

SUBMITTED VIA REGULATIONS.GOV AND EMAIL

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RE: Air Plan Approval and Conditional Approval; Colorado; Regulation Numbers 7 and 21 and RACT Requirements for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area (EPA Docket ID No. EPA-R08-OAR-2024-0225)

Dear Ms. Fulton:

On behalf of the Center for Biological Diversity, Public Employees for Environmental Responsibility, Earthjustice, Earthworks, Environmental Integrity Project, and Sierra Club (together, “Public Interest Groups”), and their tens of thousands of members and supporters who are harmed by air pollution in and from the Denver Metro/North Front Range 2008 ozone nonattainment area, we urge you to disapprove Colorado’s reporting requirements for its Regulation 7 State Implementation Plan (“SIP”) revisions relevant to inspections of and performance testing for storage tanks, which Colorado resubmitted on May 3, 2024.

Contrary to its proposal, 89 Fed. Reg. 63,852 (Aug. 6, 2024), EPA should return to its original position and disapprove of the reporting requirements tied to the Regulation 7<sup>1</sup> rules for storage tanks in the May 3, 2024 submittal. After disapproving this SIP submittal, EPA should quickly promulgate a FIP which will provide for strong transparency around air permit compliance data and help end the scourge of high levels of ground-level ozone in the Denver Metro/North Front Range area.

EPA already properly determined that the reporting requirements are insufficient to enable the public to enforce the requirements they are intended to support. It is tragic to witness EPA take this step backwards on such a critical transparency issue. Ozone kills people and causes a host of other adverse health and environmental outcomes, and EPA and Colorado have failed to bring ozone into compliance with the National Ambient Air Quality Standards (“NAAQS”) for over fifteen years.

EPA’s proposal is especially disheartening because EPA took this action without formally consulting a single member of the public, as far as the Public Interest Groups are aware and as the rulemaking docket reflects, despite this being a proposal that purports to protect the public’s

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<sup>1</sup> 5 C.C.R. § 1001-9 [hereinafter, “Regulation 7”].

interest in enforcing the Clean Air Act (“Act”), and its right to do so. EPA only met with Colorado, according to the docket and proposed rule. 89 Fed. Reg. at 63,855; *see, e.g.*, Exhibit 1 (record of an April 10, 2023 meeting between EPA and Colorado, and no others, in the rulemaking docket for the May 9, 2023 final rule, EPA Docket ID No. EPA-R08-OAR-2022-0632). This immediately renders the proposal suspect to doubt, and its substance unfortunately confirms that doubt. Colorado is often adversarial to the public in litigation related to enforcing the Clean Air Act and Colorado’s SIP. *See, e.g.*, Exhibit 2 (Colorado’s answer in the Center for Biological Diversity’s challenge to a defective air permit, which resulted in the state withdrawing the permit). And the state regularly argues that the public has not met its factual burden in those cases. *See, e.g.*, Exhibit 3 at 31–34, *Center for Biological Diversity et al v. CDPHE*, 2023CA2143, CDPHE Answer Br. (Colo. App. June 10, 2024).

Yet without consulting the most relevant category of stakeholder, the public itself, EPA has accepted Colorado’s superficial justifications for why existing reporting requirements suffice. In so doing, EPA has significantly impaired the public’s ability to enforce the Act. This makes it darkly ironic that Colorado has provided its thanks to EPA for a “robust reconsideration process.” CDPHE, *Resubmittal of SIP Revisions following Reconsideration*, at 13 (May 3, 2024) [hereinafter, “Commitment Letter”].

As a logical consequence of its lopsided consultation in the reconsideration process, EPA has also adopted Colorado’s narrow view of what is required to enable the public to enforce the Act. A problem that pervades the proposed rule, and Colorado’s Commitment Letter, is that EPA treats public enforcement actions as a two-dimensional equation, where all the public must do is compare the annual emissions reported by a facility with the annual emissions limits to determine whether a facility or piece of equipment is complying with the requirements to which it is subject.

This fails to account for the reality of public enforcement actions, which must regularly depend on more variables than self-reported annual emissions data. For example, inspections showing that a pilot light is not operating—*see* Regulation 7, Part B, Section I.E.2.c(i)—can be paired with inlet and process and/or well production data to demonstrate venting of storage tank emissions, which, depending on the facility’s status, may qualify as impermissible routine gas venting. *See, e.g.*, Exhibit 12, *United States and State of Utah v. EP Energy E&P Company, L.P.*, Case No. 22-cv-225, at 23–27 (D. Utah) (Mar. 29, 2022) (The United States, at the request of the EPA Administrator, and State of Utah’s complaint against an oil and gas company for several violations related to the control of air pollution from storage tanks, including thief hatch violations, which relied in part on production data reported by facilities). This is one example of many, but the point, which is elaborated upon below, is that public enforcement actions involve much more than taking a self-reported annual emissions value from a permittee’s report or Air Pollutant Emission Notice (“APEN”) and comparing it to the limit in the permit. A more robust consultation would have revealed this.

## I. INTRODUCTION AND BACKGROUND <sup>2</sup>

People in the Denver Metro/North Front Range (Front Range) are consistently exposed to some of the highest ozone levels in the United States outside of California. Indeed, the Front Range has not timely complied with any of EPA's NAAQS for ozone pollution, and the area far exceeds the ozone levels current scientific research dictates as necessary to protect human health—especially for sensitive populations such as children, asthmatics, and the elderly. In fact, the Front Range consistently ranks as one of the most polluted areas in the country for ozone.<sup>3</sup>

Because of Colorado's repeated failure to achieve attainment, EPA has downgraded the Front Range's classification for the 2008 ozone NAAQS to severe, which demonstrates that the Serious state implementation plan EPA is proposing to approve is a failure. EPA has also recently downgraded the Front Range's classification for the 2015 ozone NAAQS to serious, after Colorado was inevitably bound to fail to attain. However, EPA can start to change this dire trend, and a first step is to disapprove the reporting requirements that inhibit the public from fully joining the effort through data transparency and Clean Air Act enforcement.

Recent epidemiological studies demonstrate that modest reductions in ozone in the Front Range would save millions in avoided medical costs and mortalities. Scientific research continues to strengthen our understanding of the harm that ozone causes to public health. Exposure to ozone is connected to a wide range of significant human health impacts including respiratory and cardiovascular morbidity, and premature mortality, and central nervous system and developmental impacts have been demonstrated through controlled human exposure, epidemiologic, and toxicological studies.<sup>4</sup> These include demonstrated respiratory and cardiovascular morbidity, premature mortality, and perinatal and reproductive impacts, along with other suggested impacts such as to the central nervous system.

The physiological impacts of ozone exposure are experienced even by healthy individuals and even at relatively low concentrations of ozone. Moreover, there is a growing body of scientific evidence showing that repeated exposure over time causes additional health impacts, which may be more severe and less likely to be reversible.

Oil and gas development is the single largest human-caused source of ozone pollution in Colorado. *See, e.g.*, Exhibit 4, Rebuttal Statement of the Colorado Department of Public Health and Environment, at 3, 20–23 (Nov. 25, 2019) (“[T]he oil and gas industry has been, and for the foreseeable future will continue to be, this State's largest anthropogenic source of VOC and methane emissions, which negatively impact public health and the environment. The industry

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<sup>2</sup> Headings are solely for the convenience of the reader and in no way limit the scope of these comments.

<sup>3</sup> American Lung Association, *Colorado Cities Rank Among Worst in Nation for Ozone Pollution; Report Reveals Nationwide Disparities for People of Color* (Apr. 19, 2023), <https://www.lung.org/media/press-releases/state-of-the-air-colorado>.

<sup>4</sup> *See, e.g.*, U.S. Environmental Protection Agency, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants (Final Report) EPA/600/R-10/076F* (2013), <http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492>.

shows no sign of slowing, with several companies announcing significant increases in production in 2019 and drilling and investment in Colorado in the coming year.”).

Oil and gas facilities are a such an enormous source of ozone pollution because they emit both predominant forms of ozone precursor pollution—nitrogen oxides and volatile organic compounds—in massive volumes. *See* 87 Fed. Reg. 67,617, 67,621–22 (Nov. 9, 2022) (summarizing the results of Colorado’s analysis of ozone precursor pollution, which identifies the oil and gas sector as the single largest emitter of volatile organic compounds, and the second largest emitter of nitrogen oxides); *see also WildEarth Guardians v. BLM*, 322 F.Supp.3d 1134, 1139, 1142–43 (D. Colo. 2018) (discussing emissions precursors at well pads).

## **II. THE PUBLIC MUST BE EMPOWERED TO ENFORCE THE CLEAN AIR ACT.**

These repeated failures by the state, and the impacts of oil and gas on the ozone problem, make it all the more important for the public to be fully involved in the enforcement of the SIP and the Act. It is not disputed that, pursuant to Section 7604 of the Clean Air Act, 42 U.S.C. § 7604, members of the public must be able to participate in the enforcement of Colorado’s SIP. *See* 89 Fed. Reg. at 63,854. Nor does EPA dispute that “[a] lack of adequate reporting requirements can undermine citizens’ ability to participate in the enforcement of the SIP as authorized and provided for in CAA section 304.” *Id.*

As EPA itself explained in its Response to Comments accompanying its limited disapproval of the reporting requirements in the May 9, 2023 final rule:

SIP requirements must be enforceable by the EPA, the State, and citizens. *See* CAA sections 110(a)(2)(A) (requiring each SIP to have “enforceable emission limitations and other control measures, means, or techniques... as may be necessary or appropriate to meet the applicable requirements of this Act”); 113 (providing for federal enforcement); 172(c)(6) (substantively restating the 110(a)(2)(A) requirements with particular applicability to nonattainment areas); other related CAA provisions, including section 302(k) (defining “emission limitation”); and 304 (providing for citizen suits); *see also Committee for a Better Arvin v. U.S. E.P.A.*, 786 F.3d 1169, 1175 (9th Cir. 2015) (“[T]he language and structure of the CAA demand that all control measures on which the Plans rely to attain the NAAQS be included in the SIP and subject to enforcement by individuals and by EPA...”). In addition to this fundamental CAA requirement concerning enforceability, the state program must satisfy 40 CFR 51.211, which provides requirements to ensure that appropriate information concerning stationary sources is collected and reported to the state:

The plan must provide for legally enforceable procedures for requiring owners or operators of stationary sources to maintain records of and periodically report to the State –

(a) Information on the nature and amount of emissions from the stationary sources; and

(b) Other information as may be necessary to enable the State to determine whether the sources are in compliance with applicable portions of the control strategy.

Response to Comments at 46–47. EPA went on to state:

As the EPA has repeatedly stated, to be enforceable, a CAA SIP rule must be legally and practically enforceable. To ensure that citizens will be able to enforce SIP requirements, they must have reasonable access to the records allowing enforcement. If the State receives these records, then records should be available to members of the public through the State records request process under the Colorado Open Records Act. In general, requiring only that records be provided to the State on request does not ensure citizen access to information.

*Id.* at 47 (citing 88 FR 11842 (Feb. 24, 2023)).

The need for and value of public enforcement of the Clean Air Act is far from an abstract idea. Citizen lawsuits are an invaluable tool that can be used to hold government agencies, corporations, and other entities accountable for violations of the Clean Air Act. “The purpose of the citizens suit provision of the Clean Air Act is to promote private enforcement of environmental laws. Such suits are fundamental to the effective enforcement of environmental legislation . . . .” *Sierra Club v. Wellington Dev.-WVDT, LLC*, Civil Action No. 08-293, 2008 U.S. Dist. LEXIS 85621 at \*3 (W.D. Pa. Oct. 22, 2008).

Citizen suits enforcing the Clean Air Act are diverse and complicated in nature, and have served to protect air quality from a plethora of violators and threats, taking many different forms, since the inception of the Act.<sup>5</sup> Here, the SIP leaves the public, which can be a significant and

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<sup>5</sup> See, e.g., *Center for Biological Diversity and North Range Concerned Citizens v. CDPHE*, Case No. 2022-CV-31489 (Colo. Dist. 2022) (the case to which Exhibit 2 pertains); *Unitek Env'tl. Servs. v. Hawaiian Cement*, Civil No. 95-00723 SPK, 1997 U.S. Dist. LEXIS 19261 (D. Haw. Aug. 7, 1997); *Atl. Terminal Urban Renewal Area Coal. v. N.Y.C. Dep't of Env'tl. Prot.*, 697 F. Supp. 157 (S.D.N.Y. 1988); *United States v. Tenn. Air Pollution Control Bd.*, 967 F. Supp. 975 (M.D. Tenn. 1997); *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976); *Maryland Waste Coalition v. SCM Corp.*, 616 F. Supp. 1474 (D. Md. 1985); *Ohio Environmental Council v. United States Dist. Court, Southern Dist.*, et al, 565 F.2d 393 (6th Cir. 1977); *Ass'n of Irrigated Residents v. C&R Vanderham Dairy*, 435 F. Supp. 2d 1078 (E.D. Cal. 2006); *Utah Physicians for*

effective enforcement authority,<sup>6</sup> without a way to enforce Regulation 7. Thus, EPA must disapprove the reporting requirements of Regulation 7, Part D, Section I.E (now Regulation 7, Part B, Section I.E, after the reorganization of Regulation 7), unless Colorado commits to fix these defects by ensuring the public has access to the required records.

### **III. EPA MUST DISAPPROVE OF THE REGULATION 7, PART B, SECTION I.E REPORTING REQUIREMENTS, WHICH RENDER THE STORAGE TANK REQUIREMENTS UNENFORCEABLE AS A FEDERAL AND PRACTICAL MATTER.**

Regulation 7, Part B, Section I.E,<sup>7</sup> sets forth inspection and performance testing requirements for oil and gas storage tanks. The reporting requirements meant to render these requirements federally and practically enforceable by the public fail to do so, as EPA appropriately recognized in its May 9, 2023 final rule. 88 Fed. Reg. at 29,827. These inspection and performance testing requirements for storage tanks are not enforceable because the information used to show compliance are maintained on the regulated entities' private property, to the which the public has no access or only must be submitted if the Division requests it. 87 Fed. Reg. at 67,629. While the Division can request these records, the public and EPA cannot not. The Clean Air Act provides for enforcement by the State, EPA, and any "person" as that term is used in 42 U.S.C. § 7604. Furthermore, 40 C.F.R. § 51.211 requires that the owners or operators must periodically report to the State.

EPA relies on three reporting requirements outlined by Colorado to support its decision to reverse itself and approve of the specific reporting requirements meant to ensure the enforceability of the requirements for storage tanks: the annual storage tank report; Air Pollutant Emission Notices ("APENs"); and New Source Performance Standard ("NSPS") reporting pursuant to the requirements of NSPS OOOOa. *See* 89 Fed. Reg. at 63, 857, 63,858–59; *see also* Commitment Letter at 8–10, 11–12.

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*a Healthy Env't, Inc. v. TAP Worldwide, LLC*, 582 F. Supp. 3d 881 (D. Utah, Jan. 25, 2022); *Sierra Club v. Entergy Ark. LLC*, 503 F. Supp. 3d 821 (E.D. Ark., Sept. 30, 2019).

<sup>6</sup> *See* Exhibit 10 (finding that the Director of Colorado's Air Pollution Control Division ("Division") was granting enforcement discretion letters, meaning APCD was not going to take enforcement actions even though there were violations, to polluters that the Director formerly represented as a lawyer without disclosing this conflict of interest.) Even after the finding of the conflict of interest, this person was reassigned and remained working at the Division as the Deputy Director until last year. *See also, e.g.*, Exhibit 11, EPA Office of Inspector General, *EPA Should Conduct More Oversight of Synthetic-Minor-Source Permitting to Assure Permits Adhere to EPA Guidance* at 1 (July 8, 2021) (concluding: "While the EPA oversees state and local compliance monitoring for synthetic-minor-source permits, the EPA conducts only limited oversight of the permits themselves . . .").

<sup>7</sup> Formerly Regulation 7, Part D, Section I.E, in EPA's limited disapproval, prior to the reorganization of Regulation 7. For ease of reference, these comments refer to the newest regulatory citations for the relevant requirements discussed herein.

This generalized recitation of tangential reporting requirements, which does not adequately account for when the requirements do and do not apply to different tanks, and certainly does not draw a connection between the information reported and the ability of the public to enforce the requirements, provides an arbitrary and weak basis for EPA to reverse its disapproval. As a preliminary matter, the inspection requirements for oil and gas—*see, e.g.*, Regulation 7, Part B, I.E.2—cannot be directly enforced by the public without access to the records generated by those inspections. A regulated entity’s compliance with weekly inspection requirements for pilot light and auto-igniter activity, flare valves being open, the burner tray, tank piping being open, and thief hatch closure—Section I.E.2.c(i)–(vii)—is not directly demonstrated by statements regarding the monthly VOC emissions and emissions factor, or the average control efficiency of the combustion device, nor by APENs and NSPS OOOOa reporting.

This alone is a basis for rejecting the reporting requirements. *See, e.g.*, Exhibit 8, CDPHE, *Colorado Oil and Gas Storage Tank Enforcement*, at Slide 6 (Feb. 26, 2020) (stating that in CDPHE’s state-wide survey of storage tanks: “Location of the emissions predominantly observed from thief hatches and pressure relief valves on storage tanks), *cf.* Regulation 7, Part B, Section I.E.2.c(vii) (setting forth a weekly inspection requirement for thief hatches that is not enforceable by the public as a federal and practical matter without a reporting requirement).

Earthworks, for instance, has the same kind of device for optical gas imaging as the state used to identify this problem. But Earthworks’ ability to enforce the inspection and thief hatch closure requirements is significantly impaired without access to records related to the requirement. Further, the ability of the public to get close to facilities to inspect them can be limited when the facilities are remote and on private property, so the public is even more dependent on reported information than the state, which can conduct inspections. *See, e.g.*, Exhibit 12 at 23–27 (The United States, at the request of the EPA Administrator, and State of Utah’s complaint against an oil and gas company for several violations related to the control of air pollution from storage tanks, including thief hatch violations, which relied in part on production data reported by facilities); *see also United States v. K.P. Kauffman Co.*, 389 F. Supp. 3d 935, 941 (D. Colo., June 28, 2019) (outlining EPA and Colorado’s second claim in an enforcement action—“Plaintiffs allege specific violations such as failure to ensure that the pilot lights on control devices were lit and failing to ensure site glasses of the enclosed combustors were clean.”).

However, as discussed below, even accepting that the reporting requirement must enable public enforcement of more than the specific pollution control or monitoring requirements themselves, which is by no means the case, the reporting scheme EPA is approving still contains massive informational gaps, to the detriment of the public.

A. A large number of storage tanks are not subject to the annual reporting requirement upon which EPA relies.

While neither EPA nor Colorado provide citations to the reporting requirements used to justify the approval, EPA predominantly relies on the annual reporting requirement for storage tanks set forth at Regulation 7, Part B, I.F.3, to assert that Colorado’s existing requirements are adequate to enable public enforcement.

As a threshold issue, the annual storage tank reporting requirement does not apply to storage tanks with uncontrolled actual emissions of VOCs of less than 2 tons per year (“tpy”). See Regulation 7, Part B, I.F.3 (“Reporting for storage tanks subject to Section I.D.3”), and I.D.3.a(ii) (limiting the applicability of I.D.3 to “Owners or operators of storage tanks with uncontrolled actual emissions of VOCs equal to or greater than two (2) tons per year based on a rolling twelve-month total”).

Meanwhile, the requirements in Section I.E apply to “any storage tank that is being controlled pursuant to this Section I,” which is a significantly broader category of storage tank, because Section I does not include a 2-tpy exemption like Section I.D.3 does. See Regulation 7, Part B, I.E.3. Rather, the control and inspection requirements of Section I.E, the requirements for which reporting must be adequate to enable public enforcement, are not necessarily addressed by a Section I.F.3 report. Section I.E imposes inspection requirements on storage tanks that do not have to report under Section I.F.3. Thus, information as to “the monthly VOC emissions and emission factor, and the control efficiency for air pollution control equipment for each storage tank,” as well as a “list of all storage tanks”—Commitment Letter at 8—is not provided to the public for facilities with equipment not reporting under the I.F.3 requirement.

While, as discussed below, even if it were provided, this information is inadequate to enable public enforcement of the I.E requirements, the fact that this information is not provided at all for a large number of tanks, severely inhibits the ability of the public to enforce the Clean Air Act and SIP with respect to this equipment. EPA required stronger reporting requirements for the Combustion Equipment Rules where facilities were not covered by a continuous emissions monitoring system or continuous emissions rate monitoring system requirement. 89 Fed. Reg. at 63,857. The same rationale applies to the requirements at Regulation 7, Part B, I.E. Further, the significant number of facilities not covered by the Section I.F.3 reporting requirement is an important aspect of the problem that EPA failed to consider or address.<sup>8</sup>

B. APEN requirements do not amount to sufficient reporting.

EPA may inaptly argue that APEN reporting is sufficient to fill the informational gap left over from the limited applicability of Section I.F.3 reporting requirements.

*First*, EPA appropriately recognized in its initial rulemaking that APEN reporting requirements, which are outside of the specific SIP revisions EPA is evaluating and evaluated in its May 9, 2023 final rule, are subject to changes that can limit the public’s access to compliance data but do not need to go through the SIP approval process:

Although the information provided and captured in these APENs is consistent with the information that is required to be reported under [the relevant regulatory provision], the information that CDPHE

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<sup>8</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency decision can be arbitrary and capricious where the agency “entirely failed to consider an important aspect of the problem”).



requires to be submitted could be changed at any time and without going through the SIP process. Therefore, the APEN process in effect would allow the State to alter requirements for this rule without approval by the EPA, with the effect of impairing enforcement by citizens. This is a form of the “director’s discretion” problem discussed in detail in EPA’s 2015 SIP call on startup, shutdown, and malfunction exemptions.

Response to Comments at 48 (citing 80 FR 33840, 33873, 33917-33923 and passim (June 12, 2015)).

Colorado’s discussion of the requirements that surround APENs does not put this problem to rest, contrary to EPA’s discussion in the proposed rule. 89 Fed. Reg. at 63,856–57. Colorado can still unilaterally alter APEN reporting requirements outside of the SIP approval process, in such a way to further limit the already very limited usefulness of APENs for public enforcement. The requirements of C.R.S. § 25-7-114.1(1) and (2) are general and only require that APENs be filed and updated for new sources and modifications of existing sources that significantly increase emissions.

The requirement for estimating emissions in C.R.S. § 25-7-114.1(4) and Regulation 3, Part B, II.A.1 is *prospective*, and serves to provide an estimate of future pollution. EPA and Colorado do not explain how this would aid the public in assuring that the facility complies with that estimate of future pollution. In Colorado’s permitting scheme, APENs serve as a precursor to New Source Review (“NSR”) permits. APEN requirements precede Colorado’s NSR construction permit regulations in Regulation 3 for a reason. Just like an NSR permit, APENs are used to set and determine the limits with which a source must comply—they are a permitting, not a reporting mechanism. Unfortunately, like an NSR permit, knowing what limit applies to a facility does not demonstrate whether or not that facility is complying with those limits. This is true of an NSR permit for a modification as well. The NSR permit and APEN provide the prospective information necessary to evaluate and permit the future modification, but do not demonstrate compliance with the prior limits set forth in the permit or APEN.

The Regulation 3, Part B, II.B.1 emissions estimate serves the same purpose as a potential to emit estimate for a modification. *See* Commitment Letter at 12 n.11. There is not necessarily any connection between this annual emissions estimate and a facility’s prior compliance. Furthermore, an annual emissions estimate does not provide any information about compliance with weekly inspection requirements, like those pertaining to storage tanks in I.E.2. As discussed above, EPA cannot treat public enforcement actions as a two-dimensional equation, where all the public must do is compare the annual emissions reported by a facility with the annual emissions limits to determine whether a facility or piece of equipment is complying with the requirements to which it is subject. Annual reporting has no bearing on weekly inspection requirements, or hourly limits, or the hourly health-based NAAQS for oxides of nitrogen, which emissions from storage tanks could threaten.

*Second*, as EPA correctly recognized in its May 9, 2023 final rule, APENs are submitted far too infrequently, once every five years, to serve as an adequate reporting mechanism that enables public enforcement of the Clean Air Act and SIP:

An additional concern is that the information in APENs is not reported with a frequency required to satisfy either the Clean Air Act’s citizen enforceability requirements or the periodic reporting requirement of 40 CFR 52.211[.] After the initial submission of an APEN, it must only be recertified on an annual basis; this annual recertification of APEN estimates does not require reporting of all the records required to be maintained in [the relevant regulatory provision]. It therefore is not an adequate substitute for actual reporting, on at least an annual basis, of the information required to be captured . . .

Response to Comments at 48.

This reasoning holds true. Just because facilities *could* submit a revised APEN at year four because of a change in operations does not mean that APEN reporting sufficiently enables the public to enforce the SIP and Act. Even though facilities might, there is not requirement to report more frequently than every five years, which EPA has recognized is far too infrequent to constitute an adequate reporting requirement, and does not rebut in the proposed rule. The five-year “reporting” frequency could even present members of the public enforcing the Act with a bar to enforcement based on the applicable statute of limitations. *See* 28 U.S.C. § 2462 (setting forth a five-year statute of limitations); *see, e.g., Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010) (applying this statutory provision in the context of the Clean Air Act).

The public also faces a difficult burden in enforcing “past” violations, and either must enforce ongoing violations or identify repeated violations of the same standard to obtain relief. *See, e.g., Env’t Tex. Citizen Lobby, Inc. v. Exxon Mobil Corp.*, 2013 U.S. Dist. LEXIS 194479, at \*14 (S.D. Tex., Apr. 3, 2013). Waiting for vague annual emissions data for five years, even for half that time, can break a case.

*Third*, Colorado and EPA’s actions in this rulemaking demonstrate the insufficiency of APENs alone as a means of ensuring the public access to compliance data. Where APENs alone have served as the reporting mechanism, EPA has required Colorado to add specific, and more regular annual or semi-annual, reporting. EPA has only conditionally approved the reporting requirements, obligating Colorado to institute more than just an APEN-based reporting requirement. *See, e.g.,* 89 Fed. Reg. at 63,856–57 (conditionally approving the metal parts and metal product rules, wood product coating rules, where, effectively, APENs alone supplied the public with emissions information, and requiring regular reports).

C. The annual reporting requirement in Section I.F.3 contains large gaps that inhibit public enforcement.

Even for facilities that are subject to the Section I.F.3 reporting requirement, this report is woefully deficient when it comes to providing the information necessary to enable a member of the public to bring an enforcement action. There are several pieces of information critical to an enforcement action that the public does not get through the Section I.F.3 report. What the public does get is self-reported data from industry. EPA's approach to assessing the adequacy of information received by the public fails to account for the reality of public enforcement actions, which must regularly depend on more variables than self-reported annual emissions data. For example, inspections showing that a pilot light (*see* Section I.E.2.c(i)) is not operating can be paired with inlet and process and/or production data to demonstrate venting of storage tank emissions, which, depending on the facility's status, may qualify as impermissible routine gas venting. *See, e.g.*, Exhibit 12 (EPA and Utah's enforcement action for impermissible venting from oil and gas storage tanks).

The information missing from the Section I.F.3 report upon which EPA and Colorado rely so heavily includes, but is not limited to, the results of the weekly monitoring inspections required by Section I.E.2.c. Colorado can obtain the records of these inspections upon request and EPA can obtain using its Section 114 authority, whereas the public has no means of obtaining them. These inspections form the basis for the state and industry to argue that combustion devices are operating as required by their permits. The information which the public is now barred from accessing is weekly inspection records regarding:

- For combustion devices, a check that the pilot light is lit by either visible observation or other means approved by the Division. For devices equipped with an auto-igniter, a check that the auto-igniter is properly functioning. Section I.E.2.c(i).
- For combustion devices, a check that the valves for piping of gas to the pilot light are open. Section I.E.2.c.(ii).
- For combustion devices, the owner or operator must visually check for the presence or absence of smoke and that the burner tray is not visibly clogged. Section I.E.2.c.(iv).
- For vapor recovery units, the owner or operator must check that the unit is operating and that vapors from the storage tank are being routed to the unit. I.E.2.c.(v).
- For all control devices, the owner or operator must check that the valves for the piping from the storage tank to the air pollution control equipment are open. I.E.2.c.(vi).
- For all storage tanks, the owner or operator must check that the thief hatch is closed and latched, the pressure relief valve is properly seated, and all vent lines are closed. I.E.2.c.(vii)

These details are crucial to enforcement actions; the public is required to get into the weeds of permitting violations and permit failures to obtain success in enforcement and related proceedings. For example, in response to Petitions to Object by certain of the Public Interest

Groups, EPA has rejected Colorado-issued Title V permits on the basis of the inadequacy of these types of parametric monitoring requirements to support the state’s conclusion that combustion devices are operating with 95% control efficiency. *See* Exhibit 5, *In the Matter of Bonanza Creek Operating Company, LLC*, Petition No. VIII-2023-11, 2024 EPA CAA Title V LEXIS 5 (Jan. 30, 2024) [hereinafter “Bonanza Creek Order”]; Exhibit 6, *In the Matter of DCP Operating Company LP, Platteville Natural Gas Processing Plant*, Petition No. VIII-2023-14, 2024 EPA CAA Title V LEXIS 6 (Apr. 2, 2024) [hereinafter “Platteville Order”]; Exhibit 7, *In the Matter of HighPoint Operating Corporation, Anschutz Equus Farms 4-62-28*, Petition No. VIII-2024-6 (July 31, 2024) [hereinafter “HighPoint Order”]. The public obtained success in these proceedings by providing:

[A] detailed, condition-by-condition refutation of these monitoring requirements, explaining each case how, in their opinion, the monitoring is unrelated to achieving a specific control efficiency . . . . The Petitioners persuasively argue that these monitoring requirements may ensure the ECDs are not malfunctioning, and that combustion is actually occurring. *See id.* Therefore, they may also ensure that the ECDs maintain a certain, initial control efficiency. It is unclear, however, how the monitoring requirements ensure that the ECDs continually achieve the specific 95% control efficiency required in the Permits.

Bonanza Creek Order at 14; Platteville Order at 11; *see also* HighPoint Order at 10–11. In these examples, providing specific, condition-by-condition details on combustion device performance was imperative to the ability of the public to engage in, and succeed, in the implementation of the Clean Air Act. The same holds true for the direct enforcement of the Regulation 7 requirements to which the reporting requirements at issue are tied.

Access to inspection data is crucial in the effort to improve the state’s monitoring requirements for flares. For example, members of the public could pair an inspection report showing that a pilot light was lit, pursuant to Section I.E.2.c(i), with a performance test showing that a flare was not operating with 95% control efficiency. This would help to demonstrate that pilot light monitoring, or auto-igniter requirements, do not necessarily guarantee performance at 95% control efficiency. *See* Exhibit 13, Dr. Ranajit Sahu, *Technical Comments on the Proposed CDPHE Permit No. 20AD0062 for Haugen #1-30*, at 2–5 (Control efficiency of flares is affected by variables like weather, altitude, damage during shipping, the way the equipment is installed, improper construction of the particular device, wear and tear over time, variabilities in the fuel and waste streams, and different temperatures needed for different VOCs); *see also* Exhibit 14, EPA, *Parameters for Properly Designed and Operated Flares, Report for Flare Review Panel* (Apr. 2012). Further, VOC control efficiency is controlled by residence time and temperature. Exhibit 13 at 2–3. A flare, even with a lit pilot light, does not ensure consistency for these two parameters and thus cannot deliver a consistent control efficiency. *Id.* Alternatively, members of the public could bring an enforcement action premised on the failure to keep the pilot light lit. *See, e.g., United States v. K.P. Kauffman Co.*, 389 F. Supp. 3d 935, 941 (D. Colo., June 28, 2019) (outlining EPA’s Claim Two— “[EPA] allege specific violations such as failure to ensure that the

pilot lights on control devices were lit and failing to ensure site glasses of the enclosed combustors were clean.”).

Similarly, the public can pair failed stack tests with an inspection report related to visible emissions or the presence of smoke under Section I.E.2.c.(iv). *Id.* The monitoring records can demonstrate that the absence of visible emissions or smoke does not necessarily show that the combustion device is performing as it is required to, or that a facility is improperly reporting no visible emissions. *See, e.g., United States v. Comunidades Unidas Contra la Contaminacion*, 106 F. Supp. 2d 216 (EPA enforcement action against a facility for erroneously reporting no visible emissions, when EPA determined that visibility requirements were not being met). This undermines Colorado’s approach to ensuring combustion devices perform at 95% efficiency, and industries’ reliance on defective assumptions about combustion devices, and would be instrumental in an enforcement action.

In another example, one must measure the gas entering a combustion device, as well as the gas exiting it, to understand the combustion efficiency of the flare. The state incorrectly assumes 100% capture of gas routed to a flare, and premises its calculation of 95% destruction efficiency on that assumption. Capture efficiency (how much gas is actually routed to the flare) may very well be less than 100%, which disrupts the permittee and state’s approach to determining destruction efficiency.

In addition, the Section I.F.3 reporting is largely, often entirely dependent on emission factors, rather than direct measurement of emissions. Members of the public regularly raise concerns with the use of inappropriate or inadequate emission factors. Reporting that is strictly limited to emission factors provides none of the real-world data, including inlet data, flare downtime or malfunction data, or production and process or storage values, which can be used to controvert the use of an inappropriate emissions factor.

These examples also help to demonstrate why the public should have been consulted as part of EPA’s reconsideration of the May 9, 2023 final rule. Colorado is arguing against the Center for Biological Diversity, Colorado Latino Forum, and Sierra Club’s claim that flares are not adequately controlled pursuant to Colorado’s regulations in litigation in the Colorado Court of Appeals. *See, e.g., Exhibit 3.* More data has the potential to impair Colorado’s position in that litigation. This is not the only forum in which Colorado and the public are arguing over issues where the kind of information the public is now barred from accessing would support the public’s position. *See Bonanza Creek Order at 14; Platteville Order at 11; see also HighPoint Order at 10–11.*

Finally, EPA, like Colorado, fails to distinguish between SIP-approved and state-only reporting requirements when it comes to the requirements EPA is relying upon to approve the storage tank-specific reporting requirements. This is a product of EPA’s failure to include the actual language it is acting on in the docket, as well as EPA and Colorado’s failure to provide clear citations to the additional reporting requirements relied upon to reverse the prior disapproval. State-only requirements cannot be used to ensure compliance with a federally enforceable limit or requirement. *See, e.g., In the Matter of Chevron Products Company*, Petition No. IX-2004-08, 2005 EPA CAA Title V LEXIS 6, at \*81-82, 88 (Mar. 15, 2005) (stating, “EPA

also agrees with Petitioner that federally enforceable monitoring is necessary to assure compliance with the federally enforceable requirements of Condition 18656.”); *see also In the Matter of Conoco Phillips Co.*, Petition No. IX-2004-09, 2005 EPA CAA Title V LEXIS 8, at \*51(Mar. 15, 2005).

The provisions EPA appears to rely upon in Section I.F contain several state-only reporting requirements, including that Section I.F.3 reports must include:

I.F.3.c.(ii) (State Only) The report must identify any storage tank whose control status has changed, and the date of the change, since submission of the previous report.

I.F.3.c.(iii) (State Only) The report must list the production volume for each storage tank. Production volumes may be estimated by the amounts shown on the receipt from the purchaser.

I.F.3.c.(iv) (State Only) The report must list any downtime of air pollution control equipment, including the date, time, and duration of any scheduled downtime. For any unscheduled downtime, the date and time the downtime was discovered and the last date the air pollution control equipment was observed to be operating must be recorded in the report.

Regulation 7, Part B, I.F.3.c (ii)–(iv) (the “state only” labels are included in the original regulation).

Flare downtime, Section I.F.3.c(iv) can have a large impact on storage tank emissions, and often presents a ripe enforcement question, yet this crucial information is not guaranteed to the public through a federally enforceable reporting requirement. Understanding the control efficiency of the flare when its operating, pursuant to the Section I.F.3 report, does not tell the public when the flare is not running, which can have serious consequences. *See, e.g.*, Exhibit 12 at 23–27. Production volumes on a per-tank basis, Section I.F.3.c(iii), are also important to understanding tank-by-tank violations, and the public can often only obtain this information aggregated by all tanks, if at all, through any federally enforceable reporting requirements.

D. New Source Performance Standard reporting does not make up for the glaring informational gap left by the reporting requirements EPA proposes to approve.

New Source Performance Standard reporting under NSPS OOOOa is limited in applicability and relevance. First, NSPS OOOOa only applies to a specific subset of storage vessels. *See* 40 C.F.R. § 60.5365a(e). Excluded are tanks constructed or modified before September 18, 2015 and after November 16, 2020, as well as those with the potential for volatile organic compound emissions less than six tpy. *Id.* EPA fails to address the significant number of facilities not covered by this regulation. Even Colorado admits that “few, if any, storage vessels in Colorado will be subject to this performance testing requirement” in the NSPS OOOOa. Commitment Letter at 8.

The data produced by this performance testing requirement, and the subsequent reporting of that data to EPA, are what EPA and Colorado rely upon in NSPS OOOOa to assert that the storage tank requirements in Colorado's SIP revision are enforceable by the public. 89 Fed. Reg. at 63,858–59; Commitment Letter at 9–10. This data is only relevant to a limited subset of facilities, and does not make up for the large gaps in Colorado's reporting scheme.

#### **IV. COLORADO'S COMMITMENTS REGARDING THE COMBUSTION EQUIPMENT RULES ARE TOO VAGUE FOR EPA TO ISSUE A CONDITIONAL APPROVAL.**

EPA's conditional approval of the reporting requirements for the combustion equipment rules are not based on sufficient information and should be converted back to a disapproval. The Clean Air Act provides that EPA can issue a conditional approval, but the agency must do so "based on a commitment of the State to adopt *specific enforceable* measures by a date certain." 42 U.S.C. § 7410(k)(4); *see also* 89 Fed. Reg. at 63,853 (recognizing the same). EPA's own guidance provides that conditional approvals "will be used only in rare situations that merit special consideration." Exhibit 9, EPA, *Processing of State Implementation Plan (SIP) Submittals*, at 4 (July 9, 1992). Further, "[t]he commitment should, however, be as explicit as possible concerning the measures that will be adopted . . ." *Id.* at 5.

Here, however, Colorado's commitment regarding the reporting requirements for combustion equipment rules could not be more vague. Instead of outlining what specifically Colorado will require regulated entities affected by the rules to report, Colorado first proceeds to generally outline the reporting requirements that may affect facilities in this category. Commitment Letter at 6. Next, Colorado has "committed" to "incorporate additional reporting requirements into the SIP for this source category to further support the ability of the public to evaluate compliance with the SIP's emissions limits." *Id.* Colorado goes on to state that "[a]s a result of these SIP revisions, subject sources will be required to submit further information regarding their compliance with SIP emission limits" and that this information will be available to the public. *Id.*

While we appreciate EPA requiring Colorado to take further action with respect to this reporting requirement, instead of simply approving it like with storage tank requirements, this is hardly a commitment by the state. Even unlike the other conditional approvals in the proposed rule, there is no substance to this promise. There is not even a specific, regular reporting schedule established, unlike with the other conditional approvals (*e.g.*, 89 Fed. Reg. at 63,856–57, regarding metal parts and metal product rules and wood products coating rules). There is just a promise of "periodic" reports, which could mean every ten years. There is also no specificity to what will be reported.

As explained above, public enforcement actions are not two dimensional, with a simple a comparison of reported annual emissions is compared to the SIP's emissions limits. While that may sometimes be part of a case, other information is necessary for the public to bring a case to court, which is a right clearly provided by the Act. Cases can also be premised on many other

forms of noncompliance. Accordingly, EPA must disapprove of this requirement. Alternatively, Colorado's commitment must be substantiated to include specific reporting requirements, in terms of content and frequency.

In addition, "Regions should not use conditional approvals without input from Headquarters as whether such an approach is appropriate," *id.* at 4, and it is not clear from the proposed rule or docket that Region 8 received this input in conditionally approving the SIP revision at issue.

#### **V. EPA MUST INITIATE A NEW PUBLIC COMMENT PERIOD ONCE IT PLACES THE PROPOSED REGULATORY PROVISIONS AND THE PETITION FOR RECONSIDERATION INTO THE DOCKET.**

EPA is proposing to approve revisions to Colorado's SIP, but EPA did not put the relevant SIP requirements or revisions in the docket. One would have thought it painfully obvious that EPA cannot hold a public comment period on something that the public does not have access to.

The public is not required to guess at what version of Colorado's SIP EPA is proposing to approve. Rather, it would be a fundamental violation of administrative law, as well as the applicable Clean Air Act requirements, to approve a regulatory program without providing the public with the language of the regulatory program during the public comment period. EPA needs to hold a new public comment period during which the public knows specifically what it is supposed to be commenting on.

Although we are under absolutely no obligation to demonstrate how confusing it is that EPA failed to include in the docket the SIP language that EPA is proposing to approve, we point out that we do not actually know what the specific reporting requirements are, or the specific pollution control requirements to which they pertain, because EPA did not put that language in the docket. Particularly problematic is EPA's failure to include the SIP revisions associated with the May 13, 2020 submittal pertaining to Regulation 7.

The difficulty results from the frequent changes to and reorganization of Colorado's regulations (*see, e.g.*, Commitment Letter at 7, noting that the storage tank and centrifugal compressor requirements at issue were originally set forth at Regulation 7, Sections XII.E and XII.J, but were set forth at Regulation 7, Part D, Sections I.E and I.J at the time of the May 9, 2023 limited disapproval, and can *now* be found at Regulation 7, Part B, Sections I.E and I.J). It appears, from what the Public Interest Groups can discern from the confusing tangle of regulatory changes and subsequent SIP changes, that Colorado has further modified Regulation 7, Part B, Sections I.E and I.J, such that these citations, as identifiable through legal database and Colorado state materials do not show what requirements have insufficient reporting requirements. While the docket does contain EPA-R08-OAR-2024-0225-0007, EPA-R08-OAR-2024-0225-0008, EPA-R08-OAR-2024-0225-0009, these materials do not clearly define the specific reporting requirements EPA is now approving and conditionally approving in this action, nor the specific substantive requirements the reporting requirements are meant to render enforceable.



EPA must also include Colorado's July 10, 2023 Petition for Reconsideration in the docket for this action (EPA Docket ID No. EPA-R08-OAR-2024-0225), or at least in the docket for the initial May 9, 2023 limited disapproval (EPA Docket ID Nos. EPA-R08-OAR-2022-0632; EPA-R08-OAR-2022-0857). Both EPA's proposed rule and Colorado's Commitment Letter reference the Petition for Reconsideration as containing substantive descriptions of Colorado's existing reporting requirements, or its commitment to adopt future requirements. *See, e.g.*, 89 Fed. Reg. at 63,855.

For example, Colorado's Commitment Letter prefaces the Commitment Letter's discussion of existing reporting requirements for storage tanks and centrifugal compressors by saying: "As set forth in Colorado's Petition [for Reconsideration] and *summarized* below . . ." Commitment Letter at 7 (emphasis added). Colorado also relies on "the information in the Petition" in addition to the discussion in the Commitment Letter to assert that it has addressed EPA's concerns with respect to APEN reporting. *Id.* at 13.

However, the Petition for Reconsideration is not available to the public through the docket. The public does not have access to the Petition for Reconsideration and, as explained above, was not privy to the discussions in which EPA and Colorado, on their own, decided what the public needed for Clean Air Act enforcement without the public's involvement. The public must be given the opportunity to comment on the full extent of Colorado's arguments regarding why these reporting requirements are sufficient. EPA's reliance on these arguments to reverse itself and approve the reporting requirements, and the public's inability to access anything but a summary of them, constitutes insufficient notice.

## V. CONCLUSION

In conclusion, EPA must disapprove of the reporting requirements supporting Regulation 7, Part B, Section I.E, formerly Regulation 7, Part D, Section I.E, which it now has proposed to approve. After the disapproval, EPA should quickly promulgate a Federal Implementation Plan with adequate reporting requirements that enables the public to enforce the pollution control requirements in Regulation 7, as the Clean Air Act requires. Further, the Public Interest Groups would be interested in meeting with EPA to discuss the deficiencies in the reporting requirements, to provide the point of view of actual members of the public.

Sincerely,

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