DISTRICT COURT, DENVER COUNTY COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiff(s): GREENLATINOS, 350 COLORADO, AND EARTHWORKS v. **Defendant(s):** COLORADO AIR QUALITY CONTROL COMMISSION	**▲ COURT USE ONLY ▲**
Attorneys for Plaintiffs GreenLatinos, 350 Colorado, and Earthworks Ian Coghill, CO Bar No. 58423 Erik Woodward, CO Bar No. 58769 Earthjustice 633 17th Street, Suite 1600 Denver, CO 80202 Phone Number: (303) 996-4620 FAX Number: (720) 550-5757 icoghill@earthjustice.org ewoodward@earthjustice.org	

COMPLAINT OF GREENLATINOS, 350 COLORADO, AND EARTHWORKS

GreenLatinos, 350 Colorado, and Earthworks (collectively, "GreenLatinos")[1] submit this Complaint pursuant to the Colorado Air Pollution Prevention and Control Act ("CO Clean Air Act"), C.R.S. § 25-7-120, and the Colorado Administrative Procedure Act ("CO APA"), C.R.S. § 24-4-106(2), (4), to challenge the Colorado Air Quality Control Commission's adoption of revisions to its Regulation 3, 5 C.C.R. § 1001-5 that became effective on July 15, 2023 ("DIC Permitting Rule" or "Rule"). The Rule fails to ensure that residents of communities that have

[1] For ease of review, GreenLatinos have attached an Appendix listing all terms defined in this Complaint.

long borne a disproportionate share of adverse human and environmental effects from polluting industries receive the protections provided by the Environmental Justice Act, HB 21-1266 ("Environmental Justice Act").

Because critical aspects of the Rule are arbitrary and capricious, unsupported by substantial evidence in the record, and contrary to law, GreenLatinos seeks an order from this Court remanding the Rule to the Commission for further proceedings in compliance with the Act.

INTRODUCTION

1. Colorado's Environmental Justice Act recognizes that "[c]ertain communities . . . have historically been forced to bear a disproportionate burden of adverse human health or environmental effects . . ."[2] In particular, "communities with residents who are Black, Indigenous, Latino, or people of color have faced centuries of genocide, environmental racism, and predatory extraction practices."[3] Residents of these communities ("DI Communities") live alongside industrial facilities like oil refineries, power plants, freeways, and other sources of air pollution. Every day, DI Communities are exposed to the pollutants emanating from smokestacks, flares, and other sources, and their residents suffer from associated health impacts like asthma, heart disease, and other debilitating conditions.

2. The Colorado General Assembly passed the Environmental Justice Act to disrupt the status quo by halting the disproportionate impacts of harmful pollution on DI Communities. It recognized that "[s]tate action to correct environmental injustice is imperative,"[4] and that "[e]fforts to right past wrongs and move towards environmental justice must focus on disproportionately impacted communities and the voices of their residents."[5] Toward that end, the General Assembly determined that the "key to addressing the historic wrongs [of environmental injustice] is to rapidly reduce pollution in disproportionately impacted communities, including from electric power, industrial, and manufacturing sources."[6]

3. The Environmental Justice Act prescribed specific measures that must be included in the DIC Permitting Rule and that are essential to achieving the Act's goal of changing the status quo and rapidly reducing pollution in DI Communities. Recognizing that existing monitoring and modeling requirements do not adequately quantify the emissions from specific sources or evaluate their effect on DI Communities, the Act requires the Commission to adopt "enhanced modeling and monitoring requirements for new and

[2] Environmental Justice Act § 2(1)(a)(II).
[3] *Id.* § 2(1)(a)(III).
[4] *Id*. § 2(1)(b)(IV).
[5] *Id*. § 2(1)(b)(V).
[6] *Id*. § 2(2)(b)(I).

modified sources of affected pollutants in disproportionately impacted communities."[7] The Act also requires the Commission's Rule to require the modeling and monitoring of hazardous air pollutants ("HAPs") that have "the potential to cause or contribute to significant health or environmental impacts."[8]

4. These modeling and source-specific monitoring requirements are necessary to meet the goal of reducing pollution in those communities, in part because neither the state nor the DI Communities can successfully reduce pollution without reliable data on the source and quantity of those pollutants. Without the monitoring and modeling data required by the Act, DI Communities remain vulnerable to the effects of air pollution because they lack the information they need to protect themselves from exposure and to seek accountability from polluters.

5. The Rule falls short of the Act's requirements in five ways. *First*, it fails to require additional source-specific monitoring requirements for most sources, and, instead, allows most sources to pay a fee for community monitoring. *Second*, it creates a vague community monitoring program that does not explain how it will operate or how the fees imposed will be adequate to fund it. *Third*, it improperly divides DI Communities into two categories, only one of which will receive the benefits from statutorily mandated enhanced modeling and source-specific monitoring, leaving many DI Communities with the greatest air pollution burdens without those benefits and making it even more difficult for communities to understand what protections exist for them. *Fourth*, it did not consider including HAPs that have the potential to cause significant health or environmental impacts. *Fifth*, it limits enhanced modeling and source-specific monitoring to a handful of sources, leaving many communities without the protections mandated by the Act.

6. Further, when the Commission adopted the Rule, it: (i) failed to explain its reasoning or basis for its decisions, (ii) ignored substantial evidence submitted by GreenLatinos that highlighted the Rule's inadequacy, and (iii) arbitrarily adopted the Rule without articulating a rational basis or substantial evidence.

PARTIES

7. Plaintiff GreenLatinos[9] is a national membership-based organization that convenes a broad coalition of Latino leaders committed to addressing issues that significantly affect the health and welfare of the Latino community in the United States. Plaintiff GreenLatinos has members who live in disproportionately impacted communities in Colorado and suffer the effects of the cumulative pollution of the many facilities in those communities. In the past six years, Plaintiff GreenLatinos has advocated for improved air

[7] *Id.* § 8, *codified at* C.R.S. § 25-7-114.4(5)(b)(II)(A).
[8] C.R.S. § 25-7-114.4(5)(d)(I).
[9] This Complaint uses "Plaintiff GreenLatinos" to distinguish the individual plaintiff from the collective use of "GreenLatinos" to refer to all three plaintiffs.

quality monitoring in Colorado, and it played a key role in the coalitions that helped pass important environmental justice laws, including the Environmental Justice Act.

8. Plaintiff GreenLatinos relies on both source-specific and ambient pollutant monitoring data in its work. For example, in May 2022, Plaintiff GreenLatinos, in partnership with the Colorado School of Public Health, published a report on goods, services, and infrastructure in North Denver.[10] This report relied on, among other sources, facility-level pollutant monitoring and violations data to evaluate environmental contamination in North Denver. The report highlighted gaps in this data and the need for "local and accountable environmental monitoring . . . along with increased regulatory attention to gathering data and enforcing regulations."[11]

9. Plaintiff GreenLatinos' members who live in DI Communities also rely on pollutant monitoring data to understand the quality of the air they breathe. It is vital for these members that monitoring data is reliable, accurate, and covers as many pollutants as possible.

10. Plaintiff Earthworks is a nonprofit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks has been working with frontline communities in Colorado, including DI Communities, for more than 20 years to advocate for public health and the environment. Earthworks staff engage with state lawmakers and regulatory bodies as well as local governments across Colorado to pass legislation, reform policies and adopt stricter rules that put the lives of people before the interests of industry and promote a managed decline of oil and gas production, including an end to permitting new oil and gas facilities.

11. Earthworks works to highlight emissions events that are unreported and underreported due to a lack of accurate, verifiable emissions monitoring at many of these facilities. For example, since 2014, Earthworks Infrared Training Center-certified staff have employed FLIR GF320 Optical Gas Imaging (OGI) cameras to document and expose air pollution at oil and gas facilities in Colorado. Earthworks has conducted 1,377 surveys of 695 oil and gas facilities in Colorado and has filed 302 complaints with state regulators using OGI evidence to highlight potential noncompliance with air quality regulations. Many surveys are completed at the request of and in partnership with community members in both DI communities and elsewhere who live near and/or have concerns about specific oil and gas facilities.

12. Plaintiff 350 Colorado is a state-wide non-profit organization with 20,000 members, working locally to build a global grassroots movement to solve the climate crisis and transition to a sustainable future. 350 Colorado is working to ensure a fossil-free future,

[10] GreenLatinos, *Who Bears the Cost: North Denver Environmental Justice Report and Data Audit* (May 2022), *available at* https://www.greenlatinos.org/colorado.
[11] *Id.* at 12.

create climate solutions, a livable climate for all, and a just and equitable transition that protects our most vulnerable communities and workers. 350 Colorado has members that live in disproportionately impacted communities in Colorado and suffer the effects of the cumulative pollution of the many polluting facilities in those communities. 350 Colorado also conducts community outreach and trainings in DI Communities to empower community members to be active in permitting and rulemaking processes.

13. 350 Colorado also relies on both source-specific and ambient pollutant monitoring data in its work. For example, in 2022, 350 Colorado filed a petition with the United States EPA where it used air monitoring and violations data to argue that the EPA should deny the Title V air permit for the Suncor refinery due to its harmful air pollution. Also, 350 Colorado is currently a stakeholder for and will become a party to the Colorado Energy and Carbon Management Commission's forthcoming rulemaking on cumulative impacts, in which 350 Colorado will emphasize that accurate monitoring data from all sources is vital to determine cumulative impacts.

14. 350 Colorado members who live in DI Communities also rely on pollutant monitoring data to understand the quality of the air they breathe. It is vital for these members that monitoring data is reliable, accurate, and covers as many pollutants as possible.

15. The plaintiffs participated in the rulemaking as part of the Community and Environmental Partners coalition after that group was granted party status pursuant to Rules V.E.4.b and V.E.4.c of the Commission's Procedural Rules.[12] The plaintiffs also submitted an alternate proposed rule during the rulemaking hearing, pursuant to Procedural Rules V.E.4.b, V.E.6.c.(vii), and C.R.S. § 25-7-110(7).[13]

16. GreenLatinos and their members' interests have been, are being, and will continue to be harmed by the Commission's violations of law in adopting the DIC Permitting Rule. GreenLatinos advocate for air pollution reduction in DI Communities and rely on monitoring and modeling data in their work and advocacy. GreenLatinos' members who reside in DI Communities similarly rely on monitoring and modeling data to understand the pollutants entering their communities and to take protective measures in response to high levels of pollutants. The Rule's limitations on enhanced modeling and source-specific monitoring and failure to include more HAPs deprive GreenLatinos and their

[12] 5 C.C.R. § 1001-1.

[13] The other parties to the rulemaking were: (i) American Petroleum Institute of Colorado; (ii) Civitas Resources Inc.; (iii) Colorado Chamber of Commerce; (iv) Colorado Competitive Council; (v) Colorado Mining Association; (vi) Colorado Oil and Gas Association; (vii) Colorado Petroleum Association; (viii) Colorado Utilities Coalition for Clean Air; (ix) Denver Metro Chamber of Commerce; (xi EVRAZ Rocky Mountain Steel; (xi) Local Government Coalition; (xii) Occidental Petroleum Corporation; (xiii) PDC Energy Inc.; (xiv) Weld County BOCC; (xv) West Slope Colorado Oil & Gas Association; (xvi) Western & Rural Local Government Coalition; and (xvii) Williams.

members of the complete, reliable, and accurate data that they require to protect their health and achieve their advocacy goals. If the Commission resolves the shortcomings addressed in this Complaint, the DIC Permitting Rule would be more likely to serve its purpose of protecting public health in these communities.

17. Defendant Colorado Air Quality Control Commission ("Commission") is a governmental entity within the Colorado Department of Public Health and Environment ("CDPHE"), established under C.R.S. § 25-7-104. The Commission exercises primary rulemaking authority to implement the Colorado Clean Air Act, Article 7 of Title 25 of Colorado Revised Statutes.[14] As directed by the Environmental Justice Act, the Commission adopted the DIC Permitting Rule challenged by GreenLatinos in this action.

18. Non-party Air Pollution Control Division ("Division") is a division within CDPHE's Division of Administration. The Division is responsible for air permitting and enforcement of air control regulations. The Division developed and proposed the challenged DIC Permitting Rule to the Commission for adoption.

JURISDICTION AND VENUE

19. The Commission's adoption of the DIC Permitting Rule is subject to judicial review in accordance with the CO Clean Air Act, C.R.S. § 25-7-120(1), and the Colorado APA, C.R.S. §§ 24-4-103, 24-4-106.

20. Under the CO APA, any person "adversely affected or aggrieved by any agency action" may seek review in the district court.[15] The court "shall hold unlawful and set aside" the action if it determines that the action is: (i) "Arbitrary or capricious"; (ii) "A denial of statutory right"; (iii) "Contrary to constitutional right, power, privilege, or immunity"; (iv) "In excess of statutory jurisdiction, authority, purposes, or limitations"; (v) "Not in accord with the procedures or procedural limitations of this article 4 or as otherwise required by law"; (vi) "An abuse or clearly unwarranted exercise of discretion"; (vii) "Based upon findings of fact that are clearly erroneous on the whole record"; (viii) "Unsupported by substantial evidence when the record is considered as a whole"; or (ix) "Otherwise contrary to law."[16]

21. The Commission is an "agency" under the Colorado APA.[17]

22. When the Rule became effective on July 15, 2023, it became agency action subject to judicial review.[18]

---

[14] C.R.S. § 25-7-105(1).
[15] C.R.S. § 24-4-106(4).
[16] C.R.S. § 24-4-106(7)(b).
[17] C.R.S. § 24-4-102(3).
[18] C.R.S. § 24-4-103(5); 5 C.C.R. § 1001-1:V.F.11.

23. This Complaint is filed within thirty-five days after the Rule became effective.

24. GreenLatinos are "persons" under the CO APA.[19]

25. GreenLatinos are "adversely affected or aggrieved" by the DIC Permitting Rule's provisions under the CO APA.[20]

26. Venue is proper under C.R.C.P. 98 because the Commission resides in the County of Denver for purposes of this suit.[21]

LEGAL BACKGROUND

I. The Environmental Justice Act and the Definition of Disproportionately Impacted Community

27. The 2021 Environmental Justice Act, HB21-1266, declares that "[a]ll people have the right to breathe clean air" and "live free of dangerous levels of toxic pollution."[22]

28. As noted above, after acknowledging that "[c]ertain communities . . . have historically been forced to bear a disproportionate burden of adverse human health or environmental effects,"[23] and specifically noting that "communities with residents who are Black, Indigenous, Latino, or people of color have faced centuries of . . . environmental racism,"[24] the Act provides that "[s]tate action to correct environmental injustice is imperative and state policy can and should improve public health and the environment."[25]

29. Accordingly, "[t]he state government has a responsibility to achieve environmental justice, health equity, and climate justice for all communities by avoiding and mitigating harm."[26] The "key to addressing these historic wrongs [of environmental injustice] is to rapidly reduce pollution in disproportionately impacted communities, including from electric power, industrial, and manufacturing sources."[27] Accordingly, the Environmental Justice Act provides that it "is necessary to ensure that communities are not forced to bear disproportionate environmental and health impacts."[28]

---

[19] C.R.S. § 24-4-102(12).
[20] C.R.S. § 24-4-106(4).
[21] C.R.S. § 24-4-106(4).
[22] Environmental Justice Act § 2(1)(a)(I).
[23] *Id*. § 2(1)(a)(II).
[24] *Id*. § 2(1)(a)(III).
[25] *Id*. § 2(1)(b)(IV).
[26] *Id*. § 2(1)(c)(I).
[27] *Id*. § 2(2)(b)(I).
[28] *Id*. § 2(1)(c)(IV).

30. The 2021 Environmental Justice Act defines a "disproportionately impacted community" as a:

> community that is in a census block group, as determined in accordance with the most recent United States census, where the proportion of households that are low income is greater than forty percent, the proportion of households that identify as minority is greater than forty percent, or the proportion of households that are housing cost-burdened is greater than forty percent; or is any other community as identified or approved by a state agency, if: The community has a history of environmental racism perpetuated through redlining, anti-Indigenous, anti-immigrant, anti-Hispanic, or anti-Black laws; or the community is one where multiple factors, including socioeconomic stressors, disproportionate environmental burdens, vulnerability to environmental degradation, and lack of public participation, may act cumulatively to affect health and the environment and contribute to persistent disparities. As used in this subsection (2)(b)(II), "cost-burdened" means a household that spends more than thirty percent of its income on housing, and "low income" means the median household income is less than or equal to two hundred percent of the federal poverty guideline.[29]

31. The Environmental Justice Act became law on July 2, 2021.

32. On May 23, 2023, HB 23-1233 amended the definition of "disproportionately impacted community" to adjust some of the thresholds and add additional communities to the definition. [30]

33. In addition, HB 23-1233 added a provision allowing state agencies to prioritize or target certain DI Communities if the prioritization is reasonably tailored to the rule or other state action:

> In applying the definition of disproportionately impacted community, a statewide agency *may prioritize or target* certain criteria of the definition of disproportionately impacted community or *certain subsets of communities* that meet the definition of disproportionately impacted community if the statewide agency makes a determination by rule or other public decision-making process that the *prioritization or targeting is warranted and reasonably tailored to the category of statewide agency action involved*.[31]

[29] *Id.* § 3, *codified at* C.R.S. § 24-4-109(2)(b)(II) (2021).
[30] HB 23-1233 § 14, *codified at* C.R.S. § 24-4-109(2)(b)(II) (2023).
[31] *Id.*, *codified at* C.R.S. § 24-4-109(2)(a)(I)(B) (2023) (emphasis added).

II. The Environmental Justice Act Requirements Governing the DIC Permitting Rulemaking

34. Section 8 of the Environmental Justice Act requires that the Commission adopt rules that "provide for enhanced modeling and monitoring requirements for new and modified sources of affected pollutants in disproportionately impacted communities."[32]

35. The DIC Permitting Rule's requirements "apply to permits for sources of affected pollutants in disproportionately impacted communities."[33]

36. A "[s]ource of affected pollutants" is defined as "a stationary source that emits any affected pollutant in an amount such that a construction permit is required under commission rules."[34]

37. The Environmental Justice Act includes provisions for two types of sources: (i) new and modified sources, and (ii) existing sources.

38. Both enhanced modeling and enhanced monitoring are required for "new and modified sources of affected pollutants in disproportionately impacted communities."[35]

39. Under the Act, the Commission may "set thresholds of affected pollutants below which the requirements of [the DIC Permitting Rule] do not apply" (hereinafter "Affected Pollutant Thresholds").[36]

40. Therefore, both enhanced modeling and enhanced monitoring must apply to a new or modified source if it: (i) is located in a DI Community, and (ii) emits an affected pollutant above an Affected Pollutant Threshold established in the DIC Permitting Rule.

41. For existing sources, the Commission must "consider requiring enhanced monitoring." [37]

42. Along with the specific modeling and monitoring requirements, the DIC Permitting Rule must identify the "affected pollutants" subject to the DIC Permitting Rule, which are defined as "those air pollutants as determined by the commission with the potential to cause or contribute to significant health or environmental impacts."[38] At a minimum, "affected pollutants" under the DIC Permitting Rule must include:

---

[32] *See* Environmental Justice Act § 8, *codified at* C.R.S. § 25-7-114.4(5)(b)(II)(A).
[33] C.R.S. § 25-7-114.4(5)(b)(I).
[34] C.R.S. § 25-7-114.4(5)(d)(II).
[35] C.R.S. § 25-7-114.4(5)(b)(II)(A).
[36] C.R.S. § 25-7-114.4(5)(a)(II).
[37] C.R.S. § 25-7-114.4(5)(b)(II)(A).
[38] C.R.S. § 25-7-114.4(5)(d)(I).

(A) Volatile organic compounds;

(B) Oxides of nitrogen;

(C) Hazardous air pollutants as identified by the commission, including benzene, toluene, ethylbenzene, and xylene; and

(D) Particulate matter that is two and one-half microns or smaller.[39]

43. The DIC Permitting Rule must also (i) "identify disproportionately impacted communities" that meet the statutory definition,[40] (ii) impose a processing fee on sources of affected pollutants subject to the DIC Permitting Rule, [41] and (iii) "identify the types of monitoring technology that can be used by the sources of affected pollutants and must allow for the use of alternative methods of monitoring as approved by the division."[42]

III. Procedural Requirements Governing the DIC Permitting Rulemaking Proceeding

44. Any agency undertaking a rulemaking must hold a public hearing that allows "interested persons an opportunity to submit written data, views, or arguments and to present the same orally unless the agency deems it unnecessary."[43]

45. The adopted rules must incorporate by reference a "written concise general statement of their basis, specific statutory authority, and purpose" ("Statement of Basis and Purpose.").[44] If the rule "involves scientific or technological issues," the Statement of Basis and Purpose must "include an evaluation of the scientific or technological rationale justifying the rule."[45]

46. Any person may request party status in the rulemaking process, which gives the party the right to (i) file prehearing statements, (ii) file alternative proposals, and (iii) participate in the rulemaking hearing.[46]

47. Each party is required to file a prehearing statement that includes, among other things, an explanation of "the factual and legal issues that arise from the rulemaking proposal, and

[39] *Id.*
[40] C.R.S. § 25-7-114.4(5)(a)(III).
[41] C.R.S. § 25-7-114.4(5)(c).
[42] C.R.S. § 25-7-114.4(5)(b)(II)(B).
[43] C.R.S. § 24-4-103(4)(a).
[44] C.R.S. § 24-4-103(4)(c).
[45] *Id.*
[46] 5 C.C.R. § 1001-1:V.E.4.

what position is being taken on each such issue."[47] Parties may also be allowed to file rebuttal statements.[48]

48. A party may also choose to file an alternate proposal,[49] which includes "[a]ny new substantive proposed rule text offered for the Commission's consideration and approval, including wholly new regulation text, or amendments or revisions to previously proposed regulation text."[50]

49. After the presentations by the parties and the Division at the hearing, the Commission closes the record and deliberates on the proposed rule.[51]

FACTS

I. The DIC Permitting Rule

50. The Commission formally adopted the DIC Permitting Rule on May 18, 2023. As relevant to the claims herein, the Rule (i) excuses most sources from source-specific monitoring requirements and instead requires them to pay a fee to a community monitoring program, (ii) creates a community monitoring program without an explanation of how the program will work or how the fees imposed will adequately fund the program, (iii) divides DI Communities into sub-classes and grants greater protections to one class of communities over another, (iv) does not evaluate the HAPs posing the greatest risk to these communities and include those HAPs in the Rule, and (v) limits any enhanced modeling and the most stringent monitoring requirements to a very small percentage of sources.

A. Enhanced Modeling and Monitoring Requirements

51. The DIC Permitting Rule adopted enhanced modeling and monitoring requirements for DI Communities. The modeling requirements went into effect on July 15, 2023,[52] while the monitoring requirements will go into effect on July 15, 2024.[53]

1. Modeling Requirements

52. Under the Rule's modeling requirements, a new or modified source of affected pollutants must conduct air dispersion modeling for an affected pollutant, but only if the source (i) is located in a subset of DI Communities known as "cumulatively impacted

[47] 5 C.C.R. § 1001-1:V.E.6.c.(ii).
[48] 5 C.C.R. § 1001-1:V.E.6.d.
[49] 5 C.C.R. § 1001-1:V.E.6.c.(vii).
[50] 5 C.C.R. § 1001-1:III.D.
[51] 5 C.C.R. § 1001-1:V.F.9.
[52] 5 C.C.R. § 1001-5:B.III.B.4.
[53] 5 C.C.R. § 1001-5:B.III.J.

communities",[54] and (ii) emits the affected pollutant above the Affected Pollutant Threshold.[55]

2. The Monitoring Requirements Allow Almost All Sources to Avoid Monitoring Onsite By Paying A Fee into An Ill-Defined Community Monitoring Fund

53. With respect to enhanced monitoring, the DIC Permitting Rule created a structure with two different types of monitoring for new and modified sources: (i) source-specific monitoring, and (ii) community monitoring.

54. The source-specific monitoring requirements ("Source-Specific Monitoring Provision") provide that a source of affected pollutants is only required to monitor if: (1) the source is located in a "cumulative impacted community," (2) the source emits the affected pollutant above the relevant Affected Pollutant Threshold, and (3) the modeling analysis for that pollutant, discussed above, shows that the emissions will result in an ambient air concentration of that pollutant above "Disproportionately Impacted Community Monitoring Thresholds" identified in the DIC Permitting Rule.[56]

55. Because source-specific monitoring is required only in limited circumstances and for only some DI Communities, the majority of sources will be subject only to the community monitoring provisions.

56. Community monitoring identifies the concentration of air pollutants in the ambient air.

57. Community monitoring does not identify the source of air pollutants, in turn allowing polluters to remain anonymous and inhibiting targeted remedial and enforcement measures that would protect public health and the environment.

58. Under the DIC Permitting Rule, new and modified sources of affected pollutants in DI Communities are covered by the community monitoring requirements if the source or modification (i) emits an affected pollutant above the "APEN reporting threshold,"[57] and (ii) is not subject to source-specific monitoring requirements ("Community Monitoring Provision").[58]

---

[54] "Cumulatively impacted community" and "socioeconomically vulnerable community" are subclasses of DI Community created by the Commission in the Rule and addressed in detail in Section I.B, below.
[55] 5 C.C.R. § 1001-5:B.III.B.4.
[56] 5 C.C.R. § 1001-5:B.III.J.2.
[57] Air Pollution Emission Notifications, or ("APENs"), are reports that sources must file with the Division every five years estimating their emissions of any pollutant that the source emits above established thresholds. 5 C.C.R. § 1001-5:A.II.B.
[58] 5 C.C.R. § 1001-5:B.III.J.3.

59. Sources subject to the Community Monitoring Provision are not required to monitor their own emissions. Instead, they pay a fee per individual affected pollutant emitted (the "Disproportionately Impacted Community Monitoring Fee").[59] The amount of the fee is based on (i) the amount of the pollutant emitted by the new source or modification, and (ii) whether the source is located in a "cumulatively impacted community" or a "socioeconomically vulnerable community," as follows:[60]

Table 2 - Disproportionately Impacted Community Monitoring Fees			
	Socioeconomically Vulnerable Community	Cumulatively Impacted Community	
Pollutant Above APEN Reporting Thresholds and Less than Affected Construction Source Threshold	$50.00	$100.00	*Per Affected Pollutant in this Tier*
Pollutant Greater than or Equal to Affected Construction Source Threshold	$200.00	$400.00	*Per Affected Pollutant in this Tier*
Pollutant Above APEN Reporting Threshold at a Major Source of Affected Pollutant	$500.00	$750.00	*Per Affected Pollutant in this Tier*

60. The Disproportionately Impacted Community Monitoring Fee is a one-time payment made by a source before permit issuance.[61]

61. Sources pay the Disproportionately Impacted Community Monitoring Fees to the Colorado Air Quality Enterprise,[62] which the DIC Permitting Rule states "shall use the fees collected to administer the Disproportionately Impacted Community Monitoring program set forth in Section III.J.3."[63]

62. The Air Quality Enterprise is an independent state agency within the CDPHE.[64]

[59] 5 C.C.R. § 1001-5:B.III.J.3.a.
[60] 5 C.C.R. § 1001-5:B.III.J.
[61] 5 C.C.R. § 1001-5:B.III.J.b.
[62] 5 C.C.R. § 1001-5:B.III.J.b.
[63] 5 C.C.R. § 1001-5:B.III.J.c.
[64] C.R.S. 25-7-103.5(3).

63. Neither the DIC Permitting Rule nor the Statement of Basis and Purpose define "community monitoring."

64. The DIC Permitting Rule includes no provisions detailing how the community monitoring program will be run including: (i) how decisions will be made regarding where the monitors will be placed, (ii) when monitors will be installed, or (iii) which pollutants will be monitored.

65. There is no evidence in the record or discussion in either the Statement of Basis and Purpose or the Rule's economic impact analysis concerning: (i) the anticipated cost of the community monitoring program, (ii) the amount of fees anticipated to be paid into the community monitoring program annually, (iii) the number of sources anticipated to be subject to the community monitoring requirement annually, (iv) the rationale for the fees imposed, or (v) whether the fee schedule in the DIC Permitting Rule is adequate to fund the community monitoring program.

B. The DIC Permitting Rule Divides DI Communities into Sub-Classes with Different Levels of Monitoring and Modeling Requirements on Sources

66. As mentioned above, under the DIC Permitting Rule, not all DI Communities receive the same level or quality of information concerning the pollutants in the air they breathe. Instead, the Rule subdivides DI Communities into different classes, with different levels of protection, which disadvantages certain communities and makes it even more difficult for members of those communities to understand what protections apply to them under an already complicated regulatory scheme.

67. The Rule creates two sub-divisions of DI Communities: "Cumulatively impacted communities," ("CICs") and "Socioeconomically vulnerable communities" ("SVCs").[65] The quality of the information, and the monitoring and modeling requirements imposed on polluters, depends on whether the community is classified as a CIC or an SVC.

68. The DIC Permitting Rule places more stringent requirements on sources in CICs. As noted above, the Rule's enhanced modeling requirements only apply to sources in CICs.[66] Similarly, only sources in CICs can be required to conduct any additional monitoring onsite.[67]

69. Sources in communities classified as SVCs will not be required to do any modeling or monitoring onsite, even though these communities are DI Communities. Sources here are only required to pay the community monitoring fee.

[65] 5 C.C.R. §§ 1001-5:A.I.B.21; A.I.B.50.
[66] 5 C.C.R. §§ 1001-5:B.III.B.4.
[67] 5 C.C.R. § 1001-5:B.III.J.2.a (applying only if modeling was performed).

70. Therefore, even though they meet the statutory definition of DI Communities and have suffered disproportionately from the impacts of air pollution, SVCs do not benefit from this more stringent, source-specific monitoring or modeling, and are, as a result, more vulnerable to pollutants in their air.

71. The Commission bases its distinction between CICs and SVCs on the Colorado EnviroScreen Score.

72. Colorado EnviroScreen is a screening and mapping tool developed by CDPHE that reflects data from thirty-five social, health, and environmental indicators.[68] An EnviroScreen Score is calculated at the census block group level (or higher) based on mathematical weighting of each indicator.

73. The DIC Permitting Rule identifies CICs as communities with an EnviroScreen Score at or above the 80th percentile.[69]

74. The Commission claims in the Statement of Basis and Purpose that it created the distinction between CICs and SVCs "in order to appropriately tailor the regulatory requirements to the categories of communities that will most benefit from those requirements."[70]

75. However, evidence in the record demonstrates that EnviroScreen Score is an inadequate indicator of which communities would most benefit from the enhanced air pollution modeling and monitoring imposed by the Rule. Of the thirty-five indicators making up a community's EnviroScreen Score, only *five* relate to air pollution.[71]

76. As a result, the cutoff used in the Rule excludes approximately half of the communities that EnviroScreen itself indicates suffer some of the greatest air pollution burdens in the state.

77. One of the EnviroScreen indicators related to air pollution in communities is the Air Toxics Emissions Indicator.[72] This indicator estimates the comparative burden of HAPs in different communities. The Air Toxics Emissions Indicator collects data on emissions of fourteen HAPs.[73] These fourteen pollutants were selected based on (i) their estimated

---

[68] CDPHE, *Colorado EnviroScreen v. 1.0 Technical Documentation* 11 (Jan. 25, 2023), *available at* https://drive.google.com/file/d/1aZfZnLeEPxvpFBILOFGpYGKLQbDxhMMF/view?usp=drive_link ("EnviroScreen Documentation").
[69] 5 C.C.R. § 1001-5:A.I.B.21.
[70] 5 C.C.R. § 1001-5:F.I.HHH.
[71] *See, e.g.,* EnviroScreen Documentation at 28-29.
[72] EnviroScreen Documentation at 46.
[73] *Id.* at 46-48.

emissions in Colorado, and (ii) their potential of driving the greatest risk to public health and the environment.[74]

78. GreenLatinos submitted evidence to the Commission demonstrating that, according to EnviroScreen, 310 of the communities that met the numerical, census-based criteria of the DI Community definition were also in the 80th percentile or above for the Air Toxics Emissions Indicator.

79. According to the evidence submitted, of these 310 communities, only 139 met the definition of "cumulatively impacted community" because only 139 were in 80th percentile or above for EnviroScreen Score.

80. Therefore, the DIC Permitting Rule's definition of "cumulatively impacted community" excludes more than half of the DI Communities that EnviroScreen has identified as having the greatest burden from HAPs.

81. Another air pollution indicator on EnviroScreen is the PM2.5 indicator.[75] This indicator estimates the comparative burden of fine particulate matter pollution in different communities.[76]

82. GreenLatinos submitted evidence to the Commission demonstrating that, according to EnviroScreen, 449 of the communities that meet the numerical, census-based criterion for the DI Community definition are also in the 80th percentile or above for the PM2.5 Indicator.

83. According to the evidence submitted, of these 449 communities, only 241 met the definition of "cumulatively impacted community" because only 139 were in 80th percentile or above for EnviroScreen Score.

84. Therefore, the DIC Permitting Rule's definition of "cumulatively impacted community" excludes almost half of the DI Communities that EnviroScreen has identified as having the greatest fine particulate matter burden.

85. No participant in the rulemaking hearing presented evidence rebutting the evidence that GreenLatinos presented on the communities excluded by the CIC definition.

86. The Commission failed to explain its decision to rely on the EnviroScreen Score to distinguish between CICs and SVCs despite the evidence presented by GreenLatinos on the large number of DI Communities that are excluded by the 80th percentile EnviroScreen Score cutoff.

---

[74] *Id.* at 47.
[75] *Id.* at 44.
[76] *Id.*

87. The Commission failed to explain why limiting the Rule's more stringent requirements is warranted, let alone why the EnviroScreen cutoff is reasonably tailored to either (i) meet the mandates of the Environmental Justice Act to "correct" the environmental injustices suffered by DI Communities, or (ii) assist the DI Communities who would most benefit from those requirements.

C. The Rule's Provisions Concerning Affected Pollutants Limit the HAPs Subject to the Rule and the Sources Subject to Enhanced Modeling or Source-Specific Monitoring

88. The Commission limited the "affected pollutants" subject to enhanced modeling and monitoring requirements to only the seven pollutants expressly listed in the Environmental Justice Act: "volatile organic compounds, nitrogen oxides, PM2.5, benzene, toluene, ethylbenzene, and/or xylene."[77]

89. Of the affected pollutants in the Rule, volatile organic compounds ("VOCs"), nitrogen oxides ("NOx"), and PM2.5 are "criteria pollutants" under the federal Clean Air Act.[78] This Complaint will refer to these pollutants collectively as "Criteria Affected Pollutants."

90. The remaining four affected pollutants in the Rule—benzene, toluene, ethylbenzene, and xylene (often referred to as "BTEX")—are HAPs.[79] This Complaint will refer to BTEX, and any other HAPs that are included in the DIC Permitting Rule in the future, as "HAP Affected Pollutants."

1. The DIC Permitting Rule Did Not Evaluate or Include Additional HAPs as Required by the Environmental Justice Act

91. Under the DIC Permitting Rule, the only HAP Affected Pollutants that sources are required to model or monitor are benzene, toluene, ethylbenzene, and xylene.[80]

92. The state and residents of DI Communities have very little accurate information on the HAPs that sources are emitting into surrounding neighborhoods. Before the DIC Permitting Rule was adopted, Colorado law did not require sources to model their emissions of HAPs, and neither Colorado law nor federal law generally required sources to monitor their emissions of HAPs.

---

[77] 5 C.C.R. § 1001-5:A.I.B.5.
[78] 5 C.C.R. § 1001-5:A.I.B.20.
[79] *See* 5 C.C.R. § 1001-5, App'x B.
[80] 5 C.C.R. § 1001-5:B.III.B.4 (applying modeling to an "Affected Construction Source"); 5 C.C.R. § 1001-5:B.III.J.2.a (applying source-specific monitoring to sources subject to enhanced modeling); 5 C.C.R. § 1001-5:A.I.B.4 (defining "Affected Construction Source"); 5 C.C.R. § 1001-5:A.I.B.5 (defining "Affected Pollutants").

93. GreenLatinos presented evidence to the Commission identifying numerous HAPs—that the Commission did not include in this Rule—which cause or contribute to significant health and environmental impacts in Colorado.

94. One source to identify the highest-risk HAPs in the state is the Air Toxics Emissions Indicator on EnviroScreen. As explained in Section I.A.2, CDPHE developed a list of fourteen high priority HAPs when it developed the Air Toxics Emissions Indicator in EnviroScreen.[81]

95. Another source for identifying the highest-risk HAPs in the state is the Risk-Screening Environmental Indicators ("RSEI") scores from EPA's Toxic Release Inventory program. The RSEI model uses TRI-reported emissions data to rank the comparative risk of each pollutant based on "the size of the chemical release, the fate and transport of the chemical through the environment, the size and location of the exposed population, and the chemical's toxicity."[82]

96. GreenLatinos presented the Commission with evidence on the fourteen HAPs used in the Air Toxics Emissions Indicator and the fifteen HAPs with the highest RSEI score in Colorado, and they urged the Commission to include those in the Rule.[83]

97. No other participant in the rulemaking hearing presented evidence rebutting or contradicting the evidence presented by GreenLatinos on the HAPs posing the greatest risk to communities in Colorado.

98. The Commission failed to evaluate which HAPs have the potential to cause or contribute to significant health or environmental impacts.

99. The Commission failed to make a determination about whether any HAPs other than benzene, toluene, ethylbenzene, and xylene have the potential to cause or contribute to significant health or environmental impacts.

---

[81] EnviroScreen Documentation at 47-48 (listing ethyl benzene; dichlorobenzene,1,4-; butadiene,1,3-; chromium (vi) compounds; formaldehyde; carbon tetrachloride; benzene; acetaldehyde; ethylene oxide; chlorine; hexamethylene diisocyanate; naphthalene; arsenic compounds; coke oven emissions).

[82] U.S. Env't Prot. Agency*, Risk-Screening Environmental Indicators (RSEI) Model*, https://www.epa.gov/rsei.

[83] The list included ethylene oxide; nickel and nickel compounds; chromium and chromium compounds; 1,3-butadiene; formaldehyde; benzene; trichloroethylene; cobalt and cobalt compounds; hydrogen cyanide; lead and lead compounds; certain glycol ethers; polycyclic aromatic compounds; manganese and manganese compounds; and acetaldehyde.

100. The Statement of Basis and Purpose does not discuss the affected pollutants covered by the DIC Permitting Rule or why the Commission chose to not apply the DIC Permitting Rule to any HAPs other than benzene, toluene, ethylbenzene, and xylene.

101. The Commission's failure to apply the DIC Permitting Rule to HAPs other than BTEX that cause or contribute to significant health and environmental impacts means that residents of DI Communities will continue to lack data about the HAPs that sources are emitting into their communities and that put their health at risk.

2. The Affected Pollutant Thresholds for Criteria Affected Pollutants Unreasonably Limit the Scope and Effectiveness of the DIC Permitting Rule

102. The DIC Permitting Rule adopts Affected Pollutant Thresholds for Criteria Affected Pollutants and HAP Affected Pollutants in its definition of "Affected Construction Source."[84] If the emissions of a pollutant from a new source, or a modification to an existing source, are below the Affected Pollutant Threshold, the DIC Permitting Rule does not require any enhanced modeling or source-specific monitoring.

103. For Criteria Affected Pollutants, the DIC Permitting Rule sets the threshold at the "Significant Rate of Emissions."[85]

104. The "Significant Rate of Emissions" is the rate of emissions used under the federal Clean Air Act for determining whether a modification to a major source qualifies as a "major modification."[86] If a modification qualifies as major (instead of minor), the source is subject to more stringent new source review requirements.[87]

105. The "Significant Rate of Emissions" for the Criteria Affected Pollutants are:

a. For PM2.5: ten tons per year;

b. For NOx and VOCs each:

i. forty tons per year in an ozone attainment area;

ii. twenty-five tons per year in an ozone nonattainment area.

[84] 5 C.C.R. § 1001-5:A.I.B.4.
[85] 5 C.C.R. § 1001-5:A.I.B.4.a.(i).
[86] *Compare* 5 C.C.R. § 1001-5:A.I.B.49 *with* 40 C.F.R. § 51.165(a)(1)(x); *see also* 5 C.C.R. § 1001-5:D.II.A.45; 5 C.C.R. § 1001-5:D.I.A.2.
[87] *See* 5 C.C.R. § 1001-5:D.V.A; *id.* § D.VI.A.

106. Using APEN data provided by CDPHE, GreenLatinos calculated the number of new sources in the entire state that emitted a Criteria Affected Pollutant in an amount at or above the "Significant Rate of Emissions" between 2020 and 2022 as follows:

	2020	2021	2022	Total
PM2.5	0	0	0	0
NOx	3	0	0	3
VOCs	12	4	0	16
Total	15	4	0	19

107. Using APEN data provided by CDPHE, GreenLatinos estimated the number of modified sources in the entire state that increased emissions of Criteria Affected Pollutant in an amount at or above the "Significant Rate of Emissions" between 2020 and 2022, as follows:

	2020	2021	2022	Total
PM2.5	8	3	1	12
NOx	24	10	2	36
VOCs	20	8	3	31
Total	52	21	6	79

108. Based on these calculations, GreenLatinos estimate that fewer than 100 new or modified sources in the state exceeded the "Significant Rate of Emissions" for any Criteria Affected Pollutant over the three years between 2020 and 2022. If VOCs are excluded from the estimates,[88] GreenLatinos estimate that only fifty-one new or modified sources in the state exceeded the "Significant Rate of Emissions" for any Criteria Affected Pollutant over the three years between 2020 and 2022.

109. Based on these estimates, only seventeen new or modified sources in the state, on average, exceeded the "Significant Rate of Emissions" each year over the three years between 2020 and 2022.

110. The Division issues thousands of air permits per year. According to the economic impact analysis that the Division filed during the rulemaking: (i) in 2020, the Division issued 1,400 general permits and 1,751 individual permits, and (ii) in 2021, the Division issued 1,366 general permits and 2,472 individual permits.

111. Of the thousands of permits the Division issues each year, GreenLatinos estimates that, under the Rule, less than one-half of one percent will be subject to enhanced modeling or source-specific monitoring for Criteria Affected Pollutants. The residents of communities

[88] The DIC Permitting Rule expressly excludes VOCs from any enhanced modeling or source-specific monitoring requirements. 5 C.C.R. § 1001-5:B.III.B.4; *id.* § 1001-5:B.III.J.2.a.

living near the remaining 99.5% of sources will be left without information about the source of these dangerous pollutants.

112. During the rulemaking process and at the hearing, GreenLatinos presented the Commission with the calculations above.

113. No other parties presented evidence to the Commission concerning the number of sources that would be subject to enhanced modeling or potential source-specific monitoring as a result of the Affected Pollutant Thresholds for Criteria Affected Pollutants.

114. The Commission never reconciled its decision to adopt the Affected Pollutant Thresholds with the evidence presented by GreenLatinos.

115. The Statement of Basis and Purpose does not discuss the Affected Pollutant Thresholds, provide or cite to record evidence that demonstrates that they meet the requirements of the Act, or provide a rational basis for the thresholds.

II. GreenLatinos' Alternate Proposal

116. GreenLatinos submitted an alternate proposal to the Commission during the rulemaking.

117. Under GreenLatinos' alternate proposal, all DI Communities would be treated equally and would benefit from the enhanced monitoring and modeling procedures required by the Environmental Justice Act. Communities would not be separated into different sub-classes, with one receiving more benefits than the other based on classifications not contained in the Act.

118. The alternate proposal's enhanced monitoring and modeling requirements applied to all affected pollutants identified in the Environmental Justice Act.

119. To fully protect the interests of all DI Communities in understanding the pollutants to which they are exposed, the alternate proposal applied to seventeen additional HAPs. This list was based on (i) the HAPs used in EnviroScreen's Air Toxic Emissions indicator, and (ii) the HAPs with the highest RSEI score in Colorado as determined by EPA's Toxic Release Inventory.

120. The alternate proposal's Affected Pollutant Threshold for Criteria Affected Pollutants was based on the construction permit threshold for the particular pollutant.

121. The alternate proposal required new and modified sources in DI Communities emitting any affected pollutant above the Affected Pollutant Thresholds to model the source's emissions of all affected pollutants.

122. To ensure that DI Communities receive actionable information about the air pollutants to which they are exposed, the alternate proposal's enhanced monitoring requirements

consisted exclusively of source-specific monitoring requirements, not monitoring of the ambient air in the community. The alternate proposal would subject all new and modified sources to source-specific monitoring for all affected pollutants emitted by the source.

123. The alternate proposal also included requirements that sources subject to enhanced monitoring submit public reports of monitoring results on a regular schedule.

124. The Commission rejected the entire alternate proposal at the rulemaking hearing without providing a rational basis for its rejection.

CLAIMS FOR RELIEF

CLAIM ONE

The Commission's Failure to Require Source-Specific Monitoring in All DI Communities, and Relying on Community Monitoring Fees Instead, Violates the Environmental Justice Act and the Colorado APA

125. GreenLatinos reallege the previous paragraphs and incorporate them by reference as if fully set forth herein.

126. The Environmental Justice Act requires that the DIC Permitting Rule "provide for enhanced modeling and monitoring requirements for new and modified *sources* of affected pollutants in disproportionately impacted communities."[89]

127. Pursuant to the DIC Permitting Rule, the majority of "sources" subject to the rule will not be required to conduct any enhanced modeling or monitoring. Instead, these sources will only pay money to support community monitoring, which does not identify the source of the emissions.

128. The DIC Permitting Rule's Community Monitoring Provision and limitation on source-specific monitoring violates the Environmental Justice Act, C.R.S. § 25-7-114.4(5), and is unlawful under the Colorado APA, C.R.S. § 24-4-106(7)(b), because paying community monitoring fees—instead of monitoring onsite—does not qualify as enhanced monitoring for sources under the Environmental Justice Act.

CLAIM TWO

The Commission's Community Monitoring Provision is Unreasonably Vague and Arbitrary in Violation of the Colorado APA

129. GreenLatinos reallege the previous paragraphs and incorporate them by reference as if fully set forth herein.

[89] C.R.S. § 25-7-114.4(5)(b)(II)(A) (emphasis added).

130. Neither the Rule nor the Statement of Basis and Purpose define "community monitoring."

131. The Community Monitoring Provision does not (i) require any monitors to be installed, (ii) describe what monitors would be used if monitors are installed, (iii) state which pollutants will be monitored, or (iv) include factors or criteria for making any of the determinations described previously.

132. The Community Monitoring Provision imposes set fees on sources, but there is no evidence in the record or discussion in either the Statement of Basis and Purpose or the Rule's economic impact analysis concerning: (i) the anticipated cost of the community monitoring program, (ii) the amount of fees anticipated to be paid under the community monitoring requirement annually, (iii) the number of sources anticipated to be subject to the community monitoring requirement annually, (iv) the rationale for the fees imposed, or (v) whether the fee schedule in the DIC Permitting Rule is adequate to fund the community monitoring program.

133. The Community Monitoring Provision is unlawful under the Colorado APA, C.R.S. § 24-4-106(7)(b), because the Community Monitoring Provision is unreasonably vague, and the provisions of the Community Monitoring Provision are arbitrary and capricious, an abuse of discretion, unsupported by record evidence, and contrary to law.

CLAIM THREE

The Commission's Decision to Give Lesser Protections to A Subset of DI Communities that are Highly Burdened by Air Pollution Violates the Environmental Justice Act and the Colorado APA

134. GreenLatinos reallege the previous paragraphs and incorporate them by reference as if fully set forth herein.

135. The Environmental Justice Act requires that the DIC Permitting Rule "provide for enhanced modeling and monitoring requirements for new and modified sources of affected pollutants in disproportionately impacted communities."[90]

136. The Environmental Justice Act does not distinguish between classes of DI Communities or grant lesser protections to any subset of DI Communities.

137. The passage of HB 23-1233 allows state agencies, like the Commission to "prioritize or target . . . certain subsets of communities" when it is "applying the definition of disproportionately impacted community," but it can only do so if it "makes a

[90] C.R.S. § 25-7-114.4(5)(b)(II)(A).

determination . . . that the prioritization or targeting is warranted and reasonably tailored to the category of statewide agency action involved."[91]

138. In contrast to the Act's requirements and its stated objective to end environmental injustice in DI Communities, the DIC Permitting Rule distinguishes between CICs and SVCs based on Colorado EnviroScreen Score.

139. The Commission did not provide a rational basis for its use of the EnviroScreen Score or demonstrate that it is warranted or reasonably tailored to the DI Communities that will benefit most from the Rule's requirements.

140. GreenLatinos presented uncontroverted evidence to the Commission that the EnviroScreen Score cutoff in the CIC definition excludes approximately half of the DI Communities with the highest air pollution burdens on EnviroScreen.

141. The Commission fails to justify its reliance on the EnviroScreen score to exclude these highly burdened DI Communities that the Act was designed to benefit.

142. The DIC Permitting Rule's division of DI Communities into sub-classes, and its limitation of enhanced modeling and source-specific monitoring to only cumulatively impacted communities, is unlawful under the Environmental Justice Act, C.R.S. § 25-7-114.4(5), and the Colorado APA, C.R.S. §§ 24-4-106(7)(b), 24-4-109(2)(a)(I)(B), because the Commission fails to show that the use of EnviroScreen Score is warranted or properly tailored, and the distinction is arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence when the record is considered as a whole, and contrary to law.

CLAIM FOUR

The Commission's Failure to Evaluate the High-Risk Hazardous Air Pollutants in the Rule Violates the Environmental Justice Act and the Colorado APA

143. GreenLatinos reallege the previous paragraphs and incorporate them by reference as if fully set forth herein.

144. The Environmental Justice Act requires the Commission to evaluate which HAPs have the "potential to cause or contribute to significant health or environmental impacts."[92]

[91] C.R.S. § 24-4-109(2)(a)(I)(B).
[92] C.R.S. § 25-7-114.4(5)(d)(I).

145. The Act further requires the Commission to apply the DIC Permitting Rule to the HAPs that it determines have the "potential to cause or contribute to significant health or environmental impacts."[93]

146. The Commission failed to evaluate which HAPs have the potential to cause or contribute to significant health or environmental impacts.

147. The Commission failed to make a determination about whether any HAPs other than benzene, toluene, ethylbenzene, and xylene have the potential to cause or contribute to significant health or environmental impacts.

148. The Commission failed to evaluate whether to include any HAPs other than benzene, toluene, ethylbenzene, and xylene in the DIC Permitting Rule.

149. The Commission ignored the evidence presented by GreenLatinos concerning the highest-risk HAPs in the state other than benzene, toluene, ethylbenzene, and xylene.

150. The Commission's failure to evaluate any HAPs other than benzene, toluene, ethylbenzene, and xylene in the DIC Permitting Rule violates the Environmental Justice Act, C.R.S. § 25-7-114.4(5), and is arbitrary and capricious, contrary to record evidence, an abuse of discretion, and contrary to law, in violation of the Colorado APA, C.R.S. § 24-4-106(7)(b).

CLAIM FIVE

The Commission's Thresholds for Criteria Affected Pollutants Are Arbitrary or Capricious in Violation of the Colorado APA

151. GreenLatinos reallege the previous paragraphs and incorporate them by reference as if fully set forth herein.

152. The Environmental Justice Act provides that "[t]he Commission may set thresholds of affected pollutants below which the requirements of this section do not apply."[94]

153. The DIC Permitting Rule sets the Affected Pollutant Thresholds for Criteria Affected Pollutants at the "Significant Rate of Emissions."

154. The "Significant Rate of Emissions" determines whether a modification to a major source is a "major" modification. Major modifications are subject to more stringent emissions controls than smaller, minor modifications.

[93] *Id.*
[94] C.R.S. § 25-7-114.4(5)(a)(II).

155. The "Significant Rate of Emissions" bears no rational relationship to enhanced modeling or monitoring requirements.

156. On information and belief, of the thousands of permits the Division issues every year, fewer than one-half of one percent of new or modified sources per year, on average, would be subject to enhanced modeling, or potentially eligible for source-specific monitoring, for Criteria Affected Pollutants.

157. The Commission provides no justification or rationale for using the "Significant Rate of Emissions" as the Affected Pollutant Thresholds for Criteria Affected Pollutants.

158. The Commission failed to respond to GreenLatinos evidence that the thresholds were too low to provide mandated benefits in the form of enhanced monitoring and modeling to DI Communities.

159. The DIC Permitting Rule's use of the "Significant Rate of Emissions" as the Affected Pollutant Threshold for Criteria Affected Pollutants violates the Colorado APA, C.R.S. § 25-4-106(7)(b), because it is arbitrary and capricious, an abuse of discretion, unsupported by record evidence, and contrary to law.

PRAYER FOR RELIEF

WHEREFORE, GreenLatinos respectfully request that the Court:

A. Hold unlawful the provisions of the DIC Permitting Rule challenged in the individual claims for relief;

B. Remand the DIC Permitting Rule to the Commission to address the deficiencies described herein; and

C. Grant such other relief as the Court deems just and proper.

Respectfully submitted on the 21st day of August, 2023.

/s/ Ian Coghill
Ian Coghill, CO Bar No. 58423
Erik Woodward, CO Bar No. 58769
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(303) 996-4620
icoghill@earthjustice.org
ewoodward@earthjustice.org

Address of Plaintiffs:

GreenLatinos
1919 14th St.
Suite 700
Boulder, CO 80302

350 Colorado
P.O. Box 607
Boulder, CO 80306

Earthworks
1612 K St., NW, Suite 904
Washington, D.C. 20006

APPENDIX OF DEFINED TERMS

For ease of review, GreenLatinos present the following list of terms defined in this Complaint:

"Affected Pollutant Thresholds" means "thresholds of affected pollutants below which the requirements of [the DIC Permitting Rule] do not apply" adopted by the Commission pursuant to C.R.S. § 25-7-114.4(5)(a)(II).

"APEN" means "Air Pollution Emission Notifications" under 5 C.C.R. § 1001-5:A.II.

"BTEX" means benzene, toluene, ethylbenzene, and xylene.

"CDPHE" means the Colorado Department of Public Health and Environment.

"CIC" means "cumulatively impacted community" under 5 C.C.R. § 1001-5:A.I.B.21.

"CO APA" means the Colorado Administrative Procedure Act, C.R.S. § 24-4-101, et seq.

"CO Clean Air Act" means the Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101, *et seq*.

"Commission" means Defendant Colorado Air Quality Control Commission.

"Community Monitoring Provision" means the provision of the DIC Permitting Rule contained within 5 C.C.R. § 1001-5:B.III.J.3.

"Criteria Affected Pollutants" means VOCs, NOx and PM25.

"DI Communities" means "disproportionately impacted communities."

"DIC Permitting Rule" means the Colorado Air Quality Control Commission's adoption of revisions to its Regulation 3, 5 C.C.R. § 1001-5 that became effective on July 15, 2023.

"Division" means the Air Pollution Control Division within CDPHE's Division of Administration.

"GreenLatinos" means, collectively, the plaintiffs GreenLatinos, 350 Colorado, and Earthworks.

"HAP Affected Pollutants" means benzene, toluene, ethylbenzene, and xylene and any other HAPs that are included as affected pollutants in the DIC Permitting Rule in the future.

"HAPs" means hazardous air pollutants.

"NOx" means oxides of nitrogen.

"RSEI" means the Risk-Screening Environmental Indicators scores from EPA's Toxic Release Inventory program.

"Source-Specific Monitoring Provision" means the provision of the DIC Permitting Rule contained within 5 C.C.R. § 1001-5:B.III.J.2.

"Statement of Basis and Purpose" means the "written concise general statement of their basis, specific statutory authority, and purpose" incorporated in a final rule under C.R.S. § 24-4-103(4)(c).

"SVC" means "socioeconomically vulnerable community" under 5 C.C.R. § 1001-5:A.I.B.50.

"VOCs" means volatile organic compounds.