BEFORE THE AIR QUALITY CONTROL COMMISSION
STATE OF COLORADO

REGARDING DEFEND COLORADO’S PETITION FOR EXPEDITED PUBLIC HEARING
AND REQUEST FOR DECLARATORY ORDER
MARCH 21, 2019

THE AIR POLLUTION CONTROL DIVISION’S
RESPONSE TO DEFEND COLORADO’S PETITION FOR
EXPEDITED PUBLIC HEARING
AND REQUEST FOR DECLARATORY ORDER

The Air Pollution Control Division (Division) hereby submits its response to the Petition for Expedited Hearing and Request for Declaratory Order (Petition) filed by Defend Colorado with the Air Quality Control Commission (Commission) on February 14, 2019, and respectfully requests that the Commission deny the Petition at its March 21, 2019 regular meeting.

INTRODUCTION

Defend Colorado asks the Commission to conduct at least one, if not more, public hearings during which Defend Colorado proposes that the Commission would consider evidence and create a demonstration that the Denver Metro/North Front Range ozone nonattainment area (DMNFR) would attain the 2008 ozone National Ambient Air Quality Standard (NAAQS) “but for” the contribution of international emissions and exceptional events. Defend Colorado also asks the Commission to issue a declaratory order pursuant to § 25-7-105(11), C.R.S., and Commission Procedural Rule § VI.H to direct the Division to prepare and submit documentation by May 1, 2019 to the U.S. Environmental Protection Agency (EPA) certifying that the DMNFR would be in attainment with the 2008 ozone NAAQS in 2018 “but for” the contribution of international emissions as contemplated by Clean Air Act § 179B(b), 42 U.S.C. § 7509a(b) (the “179B(b) demonstration”).

Defend Colorado’s Petition should be denied for several reasons. First, under the applicable statute and Commission Procedural Rule, Defend Colorado is not entitled to the remedy it seeks through the declaratory order process. Second, the Commission is not required to conduct a public hearing under the statutes, and for the purpose, cited by Defend Colorado. Third, the May 2019 data certification discussed by Defend Colorado is not required to certify the DMNFR’s ozone attainment status, nor is it the proper means by which to submit a 179B(b) demonstration. Fourth, there is no statute or rule requiring the state to submit a 179B(b) demonstration; it is entirely discretionary. Last, Governor Polis has considered this issue, and has determined that the best policy for Colorado is to move forward with planning efforts under the 2008 ozone NAAQS. Accordingly, the Governor has directed the Division not to pursue a 179B(b) demonstration. Granting the Petition and issuing the declaratory order requested would run counter to this express directive.

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BACKGROUND

1. Colorado’s Ozone Status

The DMNFR was designated as a Marginal nonattainment area under the 2008 ozone NAAQS, effective July 20, 2012. Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30,088 (May 21, 2012). The DMNFR failed to meet its July 20, 2015 attainment deadline and was reclassified as a Moderate nonattainment area.

Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas for the 2008 Ozone National Ambient Air Quality Standards, 81 Fed. Reg. 26,697, 26,699 (May 4, 2016). Colorado’s new deadline for attainment of the 2008 ozone NAAQS was set at July 20, 2018. Id; see also 42 U.S.C. § 7511(a)(1). Attainment was to be evaluated looking at the ozone design value for the three year period of 2015-2017.

Following the reclassification to Moderate, Colorado adopted and submitted to EPA revisions to its state implementation plan (SIP) including additional ozone control measures and a demonstration (using photochemical modeling) predicting that the DMNFR would not have ozone levels exceeding the 2008 ozone NAAQS in 2017. Colorado’s modeling proved reasonably accurate, and on June 4, 2018, Colorado submitted to EPA a demonstration that no monitor in the DMNFR had recorded any values that exceeded the 2008 NAAQS in 2017 (the “Clean Data Request”). See Petition Ex.7A. Colorado also certified that it complied with all requirements and commitments in its applicable SIP. Id. The Clean Data Request was based, in part, on EPA’s concurrence into two wildfire-related exceptional events. On November 14, 2018, the EPA proposed to approve the Clean Data Request and grant Colorado a one-year extension of its attainment date until July 20, 2019. See Petition Ex.8. Due to significant public comment and the government shutdown in late 2018, the EPA has not yet finalized action on its proposal.

However, even if Colorado is granted the attainment date extension, monitored levels of ozone in 2018 exceeded the 2008 ozone NAAQS, which precludes Colorado from seeking a second one-year extension of its attainment date. Therefore, assuming the EPA grants Colorado the one-year attainment date extension, but absent some extraordinary relief, Colorado expects to be reclassified to a Serious nonattainment area by the Clean Air Act deadline of January 20, 2020. See 42 U.S.C. § 7511(b)(2).

2. What is a 179B demonstration?

Clean Air Act §179B, 42 U.S.C. § 7509a, reflects Congress’ understanding that there are situations where a state’s ozone nonattainment problems may not be due to its failure to control sources within the state’s boundaries. Though it is entitled “International Border Areas”, the plain language of the statute itself is not so limited, and the EPA has proposed to allow non-border states to utilize the provision to account for international emissions. See Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements, 80 Fed. Reg. 12,264, 12,293-4 (Mar. 6, 2015).

There are two separate mechanisms within §179B – a 179B(a) SIP revision and a 179B(b) technical demonstration. Under §179B(a), if a state is not modeling attainment as part of an
attainment demonstration required under Clean Air Act §182, 42 U.S.C. § 7511a, it can still have its attainment demonstration approved. To get approval, it must show that it would model attainment of the NAAQS if it excluded international emissions. This analysis must be submitted as part of an attainment demonstration, which is submitted to the EPA as a revision to a SIP.

In contrast, under § 179B(b), if a state modeled attainment but then did not actually attain the standard based on monitoring data, that state may avoid the otherwise mandatory reclassification to a higher level of nonattainment if it can demonstrate that its failure to attain was due to international emissions. Unlike a §179B(a) attainment plan submittal, the 179B(b) technical demonstration is not submitted to the EPA as a SIP revision.

Because a demonstration under §179B(b) is not a revision to Colorado’s ozone SIP, it does not require approval by this Commission or the Regional Air Quality Council (RAQC). Further, there are no associated rules or regulations that would also require approval by the Commission.

ANALYSIS

1. Defend Colorado’s Petition Seeks Relief that is Not Available Through the Declaratory Order Procedure.

   A. Petitions for Declaratory Order

   A petition for declaratory order may be used to resolve a controversy or settle a question about how a statute, rule or order applies to that party. In order to meet the requirements to seek a declaratory order, there must be a controversy or uncertainty about how a statute, rule or order applies to the petitioner. If the petitioner satisfies the Commission that such a controversy or uncertainty exists, then the Commission may, with or without an adjudicatory hearing, take final action and issue a declaration of how the statute, rule or order applies to the petitioner. Here, there is no controversy or uncertainty in the application of any statute, rule, or order to Defend Colorado.

   The Administrative Procedures Act provides:

   Every agency shall provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders to terminate controversies or to remove uncertainties as to the applicability to the petitioners of any statutory provision or of any rule or order of the agency.

   § 24-4-105(11), C.R.S. (emphasis added).

   The Commission’s Procedural Rules likewise state, in relevant part:

   Pursuant to Section 24-4-105(11), C.R.S., the Commission, in its discretion, may review petitions for declaratory orders in order to terminate controversies or to remove uncertainty in the application to a petitioner of provisions of the Act or of any relevant statute, rule, regulation, decision, permit, or order.
The Petition should be denied on its face because the relief sought by Defend Colorado is not available through a declaratory order. The Petition seeks a hearing and an order directing the Division to pursue a perceived remedy under the Clean Air Act, which is well beyond the available scope of relief. Defend Colorado identifies no controversy or uncertainty in the interpretation of a statute or rule to resolve through a declaratory order. Further, the Petition fails to identify how any law or order applies to Defend Colorado. Defend Colorado claims to advocate for Colorado’s economy and to protect the state’s natural resources, but fails to identify how the Commission might resolve a controversy regarding how the law is applied to the organization or its members. Defend Colorado further fails to identify how it or any members would be harmed if the requested relief is not granted.

Last, both the statute and the Commission’s Procedural Rule are clear that the Commission’s decision to hear a request for declaratory order is within its “sound discretion.” § 24-4-105(11), C.R.S. This Petition may be denied on its face. Even if it is considered, the Commission is not required to conduct the public hearing requested by Defend Colorado. *Purcell v. Colorado Division of Gaming*, 924 P.2d 1203, 1204 (Colo. App. 1996).

The Division asks that the Commission deny the Petition on the grounds that the ultimate relief sought by Defend Colorado – the issuance of a declaratory order – is unavailable under the applicable statute and Procedural Rules. Should the Commission determine that the relief were available, the Division further requests that the Commission exercise its sound discretion to deny the Petition for the reasons stated herein.

2. **Defend Colorado Does Not Allege Legal Basis for its Request to Compel a Public Hearing or Declaratory Order Regarding Clean Air Act § 179B.**

   A. **The 2019 Data Certification is not the means by which Colorado would pursue a § 179B demonstration.**

   Defend Colorado suggests that Colorado must certify its attainment status to EPA each year, by letter submitted no later than May 1st (the “May Certification”). See Petition at 2. In support of its position, Defend Colorado cites to 40 C.F.R. §§ 58.15 and 58.16. Instead, these regulations require that the Division provide EPA with accurate air quality monitoring data by May 1st for the previous calendar year. There is no requirement that the Division certify the attainment status of the DMNFR. Last year’s May Certification is attached, for reference, as Division Ex.A.

   Defend Colorado argues that EPA reviews and relies upon the May Certification to evaluate whether it has a duty to reclassify an area to a different level of nonattainment. See Petition at 5. Defend Colorado mischaracterizes how attainment is evaluated. The May Certification relates to the previous calendar year’s ozone monitoring data. In contrast, attainment is evaluated based upon a three-year average of the ozone design value (the 4th highest max). Defend Colorado also suggests that the May Certification needs to include supporting documentation for the influence of exceptional events on ozone data. However, the May Certification is not the means by which the Division would request exclusion of ozone monitoring data influenced by exceptional events.
For example, last year’s May Certification makes no reference of exceptional events data, and the Division submitted its request for exclusion of ozone monitoring data influenced by exceptional events to the EPA under separate cover as part of the Clean Data Request sent in June 2018. See Petition Ex.7A.

Defend Colorado also mischaracterizes the May Certification as an “agreement” under § 24-4-124(3), C.R.S. that would require Commission approval. Because the May Certification is nothing more than a certified copy of the previous year’s monitoring data, it cannot reasonably be characterized as an agreement in which the Commission would engage. The Commission does not customarily approve the May Certification, nor does it conduct a hearing on whether the data should be certified. There is no basis in fact or law to support the conclusion that the certification process should be the subject of a contested public hearing.

B. Neither the Colorado Air Act Nor the Clean Air Act Require a Public Hearing To Consider a § 179B(b) Demonstration

Section 179B(b) provides for a separate technical demonstration outside the scope of a SIP revision. 42 U.S.C. § 7509a; see also Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements, 83 Fed. Reg. 62998, 63009 (Dec. 6, 2018). This demonstration is not a “rule,” as that term is defined in the Colorado Administrative Procedure Act. § 24-4-102(15), C.R.S. Nor is it an element of a state implementation plan. Indeed there is no reference to a 179B(b) demonstration in the Commission’s enabling legislation, the Commission’s procedural rules, or any other Colorado statutory or regulatory provision. By extension, there is no provision that authorizes or compels the Commission to hold a hearing to consider whether Colorado should submit a 179B(b) demonstration to EPA. EPA Region 8 has advised the Division that a 179B(b) demonstration is comparable to an exceptional events demonstration, and states submitting an exceptional events demonstration are required by federal rule to go through a public comment process (though notably not through a public hearing process). See 40 C.F.R. § 50.14(c)(3). In 2018, Imperial County, California submitted the first known 179B(b) demonstration to the EPA for the 2008 ozone NAAQS, the cover letter for which is attached hereto as Division Ex.B. A review of this submittal reveals that the California Air Resources Board did not submit the 179B(b) demonstration to the EPA as a SIP revision.

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1 In contrast, Section 179B(a) expressly provides that if a nonattainment area cannot model attainment as part of a required SIP attainment demonstration, the EPA can still approve the attainment demonstration if the state can prove emissions from international sources is interfering with attainment. See 42 U.S.C. §§ 7502(c)(1), 7509a(a), and 7511a(b)(1); 80 Fed. Reg. 12264, 12266. As a SIP revision, authority for approval of the attainment demonstration containing the § 179B(a) demonstration is clearly given to the RAQC and Commission to adopt and submit to the EPA. See § 25-7-105(1)(a)(I), C.R.S., 42 U.S.C. § 7504, and Colorado Executive Order B 2013 007.

2 Imperial County did, however, submit an earlier § 179B(a) demonstration as a SIP revision (i.e. as part of its Moderate area attainment demonstration), because it could not model attainment of the NAAQS while taking into account international contributions. In contrast, Colorado did model attainment of the 2008 ozone NAAQS, and its attainment demonstration was approved by the EPA. See Approval and Promulgation of State Implementation Plan Revisions: Colorado: Attainment Demonstration for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area, and Approval of Related Revisions, 83 Fed. Reg. 31,068 (July 3, 2018).
Defend Colorado asks the Commission to direct the Division to prepare a 179B(b) demonstration, but offers no reasoned analysis supporting the conclusion that such a demonstration is within the Commission’s authority. It argues it is the Commission’s exclusive role to hold public hearings, citing to § 25-7-110(1) for its argument that the Commission is required to hold a public hearing “before taking any step that may result in adversely altering any Colorado area’s designation status under the NAAQS, affect Colorado’s obligations under its SIP, or affect Colorado’s obligations under the [Clean Air Act].” Petition at 4. Section 25-7-110(1) requires the Commission to hold a rulemaking hearing under the Colorado Administrative Procedure Act, § 24-4-103, C.R.S., “[p]rior to adopting, promulgating, amending, or modifying any ambient air quality standard authorized in section 25-7-108, or any emission control regulation authorized in section 25-7-109, or any other regulatory plans or programs authorized by sections 25-7-105(1)(c) or 25-7-106.” The Commission’s authority under Section 110 is irrelevant here because Defend Colorado’s Petition does not involve the adoption, promulgation, amendment or modification of any air quality standard, emission control regulation, or any other rule or regulation contemplated by § 25-7-105(1)(c) (regarding the Prevention of Significant Deterioration program) or § 25-7-106 (authorizing the promulgation of rules to carry out an effective air quality program).

Defend Colorado’s reliance on § 25-7-105(18), C.R.S. is equally misplaced. See Petition at 18 (where Defend Colorado argues that § 25-7-105(18) compels the Commission to hold this public hearing). This statute enables the Commission to evaluate the state’s emission inventory to determine if it is insufficient for purposes of a commission rulemaking or adjudication, relating to the development of ozone control strategies, including the ozone SIP. Defend Colorado is not questioning the sufficiency of the existing inventory and, indeed, explicitly relies upon the sufficiency of the existing inventory to support its request for submittal of a 179B demonstration. See Petition at 11-15. Even if there were a question regarding the inventory, that question is evaluated under § 25-7-105(18) in the context of a rulemaking or adjudication, neither of which is at issue here.

Thus, not only is there no basis upon which the Commission can grant Defend Colorado the remedy it seeks, it is equally clear the Commission has no duty to conduct a public hearing to consider the matters raised in the Petition.

C. The Submittal of a § 179B Demonstration is Discretionary and Colorado has already considered and declined to submit a § 179B demonstration.

Clean Air Act §179B says a state “may” submit a 179B demonstration. There is no statute or regulation compelling a state to submit a demonstration, even if that state qualifies. Instead, the decision is left to the discretion of the state. As the Commission has been previously informed, the Division has been evaluating the option of submitting a demonstration of international interference under §179B of the Clean Air Act. Following deliberations on the question, Governor Polis has specifically directed the Division not to further investigate or to submit a 179B(b) demonstration. Instead, the Division will turn its resources towards the development and implementation of revisions to the ozone SIP to satisfy the requirements for a Serious ozone nonattainment area.
CONCLUSION

Because the relief Defend Colorado seeks is beyond that which may be granted under § 24-4-105(11), C.R.S. and Commission Procedural Rules, Section VI.H, the Petition should be denied on its face. Further, the Commission is under no duty to hold a public hearing. To do so would only further strain the limited resources of the Commission, the Division and any other interested parties. If a hearing were held, the Commission would then be faced with the prospect of either denying the remedy sought because it is beyond the scope of relief available or granting a remedy that is beyond the authority of the Division to deliver. Therefore, the Commission should deny the request for hearing and the Petition.

Respectfully submitted this 8th day of March, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within RESPONSE TO DEFEND COLORADO’S PETITION FOR EXPEDITED PUBLIC HEARING AND REQUEST FOR DECLARATORY ORDER upon the parties below electronically via email this 8th day of March, 2019 addressed as follows:

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