

# DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

## Colorado Air Quality Control Commission

### REGULATION NUMBER 9

#### OPEN BURNING, PRESCRIBED FIRE, AND PERMITTING

##### 5 CCR 1001-11

#### **APPENDIX C PROGRAM COST AND DISTRIBUTION METHODOLOGY**

Fees that are levied by the Department to cover the costs of the Smoke Management Program are determined using the following methodology.

#### **Cost of the Program**

The Colorado Air Pollution Prevention and Control Act require that the smoke management program fees cover the cost of the program. Section 25-7-106(7)(a), C.R.S. The Air Pollution Control Division's Fiscal Officer determined the cost of the program as implemented by this Regulation Number 9. The program cost is built upon estimates of the percent of each position devoted to all aspects of the Smoke Management Program (SMP). This percentage is applied to each position's salary and benefits. Operating costs and indirect costs are also included. The total cost of the SMP is \$174,585.08 for calendar year 2008 and \$199,305.13 for calendar year 2009 and succeeding years.

#### **Fee Use**

Functions of the SMP include but are not limited to: management, administration, permitting operations, modeling support, training of users of prescribed fire regarding air quality concerns and the SMP program, database management and reporting, fee program administration (including database management, invoicing, and/or customer service), regulatory development, guidance development, web page management/maintenance, compliance assistance, enforcement, field work, tracking of, and if necessary, involvement in wildfire monitoring, review of plans and involvement in public hearings, data entry, meteorological forecasting, and consultation on high smoke risk burns.

#### **Fee Calculation**

The annual cost of the program will be the smoke management program fee. The Division's cost of the SMP will be recalculated annually and reported to the Commission each August. If the Division's annual program cost calculation exceeds five percent of the smoke management program fee reflected in the regulation, the Division will seek a fee change through a Commission rulemaking.

The annual program cost calculation shall utilize the "total cumulative dollar difference" between the regulatory fee and the annual cost. It will be calculated by first computing a total projected smoke management program cost considering the projected salary and benefits for personnel associated with the program (apportioned according to the percentage of time assigned to the program for each position), indirect costs, travel costs, Division operating costs, Department operating costs and Department indirect costs. That sum will be adjusted by the difference between salary and travel expenses and the previous year's projected salary and travel costs. The Division will complete the calculation of the total cumulative dollar difference by summing: the difference between the adjusted program cost and the previous regulatory fee; and the total cumulative dollar difference from the previous year.

#### **Distribution of Cost**

The Division will distribute the cost of the program to permittees as follows:

1. The fee for an unplanned ignition prescribed fire permit in effect for an area is \$1000 per permitted area each year the permit is valid. Unplanned ignition prescribed fire permits are valid for up to 5 years.
2. The fee for a planned ignition prescribed fire permit for any permittee with a 3-year block average SMP score (see 3 below) under 1.00% is \$100 per permit.
3. The fees for planned ignition fire permits for permittees with 3-year block average SMP score of 1.00% or greater shall be determined as follows:
  - a. To distribute the cost of planned ignition prescribed permits for larger users of the SMP, each year the Division shall compute a Smoke Management Program Score (SMP score). The SMP score shall be calculated by averaging the percent of total planned ignition prescribed fire permits requested by that permittee in a calendar year; and the percent of total PM10 emissions generated by actual planned ignition prescribed fire burning activity by that entity.
  - b. Every three years the Division shall compute a 3-year block average SMP score based on the most recent three years SMP scores. Any entity whose SMP score is less than 1.00% shall be removed from the 3-year block average. The SMP scores for remaining users shall be re-scaled to 100% after small users have been removed.
    - i. ~~The 3-year block average shall be 2005-2007 to be used for planned ignition prescribed fire fees from activity conducted in 2009-2011.~~ The 3-year block average shall be 2008-2010 to be used for planned ignition prescribed fire fees from activity conducted in 2012-2014.
    - ii. ~~The percents to distribute the fees for the following entities for planned ignition prescribed fire activity conducted in 2006-2008 are: U.S.D.A. Forest Service 61.92%, U.S.D.I. Bureau of Land Management 18.71%, U.S.D.I. National Park Service 5.83%, Colorado Division of Wildlife 3.31%, City of Boulder Wildland Fire Program 2.44%, U.S.D.O.D. Fort Carson 3.05%, Boulder County Open Space 1.23%, U.S.D.I. Fish and Wildlife Service 1.89%, and Grand River Ranch ( Rob Young) 1.62%.~~ The percents to distribute the fees for the following entities for planned ignition prescribed fire activity conducted in 2009-2011 are: U.S.D.A. Forest Service 61.70%, U.S.D.I. Bureau of Land Management 16.90%, U.S.D.I. National Park Service 5.92%, Colorado Division of Wildlife 2.57%, Colorado State Trust Board 1.25%, City of Boulder Wildland Fire Program 1.38%, U.S.D.O.D. Fort Carson 5.72%, Boulder County Open Space 1.23%, U.S.D.I. Fish and Wildlife Service 3.02%, and Spur Associates Grand River Ranch 1.33%. The percents to distribute the fees for the following entities for planned ignition prescribed fire activity conducted in 2012-2014 are: U.S.D.A. Forest Service 62.01%, U.S.D.I. Bureau of Land Management 17.40%, U.S.D.I. National Park Service 3.76%, Colorado Division of Wildlife 2.12%, Colorado State Trust Board 1.32%, U.S.D.O.D. Fort Carson 2.98%, Boulder County Open Space 1.32%, U.S.D.I. Fish and Wildlife Service 2.11%, Spur Associates Grand River Ranch 1.15%, Blue Valley Ranch 1.86%, and Trinchera Ranch 3.96%.
  - c. The resulting 3-year block average percent for each entity shall determine how the cost of the program will be distributed. The cost of the program shall have all unplanned ignition fees and small user fees subtracted from it before it is applied to the 3-year block average to determine the fee for planned ignition prescribed fire users with 3-year block average SMP scores at or greater than 1.00%.

**IX. Statement of Basis, Specific Statutory Authority and Purpose**

A. ~~Statement of Basis, Specific Statutory Authority and Purpose—Revisions to Colorado Air Quality Control Commission Regulation Number 9~~ Adopted January 17, 2002

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S. and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5 and implements parts of Sections 25-7-106(7) and (8), 25-7-114.7 and 25-7-123, C.R.S.

**Basis**

These rule revisions implement the provisions of Senate Bill 01-214 and relocate, update and reorganize existing provisions of Regulation Number 1 relating to open burning into Regulation Number 9. Regulation Number 9 deals solely with open burning activities. This new regulation contains permitting, monitoring, reporting and fee provisions, as well as requirements particular to significant users of prescribed fire.

**Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Sections 25-7-109(2)(e) and 25-7-123, C.R.S., provides the authority for the Commission to adopt and modify a program including emissions control regulations to control burning activities. Sections 25-7-106(7) and (8), 25-7-114.7(2)(a)(III) and 25-7-123, C.R.S., set forth specific requirements relating to activities by significant users of prescribed fire, including open burning activities by federal land managers. The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S.

**Purpose**

**Open Burning**

The focus of SB 01-214 is on open burning activities by significant users of prescribed fire. Addressing open burning issues is necessary in order to address emissions from natural and prescribed fires. The Grand Canyon Visibility Transport Commission identified these fires as having enough episodic impact on visibility at class I areas to overwhelm progress made through other emission control measures. The Commission views reduction of visibility impairment from fires as an important component in achieving federal and state visibility goals. This regulation should ensure that users of prescribed fire consider air pollution impacts in making determinations whether, and under what conditions, to use fire for grassland or forest management.

**Permitting**

The regulation continues the existing prohibition on open burning absent a permit from the Division or a local agency. The exemptions from this requirement also remain largely the same. In particular, agricultural open burning activity does not require a permit.

The regulation specifies factors that the Division must consider in deciding whether, and under what conditions, to issue a burning permit. These factors differ depending on the type of permit applicable to the proposed activity.

General open burning permits are the basic permits for most burning activities. General permits require that an applicant use best smoke management techniques to reduce or eliminate smoke impacts on the health and welfare of the public. Although the regulation includes a partial listing of methods to minimize

fire emissions and smoke impacts, the Commission intends that the Division will exercise its discretion to achieve the goals of this regulation without imposing unreasonable conditions. The Division to local counties may delegate general open burning.

The next category of fire addressed by this regulation is planned ignition fires, which are a subset of prescribed fires for grassland and forestland management. The Commission decided to establish emissions and smoke de minimus threshold below which a permit applicant must only obtain a general open burning permit. For fires that will exceed that threshold, applicants intending to initiate a fire must obtain a permit for a planned ignition fire. Permits for this type of fire must address additional concerns beyond those applicable to general open burning activities. The Commission listed factors for Division consideration in determining whether, and under what conditions, to issue a permit. This list is not exclusive and the Division may incorporate in permits additional conditions if it finds them necessary to minimize the impacts of fire on visibility and on public health and welfare. These factors focus on identifying and minimizing impacts to smoke-sensitive receptors. In addition, planned ignition permit conditions should ensure that the permittee would take appropriate action to ensure that the fire remains within the terms of the permit or is managed so as to return it within those terms, or that the permittee will suppress the fire if compliance with permit terms cannot otherwise be achieved.

Unplanned ignition fire permits offer persons a mechanism to use fire for grassland or forest management even though the precise time and location of a particular prescribed fire cannot be anticipated. These permits generally will apply to larger parcels of land, in some portion of which unplanned ignition may occur. The purpose of this permit type is to determine before ignition the conditions under which the fire may be used for resource benefit. As with planned ignition fires, permit conditions should ensure that the permittee will take appropriate action to ensure that the fire remains within the terms of the permit or is managed so as to return it within those terms, or that the permittee will suppress the fire if compliance with permit terms cannot otherwise be achieved.

This regulation focuses on fires that a person intends to use for a beneficial purpose, such as grassland or forest management. The Commission distinguished between those fires and wildfires. Wildfires are beyond the scope of this regulation and no permitting requirements apply to a land manager within whose jurisdiction a wildfire occurs.

The Commission also concluded that a public comment opportunity should be available regarding fires with a high smoke risk. The Commission intends that a high smoke risk rating be equivalent to a rating of 41 or greater from the draft Smoke Risk Rating Worksheet prepared by the Division in conjunction with some users of prescribed fire and attached to this Statement of Basis and Purpose as Attachment A. The Commission recognizes that the Division and users of prescribed fire may find it appropriate to revise the smoke risk rating methodology in the future. If this is done, the Commission intends that what constitutes a high smoke risk burn will consider at least the same factors as in Attachment A, and the point at which a fire becomes a high smoke risk should be equivalent to a rating of 41 on Attachment A.

The Division will determine which fires have a high smoke risk through consideration of the factors reflected in Attachment A. If, after considering these factors, the Division concludes that the fire has a high smoke risk, it will allow the public thirty days in which to submit comments regarding whether a permit should be issued and what conditions are appropriate for inclusion in the permit. For planned ignition prescribed fires, the notice will include information about location of the fire, expected burn dates, expected duration of the fire, potential emissions, and potential air quality and visibility impacts at smoke sensitive receptors. The Commission intends that the Division either add appropriate conditions or combine permits to prevent circumvention of the public comment requirement, should a permit applicant submit separate applications that may have the effect of dividing burns that are more appropriately considered together. This comment opportunity is subject to the Commission's Procedural Rules and includes the rights to a public comment hearing provided in those Rules. The comment opportunity does not include a right to an adjudicatory hearing to appeal issuance of a permit, as only the permit applicant may request such a hearing. Persons would still have recourse to seek judicial review of permits pursuant to the Administrative Procedures Act.

## **Significant users of prescribed fire**

Senate Bill 01-214 imposes on significant users of prescribed fire additional requirements to ensure that those users consider air quality impacts in making decisions about when, and under what conditions, they will use fire for grassland or forest management. Senate Bill 01-214 defined a significant user of prescribed fire as a person or agency that collectively manages or owns more than 10,000 acres of land and that uses prescribed fire. The Commission enlarged on the part of this definition dealing with use of prescribed fire by establishing a minimum activity level based on PM10 emissions during a calendar year. The Commission concludes that users of prescribed fire at levels below this threshold do not have significant enough an impact on visibility and air quality to justify their inclusion in this part of the smoke management program. This provision will focus the regulatory requirements and the resources of the Division and others on the prescribed fires with the greatest potential impact on visibility and human health and welfare. The Commission did not establish a de minimus threshold for other open burns, as even small fires intended to dispose of trash, rubbish and similar materials may have disproportionate impacts on local air quality.

The regulation imposes additional duties on significant users of prescribed fire, consistent with specific requirements in SB 01-214. Section 25-7-106(8)(b), C.R.S., requires that significant users submit planning documents to the Commission for comment and recommendations. This section also anticipates a hearing on the plans to allow public input. This public hearing requirement is similar to public hearing options applicable to major stationary source permitting. Public input on regulatory compliance and permits for major sources is important to public confidence in air pollution control efforts, particularly for long-term planning documents.

The Commission will hold public hearings to review the planning documents and may make comments and recommendations regarding the plans. Open burning permits for general, planned and unplanned ignition fires can only be issued to significant users of prescribed fire if the permit is consistent with the comments and recommendations of the Commission. The Commission intends that, wherever possible, the Division will issue a permit with appropriate conditions in order to meet this requirement, rather than denying the permit altogether. This approach recognizes the value of prescribed fire in grassland and forestland management, but ensures that the air quality goals of SB 01-214 and this regulation are adequately protected.

The Commission defined planning documents and tailored the applicable regulatory requirements to focus submittals and Commission review on the process used by a significant user of prescribed fire, rather than on the results of that process in a specific instance. The Commission does not intend to challenge land use decisions made by the land manager. The purpose of the Commission comments and recommendations will be to ensure that the land manager adequately considers air quality impacts when making decisions whether, and under what conditions, to use prescribed fire. The Commission planning document review will focus on how a significant user of prescribed fire will meet the state air quality protection standard expressed in Section 25-7-106(7)(e), C.R.S.

Planning documents should summarize the decision process by which the land manager identifies and selects among alternative treatment methods for fuel reduction. The documents should provide a specific description relevant to accomplishment of the state air quality goal expressed in § 25-7-106(7)(e), C.R.S. This requirement will focus the land manager decision-making process on the goals of Senate Bill 01-214.

The Commission recognizes that planning documents will vary in their level of detail and sophistication in describing decision mechanisms used by land managers, particularly during the initial set of Commission reviews. Commission comments and recommendations may extend to beneficial changes in planning documents as well as improvements in the land manager planning process related to consideration of the state air quality goal.

Specific permit conditions may be excluded from a permit if a federal land manager asserts that a federal statute specifically prohibits the compliance with the condition. In adopting this regulation, the Commission made no evaluation whether any particular federal statute or permit condition may justify

exclusion of a permit condition. Nevertheless, Section 118 of the federal Clean Air Act, 42 U.S.C. §7418, subjects federal agencies engaging in activities resulting, or which may result, in discharge of air pollutants to state requirements on control and abatement of air pollution "in the same manner, and to the same extent as any nongovernmental entity." This waiver of federal sovereign immunity allows states to subject federal agencies to any substantive, procedural, permitting, fee or any other requirement. The Colorado General Assembly enacted §25-7-106(7), C.R.S., pursuant to §118 and directed that this subsection be construed to exercise the full extent of the state's authority regarding pollution from federal facilities. The Commission intends these revisions to comport with §118 and to exercise the state's authority to its full extent. The Division should consider this intent in deciding whether a federal statute specifically prohibits imposition of a particular permit condition.

The rule also establishes a means for dealing with outdated plans or documents. The Commission chose to view a plan as being outdated upon expiration of the period for which the plan itself states it is applicable, up to ten years. The Commission may make comments or recommendations in the review process that urge a shorter applicable period than anticipated in the planning document. Any such comments will recognize applicable constraints on preparation of updated documents, such as the provisions of the National Environmental Policy Act.

The regulation establishes a means for dealing with lands acquired by a significant user of prescribed fire after the Commission reviews an initial or later version of a planning document. The Commission concluded that requiring changes and further review of planning documents whenever a significant user acquires land would unduly increase the burdens of the review process on the Commission, the Division and the land managers. In general, the Commission anticipates addressing planning documents for these lands at the next regular review, so long as the acquired lands will be managed in largely the same way as those already addressed by the Commission. Where there will be a substantial difference in management of the acquired lands, the Commission concluded that the land manager must submit planning documents to address the anticipated management.

### **Fees and Monitoring**

Senate Bill 01-214 directed the Commission to include within its smoke management program provisions for fees necessary to pay for administration of the program. Since the General Assembly granted the direct authority to develop a fee program for the smoke management program, the Commission is not required to utilize the fee mechanism applicable to traditional stationary sources. The Commission chose to apportion the cost of administering the program among users of prescribed fire rather than relying on traditional emissions fees. In part, this conclusion was due to the unique characteristics of this emission source category including highly variable emissions from one year to the next. Therefore, the Commission concluded that the traditional emission fee approach would result in substantially greater administrative burdens for both the Division and for users of prescribed fire. The methodology adopted combines the proportion of the total number of permits and total PM10 emissions of a particular user to determine the appropriate fraction of the program cost payable by that user. This approach will provide an equitable distribution of the costs of administering the common elements of the program. The Commission intends that fees paid by stationary sources will not be used to pay any portion of the smoke management program costs.

The total administrative cost of \$129,646.45 at the outset is specified in an appendix to the regulation and the Commission intends that any change to it or the distribution methodology occur only through a properly noticed public rule-making hearing before the Commission. To that end, the cost is included in the regulation as the regulatory "fee." The Division cost for program administration will be recalculated annually and reported to the Commission each August. If the total cumulative dollar difference between the cost reflected in the regulation and the Division's annual calculation exceeds five percent, the Division will seek a fee change through a Commission rulemaking. The "total cumulative dollar difference" between the regulatory fee and the annual cost will be calculated considering personnel and indirect and operating costs associated with the program, and the cumulative dollar difference from the previous year. This calculation will be performed substantially in accordance with the Colorado Smoke Management Program Cost and Fee Calculation Template (Attachment B). The Commission also intends that the

actual revenue collected be reported annually. If collections are consistently below projections, the Division shall seek an appropriate fee adjustment consistent with the shortfall in revenue.

In addition, the Commission imposed a fee pursuant to Section 25-7-114.7(2)(A)(III), C.R.S., to cover the direct and indirect costs of evaluating planning documents submitted to the Commission. In order to reduce the administrative burden on the Division and permittees, both the evaluation fees and the administration fee will be billed annually.

The rule revisions adopted address the procedural mechanisms for accomplishing the mandatory requirements of Senate Bill 01-214. The general structure of the smoke management program has been established by statute. The Commission's rule implements that legislative prescription; the revisions adopted set a de minimus level for significant users of prescribed fire, establish a fee mechanism and delineate the specifics of the program anticipated by the statute. The Commission concludes that these rule revisions are adopted to implement prescriptive state statutory requirements, where the Commission is allowed no significant policy-making options, for the purposes of § 25-7-110.5, C.R.S. The Commission also concludes it has no discretion under state law to adopt alternative rules that differ significantly from these revisions, for the purposes of § 25-7-110.8(1), C.R.S. Accordingly, the Commission did not include in the record some of the portions of the rulemaking prerequisites addressed in § 25-7-110.5, C.R.S., and did not make specific determinations regarding the factors listed in § 25-7-110.8(1), C.R.S.

The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

#### AIR QUALITY CONTROL COMMISSION

ADOPTED: JANUARY 17, 2002

~~IX.B.~~ **Adopted** December 19, 2002 ~~Statement of Basis, Specific Statutory Authority and Purpose (5 CCR 1001-11)~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5, C.R.S., and implements parts of Sections 25-7-106(7) and (8), 25-7-114.7 and 25-7-123, C.R.S.

#### **Basis**

This rule revision updates the fee provisions of Regulation Number 9. Regulation Number 9 anticipates that the Commission will review and, as necessary, change the fee charged for program administration.

#### **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Sections 25-7-109(2)(e) and 25-7-123, C.R.S., provides the authority for the Commission to adopt and modify a program including emissions control regulations to control burning activities. Pursuant to Section 25-7-106(7)(a), C.R.S., the Commission program for significant users of prescribed fire includes fees necessary to administer the program. The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S.

#### **Purpose**

When it adopted Regulation Number 9 in order to implement Senate Bill 01-214, the Commission elected to treat the program costs, as the program "fee" required by the legislation. In the regulation, the Commission required the Division to recalculate the program cost annually and to provide a briefing to the

Commission each August. Based on the Program Cost and Distribution Methodology contained in Appendix C, the Division calculated the initial cost for the program. The Commission included the total administrative cost of \$129,646.45 for calendar year 2002 in Appendix C to the regulation. In this proceeding, the Commission considered and adopted a change to the projected 2003 program cost and corrected an error in Appendix C. As a result, the "fee" in Appendix C is "\$144,309.85 for calendar year 2003 and succeeding years." The fee amount of \$144,309.85 is intended to apply beginning calendar year 2003. The Division will bill users of the fire program for activity during 2002 using the \$129,646.45 amount. Users of the fire program during 2003, and thereafter if the fee is not adjusted subsequently, will be subject to the \$144,309.85 amount.

The Division calculated the projected program cost for calendar year 2003 as \$144,309.85, representing an increase of 11% over the 2002 fee. This increase largely results from a position within the program that was hired in 2002 and worked only 2 months of that calendar year but will be filled for all of 2003. The calculation is based on the methodology contained in Appendix C. The Commission reviewed the calculation of the changes between the 2002 cost projection and the 2003 cost projection and concluded that the fee amount proposed by the Division represents the program cost for calendar year 2003.

Accordingly, the Commission adopted \$144,309.85 as the program cost and fee to begin in calendar year 2003.

~~IX.C.~~ Adopted February 19, 2004—~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5, C.R.S.

### **Basis**

The rule revisions adopted change the method used to distribute the fees for users of planned and unplanned ignition prescribed fire permits utilizing the Division's Smoke Management Program.

### **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Section 25-7-109(2)(e), C.R.S., provides the authority for the Commission to adopt and modify emissions control regulations pertaining to open burning activities.

The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

### **Purpose**

In 2002, the Commission adopted regulations to implement the requirements of Senate Bill 99-145 and Senate Bill 01-214 relating to open burning activities by public and private land managers and other significant users of fire for range and forest management. The regulation included a mechanism intended to distribute equitably the cost of the program among the users and to provide revenue certainty to the Division. In practice, fire users subject to the program have experienced substantial uncertainty in their budgeting process because the fee assessments are not determined until the spring following the year for that fee.

The revisions adopted restructure the fee distribution system into the following components. The first is a flat fee of \$1000 per year for all unplanned ignition fire permits. Such permits are valid for up to 5 years. The second is a flat fee for small users of planned ignition prescribed fire, which will be charged \$100 for each permit. Rather than recalculating the program cost share each year for larger users, the Division will

determine the three-year average of proportion of permits and actual PM10 emissions for the user. That proportion will be used to divide the program cost among the large users. Although there may be some variations in fees from year to year, they will be smaller than those occurring under the present system. These proportions will be recalculated every three years to accommodate program participation changes among large users.

~~IX.D.~~ Adopted February 19, 2004—~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S. and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5.

### **Basis**

The rule revisions adopted change the evaluation method used to distinguish between the permit requirements for prescribed fires above and below a threshold depending on the potential for smoke impacts from the fire.

### **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Section 25-7-109(2)(e), C.R.S., provides the authority for the Commission to adopt and modify emissions control regulations pertaining to open burning activities.

The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

### **Purpose**

In 2002, the Commission adopted regulations to implement the requirements of Senate Bill 99-145 and Senate Bill 01-214 relating to open burning activities by public and private land managers and other significant users of fire for range and forest management. Those regulations included in Appendix A, a rating table for the Division to use to identify fires with a low enough potential for smoke impact that use of a general open burning permit sufficed to prevent undue air quality impacts. Division experience since that time indicates that the rating table failed to allow sufficient evaluation of the potential impacts from specific fires. In this proceeding, the Commission substituted for the table a more flexible mechanism for the Division to make its determinations. The Commission chose the project size, fuel type, duration and proximity to smoke-sensitive receptors as the most important factors in these evaluations. The Commission has provided guidelines in the Appendix regarding the application of the first 3 factors to identify low smoke risk burns. The final factor shall be addressed in permit conditions. The Commission has also provided that the Division may apply the factors to arrive at somewhat different thresholds as compared to the guideline table in Appendix A as long as the Division provides evidence how the factors are still adequately addressed to ensure the burn is indeed low or no smoke risk. The Commission intends by this change only to simplify and improve the process for assessing smoke impact potential. The purpose of the revisions is not to allow fire users to avoid the more substantial requirements associated with prescribed fire permits unless the potential for smoke impacts is found to be low. The Division is to issue guidance regarding the application of the identified factors to reflect Commission intent.

~~IX.E.~~ Adopted February 19, 2004—~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S. and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5.

## **Basis**

The rule revisions adopted remove a requirement for an unplanned ignition permit renewal where more than 500 acres burn within a permitted burn area during a calendar year. That requirement prompted unnecessary renewals where the terms of the permit in general remained substantially unchanged.

## **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Section 25-7-109(2)(e), C.R.S., provides the authority for the Commission to adopt and modify emissions control regulations pertaining to open burning activities.

The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

## **Purpose**

In 2002, the Commission adopted regulations to implement the requirements of Senate Bill 99-145 and Senate Bill 01-214 relating to open burning activities by public and private land managers and other significant users of fire for range and forest management. Section VI.B of Regulation Number 9 allows the Division to issue unplanned ignition fire permits for up to five years if no more than 500 acres burn within the burn area during any calendar year. The expectation in adopting this provision was that large fires would drive significant changes in the fire use plan. Experience in the interim demonstrates that even large fires have not in most cases required significant changes in the permit. The existing regulation created an undue burden on both permittees and the Division by requiring new applications, proposed permits and public comment processes. This revision reduces that burden in the recognition that the permits remain substantially similar and that the renewal did not serve a significant public interest.

~~IX.F.~~ Adopted March 12, 2004 ~~Statement of Basis, Specific Statutory Authority and Purpose~~

This statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S. and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5.

## **Basis**

The rule revisions adopted address the use of air curtain destructors for burning materials generated as a result of projects conducted to reduce the risk of wildfire. Regulation 9 deals with open burning activities and Regulation 3 contains emission notice requirements. The Common Provisions Regulation contains a definition related to these devices.

## **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Section 25-7-109(2)(e), C.R.S., provides the authority for the Commission to adopt and modify emissions control regulations pertaining to open burning activities. These regulatory changes implement the provisions of the Colorado Air Pollution Prevention and Control Act, 25-7-101, et. seq., that prohibit anyone from operating an air pollution source such as an air curtain destructor without first obtaining a permit.

The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

## **Purpose**

In 2002, the Commission adopted regulations to implement the requirements of Senate Bill 99-145 and Senate Bill 01-214 relating to open burning activities by public and private land managers and other significant users of fire for range and forest management. Since that action, the public and both state and federal agencies have focused on the risks associated with wildfires, particularly in the forest/urban interface throughout Colorado. The Commission views reduction of the risks associated with wildfires and their potential for serious public health consequences as a result of the emissions from the fires as an important component in protecting public health and the environment. The Commission also views the use of methods to reduce risk that also reduce air pollution emissions compared to other methods as an additional important factor. In this rule adoption, the Commission acted to enlarge the options available to dispose of materials generated by projects conducted to reduce the risks of wildfire. It is the intention of the Commission that practical alternatives to burning be used when they exist.

The Commission reviewed the available emissions data and limited uses proposed for air curtain destructors. That information demonstrated to the satisfaction of the Commission that, with appropriate permit conditions, the destructors can safely be used to dispose of certain materials without endangering public health or causing or contributing to a violation of the National Ambient Air Quality Standards (NAAQS) and will reduce emissions compared to traditional pile burning.

The Division performed an air dispersion modeling analysis on December 30, 2003. The analysis is based on the assumption that the air curtain destructors operate no more than 13 hours per day and no more than 110 days per year at a single site. In addition, it is assumed that no more than 20 tons of fuel will be burned per hour. At this level of operation and fuel throughput, the device would be limited to 110 days per year to meet the restriction in the proposed regulation that no more than 100 tons of any criteria pollutant be emitted per year.

Screening level air quality analyses suggest that emissions from air curtain destructors are not expected to cause violations of the carbon monoxide, sulfur dioxide, and nitrogen dioxide ambient air quality standards except in situations where the air curtain destructor is operated next to a nearby source of air pollutants that is already causing high air pollution impacts in an area that, for one reason or another, has poor existing air quality. The analyses suggest it would be prudent to require setbacks in the regulation to prevent public exposure to potentially elevated PM10 levels near the units. The proposed setbacks of 150 feet and 300 feet for short-term versus long-term sites are reasonable except in situations where the air curtain destructor is located near another stationary source of fugitive PM10 emissions. Accordingly, the rule adopted prohibits co-location of an air curtain destructor with another air curtain destructor or any facility that is required to have an air quality permit or any commercial or industrial facility.

The rule adopted contains specific limitations to assure that the devices are operated consistently with the Commission's expectations. The rule adopted allows disposal of wood products generated by projects conducted to reduce the risks of wildfire. The information presented to the Commission did not demonstrate that air curtain destructors are appropriate for disposal of other materials including clean lumber.

~~IX.G.~~ Adopted December 15, 2005 ~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5, C.R.S., and implements parts of Sections 25-7-106(7) and (8), 25-7-114.7 and 25-7-123, C.R.S.

### **Basis**

This rule revision corrects clerical errors in published regulations related to the Smoke Management Program. The insertions and deletions to regulatory language in this rulemaking will bring published regulatory language into conformance with what the Commission adopted in actions at past rulemaking hearings.

### **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Sections 25-7-109(2)(e) and 25-7-123, C.R.S., provides the authority for the Commission to adopt and modify a program including emissions control regulations to control burning activities.

The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

### **Purpose**

In this proceeding, the Commission considered and adopted changes to Regulation Number 9 to bring the published versions of the regulation into conformance with what the Commission adopted during previous rulemaking hearings that occurred on February 19, 2004 and March 12, 2004. The corrections were needed due to clerical errors in the published versions of the rules that remained unnoticed until July 2005.

Accordingly, the Commission adopted corrections to Regulation Number 9.

~~IX.H.~~ Adotped December 14, 2006 ~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5, C.R.S.

### **Basis**

This rule revisions adopted change the percentages used to distribute the fees for users of planned and unplanned ignition prescribed fire permits utilizing the Division's Smoke Management Program.

### **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Sections 25-7-109(2)(e), C.R.S., provides the authority for the Commission to adopt and modify a program including emissions control regulations pertaining to open burning activities.

The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

### **Purpose**

In January 2002, the Commission adopted regulations to implement the requirements of Senate Bill 01-214 relating to open burning activities by federal land managers and other users of fire for range and forest management. The regulation included a mechanism intended to distribute equitably the cost of the program among the users and to provide revenue certainty to the Division.

The fee distribution portion of the regulation was revised in 2003 at the request of federal land management agencies. Revisions adopted restructure the fee distribution system into the following components. The first is a flat fee of \$1000 for all unplanned ignition fire permits. The second is a flat fee for small users of planned ignition prescribed fire, which are charged \$100 for each permit. Rather than recalculating the program cost share each year for larger users, the Division determines the three-year average of proportion of permits and actual PM10 emissions for the user. That proportion is used to divide the program cost among the larger users. Although there are some variations in fees from year to

year, they are much smaller than those occurring under the previous system. These proportions are to be recalculated every three years to accommodate program participation changes among users.

The revisions adopted update the recalculations of the proportions based on recent activity information collected by the Division of users of the smoke management program. The revisions are applicable for fee distribution calculations for users of the program during calendar years 2006, 2007, and 2008; with billing of users based on the adopted percents to occur in 2007, 2008 and 2009, respectively.

~~IX.I.~~ Adopted June 21, 2007 ~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5, C.R.S.

### **Statutory Authority**

The Air Quality Control Commission is authorized to adopt these revisions to Regulation Number 9 and Regulation Number 1 pursuant to C.R.S. §§ 25-7-106(7), (8) (2001) and 25-7-123(1) (2001).

### **Basis and Purpose**

#### Prescribed Fire Regulation by Counties

Current regulations provide that the Division issues permits for a prescribed fire. This revision clarifies that the Division, as well as local agencies that have been designated agents of the Division, may issue wildland fire permits. The revision also exempts such permits issued by delegated local agencies from State fees. The Division retains oversight of the program should a local agency fail to administer the program as per Regulation Number 9.

The Division is authorized to delegate open burn regulation to local agencies under C.R.S. § 25-7-111(2)(f). The Division may designate local agencies as agents of the state to administer powers and duties such as open burn regulation. Limited delegations are good policy because local governments are closest to the challenges of conducting such burning. They can work more closely and consistently with a larger number of local landowners to ensure timely inspection of proposed projects, more effective compliance assistance, and more effective smoke monitoring.

This revision is necessary to avoid any confusion among land managers regarding which agency issues burn permits. Over the past thirty years, the Division has designated agencies from twelve counties as agents of the Division for the purpose of administering general open burn permitting. However, the general open burn program is limited to de minimus wildland fuel piles (as defined in Regulation 9 Appendix A). The pine beetle epidemic has changed the needs of all stakeholders.

Certain Colorado counties are facing a critical need for tools to use in the management or disposal of dead timber after forests have been devastated by the pine beetle epidemic. The spread of the epidemic has been exponential, creating huge volumes of trees and woody debris to dispose of responsibly. The United States Forest Service estimates that 50-60% of the mature lodge pole trees in Summit County are dead or dying. The numbers climb to 80-90% in Grand County. Eagle County is also heavily impacted. The risk of catastrophic wildfire has increased by these large stands of diseased or dead trees. While no one approach will solve all the problems associated with dealing with the huge volume of trees to be disposed of, responsible burning is one option.

Recently local county agencies and landowners in these areas have contacted the Division regarding the burning of piles of logged trees under local permitting. The Division has been collaborating with local counties affected by the mountain pine beetle epidemic to evaluate the prospect of delegating the prescribed fire program to willing and able county agencies.

It now makes sense to designate local agencies to permit larger pile burns than possible under a general open burning permit. The Division believes that in the face of the pine beetle kill challenge, if local agencies are properly staffed and prepared to assume the responsibilities of permitting, it is appropriate to consider developing a written delegation agreement. Thus, the Division is now working on a delegation for the prescribed fire program to local agencies.

### Training and Instructional Fires

Wildland fuel burns that have a training or instructional component but are large enough to constitute prescribed fires will now be subject to Regulation 9 permitting requirements. Prescribed fires are burns large enough to be over the de minimus low smoke risk threshold in Regulation 9, Appendix A. This change will require the permittees to insure that the smoke is managed responsibly and that public health is considered. Open burns causing de minimus smoke emissions that are used for training purposes are still exempt from permitting requirements.

Prior to this revision, Regulations 1 and 9 exempted all training and instructional fires from permitting by the Division. However, this exemption does not reflect the realities of wildfire suppression training. Few, if any, burns are used exclusively for wildland fire suppression training. These burns accomplish several objectives in addition to training, such as habitat improvement, weed control, and wildfire fuel control. Most prescribed fires are used for training to some degree. Prior to this revision, these fires would arguably be entitled to an exemption.

Prescribed fires are, by definition, large with significant emissions that can impact residents in the vicinity of the fire. If the Division were to grant an exemption for every prescribed burn that involves training, few prescribed fires would be permitted. Without a permit, the Division cannot ensure that the land manager is implementing the controls that are necessary to protect public health and safety.

Wildland fire instructors usually consider applying for and obtaining a planned ignition fire permit from the Division as part of the training exercise. This revision reflects that burn permits are necessary for burns that exceed the de minimus smoke emissions threshold and the industry practice of requesting a permit.

The Division is aware of instances where structures were ignited under the training exemption yet did not receive a Demolition Notice from the Division prior to ignition to assure they were free from asbestos. This revision does not require permitting for structural fire fighting training, though it does include a cross reference to Regulation Number 8, Part B, Section III.E.1. concerning the possible need for a Demolition Notice to assure the structure is free of asbestos before the structure is burned.

~~IX.J.~~ Adopted June 19, 2008 ~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5, C.R.S.

### **Basis and Purpose**

The Commission hereby establishes a process to administer planning documents for prescribed fire in the event the ownership of the acreage in question changes. The Commission intends to ensure that new landowners or managers are aware of the planning document that applies to their land and intend to comply with the document.

Any new owner who qualifies as a significant user of prescribed fire and plans to use prescribed fire must do so pursuant to an approved planning document. Significant users of prescribed fire include any public or private entity that owns or manages 10,000 acres or more in Colorado and conducts enough wildland prescribed fire burns such that they generate at least 10 tons of PM10 per year.

Significant users must submit a planning document that explains how decisions are made about fuel treatment options and how the entity complies with applicable standards. The Commission reviews and approves the planning document following a public hearing. The Division may not issue prescribed fire permits to a significant user without an approved or valid planning document.

In the event of a change of ownership or management associated with acreage that is subject to a planning document, the Division will seek a written commitment from the new owner or land manager to comply with the document. The Division will no longer issue permits until a written commitment is received regarding the existing plan or the new owner or manager has submitted a new or amended planning document that is approved by the Commission at a public hearing.

### **Specific Statutory Authority**

C.R.S. § 25-7-106(7) and (8) authorizes and directs the Commission to develop a program to minimize impacts of actions by significant users of prescribed fire, including a requirement that significant users submit planning documents to the Commission.

~~IX.K.~~ Adopted December 19, 2008 ~~Statement of Basis, Specific Statutory Authority and Purpose~~

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, Section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, Sections 25-7-110 and 25-7-110.5, C.R.S.

### **Basis**

The rule revisions adopted change the percentages used to distribute the fees for users of planned and unplanned ignition prescribed fire permits utilizing the Division's Smoke Management Program. This rule revision also increases the cost of the smoke management program. Regulation Number 9 anticipates that the Commission will review and, as necessary, change the fee charged for the program. Finally, numerous format edits of Regulation Number 9 are adopted to achieve more consistency between Commission regulations.

### **Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, Sections 25-7-109(2)(e) and 25-7-123, C.R.S., provides the authority for the Commission to adopt and modify a program including emissions control regulations to control burning activities. Pursuant to Section 25-7-106(7)(a), C.R.S., the Commission program for significant users of prescribed fire includes fees necessary to administer the overall smoke management program. The Commission's action is taken pursuant to procedures set forth in Sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in Section 25-7-109(1)(b), C.R.S.

### **Purpose**

In January 2002, the Commission adopted regulations to implement the requirements of Senate Bill 01-214 relating to open burning activities by federal land managers and other users of fire for range and forest management. The regulation included a mechanism intended to distribute equitably the cost of the program among the users and to provide revenue certainty to the Division.

The fee distribution portion of the regulation was revised in 2003 at the request of federal land management agencies. Revisions adopted restructure the fee distribution system into the following components. The first is a flat fee of \$1000 for all unplanned ignition fire permits. The second is a flat fee for small users of planned ignition prescribed fire, which are charged \$100 for each permit. Rather than recalculating the program cost share each year for larger users, the Division determines the three-year average of proportion of permits and actual PM10 emissions for the user. That proportion is used to

divide the program cost among the larger users. Although there are some variations in fees from year to year, they are much smaller than those occurring under the previous system. These proportions are to be recalculated every three years to accommodate program participation changes among users.

The revisions adopted update the recalculations of the proportions based on recent activity information collected by the Division of users of the smoke management program. The revisions are applicable for fee distribution calculations for users of the program during calendar years 2009, 2010, and 2011; with billing of users based on the adopted percents to occur in 2010, 2011 and 2012, respectively.

When it adopted Regulation Number 9 in order to implement Senate Bill 01-214, the Commission elected to treat the program costs, as the program "fee" required by the legislation. In the regulation, the Commission required the Division to recalculate the program cost annually and to provide a briefing to the Commission each August. Based on the Program Cost and Distribution Methodology contained in Appendix C, the Division calculated the initial cost for the program. The Commission included the total administrative cost of \$129,646.45 for calendar year 2002 in Appendix C to the regulation. In a later proceeding, the Commission considered and adopted a change for the projected 2003 program to "\$144,309.85 for calendar year 2003 and succeeding years." In 2005, the Commission again adopted a change for 2005 and succeeding years of \$174,585.08.

The Division calculated the projected program cost for calendar year 2009 as \$199,305.13, representing an increase of 14% over the 2005-2008 program cost. This increase largely results from small, accumulated increases in salaries and benefits for the Division positions supporting the SMP and a new charge for vehicle use. The calculation is based on the methodology contained in Appendix C. The Commission reviewed the calculation of the 2009 cost projection and concluded that the cost of the program amount proposed by the Division represents the program cost for calendar year 2009 and succeeding years. Accordingly, the Commission adopted \$199,305.13 as the program cost and fee to begin in calendar year 2009.

Finally, in this proceeding the Commission considered and adopted format changes and edits to bring Regulation Number 9 into conformance with other Commission regulations. Accordingly, the Commission adopted the changes to Regulation Number 9.

L. Adopted September 15, 2011

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act, section 24-4-103, C.R.S., and the Colorado Air Pollution Prevention and Control Act, sections 25-7-110 and 25-7-110.5, C.R.S.

**Basis**

The rule revisions adopted change the percentages used to distribute the fees for users of planned and unplanned ignition prescribed fire permits utilizing the division's Smoke Management Program.

**Specific Statutory Authority**

The Colorado Air Pollution Prevention and Control Act, section 25-7-106(7)(a), C.R.S., provides authority to the Commission to develop a fee program for the Division's Smoke Management Program. Section 25-7-109(2)(e), C.R.S., provides the authority for the Commission to adopt and modify emissions control regulations pertaining to open burning activities.

The Commission's action is taken pursuant to procedures set forth in sections 25-7-105, 25-7-110 and 25-7-110.5, C.R.S. The Commission took into consideration the appropriate items enumerated in section 25-7-109(1)(b), C.R.S.

**Purpose**

In January 2002, the Commission adopted regulations to implement the requirements of Senate Bill 01-214 relating to open burning activities by federal land managers and other users of fire for range and forest management. The regulation included a mechanism intended to distribute equitably the cost of the program among the users and to provide revenue certainty to the Division.

The fee distribution portion of the regulation was revised in 2003 at the request of federal land management agencies. Revisions adopted restructure the fee distribution system into the following components. The first is a flat fee of \$1000 for all unplanned ignition fire permits. The second is a flat fee for small users of planned ignition prescribed fire, which are charged \$100 for each permit. Rather than recalculating the program cost share each year for larger users, the Division determines the three-year average of proportion of permits and actual PM<sub>10</sub> emissions for the user. That proportion is used to divide the program cost among the larger users. Although there are some variations in fees from year to year, they are much smaller than those occurring under the previous system. These proportions are to be recalculated every three years to accommodate program participation changes among users.

The revisions adopted update the recalculations of the proportions based on recent activity information collected by the division of users of the smoke management program. The revisions are applicable for fee distribution calculations for users of the program during calendar years 2012, 2013 and 2014; with billing of users based on the adopted percents to occur in 2013, 2014 and 2015, respectively.