proposed rules and revisions comply with the requirements of the Air Pollution Prevention and Control Act, §§ 25-7-101, C.R.S. *et seq.*, including the new requirements added by Senate Bill 19-181.
 5. Whether the proposed rules and revisions are consistent with the scope of the Notice of Rulemaking Hearing issued by the Commission on August 26, 2021.
 6. Whether there is justification for the adoption of the proposed rules and revisions in accordance with §§ 25-7-110.5 and -110.8, C.R.S.
 7. Whether the proposed revisions are cost-effective and technically feasible.
 8. Whether the submitted alternative proposals comply with applicable state and federal law, and whether any portions thereof should be adopted.
 9. Whether the proposed revisions comply with all other relevant requirements of state and federal law.

IV. EXHIBIT LIST

The Exhibits submitted by the Division are listed on the enclosed APCD PHS Exhibit List. The Final Economic Impact Analysis includes cost updates for Rocky Mountain Bottle Company and Miller MolsonCoors Boiler Support Facility and have been incorporated into the revised TSDs. A Cost Benefit Analysis has been requested for this rulemaking. It has not been completed at this time and will be submitted at least 10 days prior to the hearing date.

The Division may also utilize exhibits identified by other parties.

V. WITNESS LIST

The following potential witnesses are employees of the Colorado Department of Public Health and Environment, Air Pollution Control Division and should be contacted only through undersigned counsel.

1. Joshua Korth - Technical Support and SIP Unit Supervisor. Mr. Korth may testify regarding the development, meaning, and implementation of the proposed revisions and documents on which they are based. Mr. Korth may provide information about how the PUC process relates to this rule proposal. Mr. Korth may also testify regarding any alternative proposals submitted by other parties.
2. Sara Heald - Technical Planner. Ms. Heald may testify regarding the development, meaning, and implementation of the proposed revisions and documents on which they are based. Ms. Heald may also testify regarding any alternative proposals submitted by other parties.

3. Weston Carloss - Technical Planner. Mr. Carloss may testify regarding the development, meaning, and implementation of the proposed revisions and documents on which they are based. Mr. Carloss may also testify regarding any alternative proposals submitted by other parties.
4. Richard Coffin - Planner. Mr. Coffin may testify regarding stakeholder outreach and agency coordination related to the proposed revisions.
5. Dena Wojtach - Manager, Planning & Policy Program. Ms. Wojtach may testify regarding the development, meaning, and implementation of the proposed revisions and documents on which they are based. Ms. Wojtach may also testify regarding any alternative proposals submitted by other parties.
6. Garry Kaufman - Director. Mr. Kaufman may testify regarding the development, meaning, and implementation of the proposed revisions, as well as the Economic Impact Analysis and documents on which they are based. Mr. Kaufman may also testify regarding any alternative proposals submitted by other parties.
7. Blue Parish - Title V Operating Permits Unit Supervisor. Ms. Parish may testify regarding the netting, offset, and permitting-related issues for the proposed revisions.

The Division may also call the following potential witnesses:

8. Parties to this rulemaking, their representatives, or witnesses identified by those Parties.

VI. IDENTIFICATION OF WRITTEN TESTIMONY

The Division does not, at this time, intend to submit any written testimony.

Respectfully submitted this 7th day of October, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Prehearing Statement of the Colorado Department of Public Health and Environment, Air Pollution Control Division was served on the Parties listed below on October 7, 2021.

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