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DISTRICT COURT, DENVER COUNTY, COLORADO 1437 BANNOCK STREET DENVER, COLORADO 80202 **Plaintiff:** COLORADO AUTOMOBILE DEALERS ASSOCIATION v. **Defendants:** THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, THE COLORADO AIR QUALITY CONTROL COMMISSION, and THE COLORADO AIR POLLUTION CONTROL DIVISION.	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiffs: Paul M. Seby, #27487 Matt Tieslau #47483 GREENBERG TRAURIG, LLP 1200 Seventeenth Street, Suite 2400 Denver, Colorado 80202 Phone Number: 303.572.6500 Fax Number: 303.572.6540 E-Mail: sebyp@gtlaw.com tieslaum@gtlaw.com	Case Number: Division: Courtroom:

COMPLAINT FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

Plaintiff Colorado Automobile Dealers Association ("CADA"), by and through its undersigned counsel, and pursuant to C.R.S.§ 25-7-120, C.R.S.§ 24-4-106, and C.R.C.P. 106(a)(2) and (4), respectfully submits this Complaint for Judicial Review of Final Agency Action against Defendants Colorado Department of Public Health and Environment ("CDPHE"), the Colorado Air Quality Control Commission ("Commission"), and the Colorado Air Pollution Control Division ("Division"), and state as follows:

INTRODUCTION

1. On November 16, 2018, the Commission adopted Colorado Regulation Number 20 ("Regulation 20"), which incorporated by reference 53 specific regulatory requirements mandated by the State of California Air Resources Board ("CARB") under what California terms its low emission vehicle (LEV III) regulations. Regulation 20 took effect December 30, 2018 and will apply to all model year 2022 and later light-duty passenger vehicles, light-duty trucks, and medium-duty passenger vehicles sold in Colorado. Regulation 20 also applies to all Aftermarket Catalytic Converters that are sold, offered for sale, or advertised for sale or use in Colorado after January 1, 2021 for any model year vehicle.

2. Prior to the adoption of Regulation 20, passenger vehicles, light-duty trucks, and medium-duty passenger vehicles sold in Colorado were subject to the Federal Tier 3 greenhouse gas ("GHG") emissions and Corporate Average Fuel Economy ("CAFE") standards promulgated by the United States Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA"). Regulation 20 replaces the Federal Tier 3 GHG and CAFE standards with California's LEV III Standards beginning with model year 2022 vehicles sold in Colorado.

3. Regulation 20 also replaces the Federal Tier 3 standards for exhaust emission control devices ("Aftermarket Catalytic Converters"), requiring all Aftermarket Catalytic Converters sold, offered for sale, or advertised for sale or use in Colorado after January 1, 2021 to comply with the requirements for Aftermarket Catalytic Converters under California's LEV III regulations as codified at California Code of Regulations, Title 13, Section 2222 (h) regardless of the age or model year on which those catalytic converters are installed.

4. CADA is a not for profit association that represents more than 260 new car and truck dealers throughout the State of Colorado. CADA's members provide jobs - and careers - to more than 43,000 people throughout Colorado and contributed more than $1.1 billion in total compensation to Colorado residents in 2016. CADA sought and obtained timely "party status" in the Commission's Regulation 20 rulemaking out of concern that Regulation 20 would have a direct adverse effect on CADA and its members and employees as well as Colorado consumers.

5. CADA participated in the Regulation 20 rulemaking process, including the Commission's public rulemaking hearing held on November 15 and 16, 2018.

6. CADA objects to the Commission's adoption and promulgation of Regulation 20, and asserts that Regulation 20 is legally flawed for the following reasons:

a. The Regulation 20 Rulemaking and the Commission's adoption of Regulation 20 violated the statutory prerequisites for a motor vehicle emission control rulemaking to complete motor vehicle emission control studies and make recommendations based on the studies before adopting motor vehicle emission controls.

b. The Division failed to comply with the statutory requirements to prepare an Economic Impact Analysis ("EIA"), Cost Benefit Analysis ("CBA") and Regulatory Analysis ("RA") as required by the Colorado Air Pollution Prevention and Control Act ("Colorado APPCA") and the Colorado Administrative Procedure Act ("Colorado APA"), and the Division's late Revised Final EIA violated Colorado law by failing to allow adequate notice and comment rulemaking as required by the Colorado APPCA.

c. The Commission violated the Colorado APA by promulgating an arbitrary and capricious Rule.

d. The Governor's Executive Order mandating the Regulation 20 rulemaking and rulemaking timeline violated the separation of powers under the Colorado Constitution and the Colorado APA.

7. CADA now asks this Court to declare that the Division and the Commission promulgated Regulation 20 in violation of the Colorado APPCA and Colorado APA and therefore hold invalid, enjoin, and set aside Regulation 20 in its entirety and provide any other relief the Court deems just and proper.

THE PARTIES

8. Plaintiff CADA, is a Colorado non-profit association, authorized to conduct business in the State of Colorado.

9. Defendant CDPHE is the Colorado regulatory Department with jurisdiction and authority to implement the Colorado APPCA, C.R.S. § 25-7-101, *et seq.*

10. CDPHE includes the Division and the Commission.

11. The Division is a subdivision of the Division of Administration of CDPHE that is tasked with air quality control and compliance under Colorado APPCA. *See* C.R.S. § 25-7-103(2), (9); C.R.S. § 25-7-115.

12. The Commission is also an agency of the State of Colorado created pursuant to C.R.S. § 25-7-104. The Commission promulgates rules and regulations to implement the Colorado APPCA.

JURISDICTION AND VENUE

13. Jurisdiction is proper pursuant to the judicial review provision of the Colorado APA, which states that "any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court within thirty-five days after such agency action becomes effective; . . . A proceeding for such review may be brought against the

agency by its official title, individuals who comprise the agency, or any person representing the agency or acting on its behalf in the matter sought to be reviewed. C.R.S. § 24-4-106(4).

14. Jurisdiction is also proper pursuant to C.R.S. § 24-4-103(8.2)(b) which holds that "[a]n action to contest the validity of a rule on the grounds of its noncompliance with any provision of this section shall be commenced within thirty days after the effective date of the rule."

15. An individual may initiate pre-enforcement challenge to regulation's validity under C.R.S. § 24-4-106(4). When an individual is subject to the demands of a regulation, "nothing in the APA denies standing to an individual to initiate a pre-enforcement challenge to the validity of [that] regulation." *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 610 P.2d 85, 91-92 (1980).

16. Declaratory judgment is an appropriate procedure by which to seek review of a regulation under C.R.C.P. 57. *CF&I Steel Corp.,* 610 P.2d at 92. Because jurisdiction is granted under C.R.S. § 24-4-106(4), requesting relief under declaratory judgement may be duplicative.

17. Relief is not appropriate under C.R.C.P. 106(a)(4) because there is an adequate remedy available under C.R.S. § 24-4-106(4). Decisions rendered by government bodies or officers acting in a judicial or quasi-judicial role are reviewable by district courts under C.R.C.P. 106(a)(4) only when there is no other "plain, speedy, and adequate remedy otherwise provided by law."

18. Venue is proper in this Court pursuant to C.R.C.P. 98(a) because Plaintiff CADA resides in the City and County of Denver.

19. Venue is also proper as the CDPHE, the Division, and the Commission are all resident in the City and County of Denver pursuant to C.R.S. § 24-4-106(4).

GENERAL ALLEGATIONS

I. Applicable Statutory and Regulatory Authority.

A. The Federal Clean Air Act

20. Section 202 of the Clean Air Act ("CAA") directs the Administrator of the EPA to prescribe regulations governing emissions from new motor vehicles. 42 U.S.C. § 7521.

21. Section 209 of the CAA prohibits states from promulgating or enforcing emission standards for new motor vehicles separate from those set by the Administrator unless the state had already adopted standards prior to 1966, the state applies for a waiver from the Administrator, and the Administrator determines that the state's standards are at least as protective as the Federal standards. 42 U.S.C. § 7543. California is the only state that has obtained a waiver under Section 209 of the CAA.

22. Section 177 of the CAA allows states who have not obtained a Section 209 waiver to adopt California's motor vehicle emission standards for "new motor vehicles or new motor vehicle engines," so long as the standards "are identical to the California standards for which a waiver has been granted for such model year." 42 U.S.C. § 7507(1). Under the CAA there is no ''third vehicle'' path for the regulation of new motor vehicle emissions: states can either adopt the Federal standards or the California waiver standard. *Id.*

23. Section 177 of the CAA also requires that states adopting the California standard adopt those standards "at least two years before commencement of such model year" in order to give manufacturers sufficient lead time to prepare for the new standards. 42 U.S.C. § 7507(2).

B. The Federal Tier 3 Regulations

24. The current Federal Tier 3 GHG and CAFE standards were developed by EPA and NHTSA in cooperation with CARB, with a focus on establishing a single set of largely identical emissions standards across all 50 states ("National Program").

25. The National Program was promulgated by EPA and NHTSA in 2012 and is known as the current Federal Tier 3 standards, which set GHG and CAFE standards for model years 2017-2025. The Tier 3 standards and California's LEV III standards are largely identical, with some exceptions not relevant to the standards covered by Regulation 20.

26. As a part of the 2012 rulemaking establishing the National Program and the 2012 Tier 3 Standards, EPA and NHTSA agreed to conduct a midterm evaluation ("MTE") of the GHG and CAFE standards for model years 2022-2025.

27. Through the MTE, EPA and NHTSA were required to determine, no later than April of 2018, whether the model year 2022-2025 GHG and CAFE standards were still appropriate under Section 202(a) of the CAA, in light of updated data and information collected during the initial years of the National Program.

28. In July of 2016 EPA, NHTSA, and CARB released a Draft Technical Assessment Report ("Draft TAR") which initially concluded that the Tier 3 Standards for model years 2022-2025 were still appropriate. *Draft Technical Assessment Report: Mid-Term Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022 – 2025* (available at https://nepis.epa.gov/Exe/ZyPDF.cgi/P100OXEO.PDF?Dockey=P100OXEO.PDF).

29. EPA issued a final determination in January of 2017, only a week before the current administration took office and over a year in advance of the April, 2018 deadline for the MTE, concluding that the GHG emission standards for model year 2022-2025 vehicles were still appropriate. *Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation* (available at: https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf).

30. In March of 2017, EPA announced its intention to reconsider the January 2017 final determination and revisit whether the current GHG and CAFE standards were still appropriate for model year 2022-2025 vehicles based on updated data and information gathered through the entire length of the MTE period. *Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles,* 82 Fed. Reg. 14671 (March 22, 2017) (available at https://www.govinfo.gov/content/pkg/FR-2017-03-22/pdf/2017-05316.pdf).

31. As a part of that reconsideration, on April 13, 2018, EPA and NHTSA released an updated mid-term evaluation that concluded that current Tier 3 GHG and CAFE standards for model years 2022-2025 were no longer appropriate based on updated data and information which suggested that the standards were too stringent, presented challenges for automakers due to feasibility and practicality, and raised significant additional costs on consumers not outweighed by the benefits of the standards. The new data and information available to EPA and NHTSA showed that many of the considerations relied upon in the prior January 2017 MTE, including fuel price forecasts and consumer acceptance of advanced technology vehicles, were too optimistic or had significantly changed and thus no longer represented realistic assumptions.

32. EPA and NHTSA therefore concluded that the model year 2022-2025 standards were no longer appropriate, and proposed initiating a Federal rulemaking effort to amend the Tier 3 GHG and CAFE standards for model years 2022-2025. *Mid-term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles*, 83 Fed. Reg. 16077 (April 13, 2018).

33. On August 24, 2018, EPA and NHTSA published the proposed Safer Affordable Fuel-Efficient Vehicles Rule ("SAFE Vehicles Rule") for public notice and comment, proposing to amend GHG and CAFE standards for model years 2021-2026 vehicles. *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,* 83 Fed. Reg. 42986 (August 24, 2018) (available at https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-16820.pdf).

34. Three public hearings on the SAFE Vehicles rule were held in September of 2018. Comments on the SAFE Vehicles Rule were due by October 26, 2018. EPA and NHTSA are currently considering comments received on the proposed SAFE Vehicles Rule, and no final rule has been promulgated at this time.

C. The Colorado Air Pollution Prevention and Control Act

35. The Colorado legislature enacted the Colorado APPCA, C.R.S. § 25-7-101, *et seq.*

36. The Colorado legislature, through the Colorado APPCA, created the Commission, a governmental agency "which shall consist of nine citizens of this state who shall be appointed by the governor with the consent of the senate." C.R.S. §25-7-104.

37. The Commission is tasked with promulgating rules and regulations to implement the Colorado APPCA. C.R.S. §25-7-105. The scope of the Commission's authority, however, is not without limitation. Rather, the Commission's authority is subject to several express limitations set forth under the Federal CAA, Colorado APPCA, the Colorado APA, and the Colorado Constitution.

38. The Commission has the statutory duty to "[p]romulgat[e] such rules and regulations as are consistent with the legislative declaration [and the purpose of the Colorado APPCA] and necessary for the proper implementation and administration of this article," including a comprehensive state implementation plan that is in accord with Federal standards, "*[e]xcept as provided in section[] 25-7-130*." C.R.S. §25-7-105(1) (emphasis added).

39. The Commission, although granted the statutory authority for "maximum flexibility in developing an effective air quality control program and may promulgate such combination of regulations as may be necessary or desirable to carry out that program," is limited in that flexibility "*[e]xcept as provided in section[] 25-7-130*." C.R.S. §25-7-106(1) (emphasis added).

40. The Commission also has the statutory duty to "adopt, promulgate, and from time to time modify or repeal emission control regulations which require the use of effective practical air pollution controls" again, "*[e]xcept as provided in section[] 25-7-130*." C.R.S. §25-7-109(1)(a) (emphasis added).

41. The Colorado legislature also created Title 42, Article 4, of the Colorado Revised Statutes, which governs the regulation of vehicles and traffic, and creates an automobile inspection and readjustment program ("AIR Program"). C.R.S. § 42-4-301 et seq.

42. "AIR program . . . means the automobile inspection and readjustment program . . . the basic emissions program, and the enhanced emissions program established" under Title 42. C.R.S. § 42-4-304.

43. Under the AIR Program, the Commission "shall develop and adopt, and may from time to time revise, regulations . . . *in accordance with section 25-7-130*," and such regulations "shall be designed to assure compliance with the [CAA], Federal requirements, and the state implementation plan." C.R.S. § 42-4-306(6)(a) (emphasis added).

44. The Commission is also required by statute to "continuously evaluate the entire AIR program to ensure compliance with the state implementation plan and Federal law . . . [s]uch evaluation shall be based on continuing research conducted by the [Division] *in accordance with section 25-7-130*." C.R.S. § 42-4-306(9)(a)(I) (emphasis added).

45. The Commission's authority to promulgate rules and regulations is clearly subject to C.R.S. § 25-7-130.

46. Under Section 130, the Colorado legislature mandates that the Division, along with the Colorado Department of Revenue, develop motor vehicle emission control studies. C.R.S. § 25-7-130.

47. In developing motor vehicle emission control studies, the Colorado legislature mandates that the Division must first "develop a continuing joint program for the study of the control of motor vehicle exhaust emissions, *including emissions from model year 1975 and later models*. Such emission control studies shall include such investigations and evaluations of existing and *available motor vehicle emission control equipment and technology*." C.R.S. § 25-7-130(1) (emphasis added).

48. Additionally, the motor vehicle emission control studies "shall" investigate and evaluate "the *social problems, economic impacts, effectiveness, and costs involved* in the use of such technology in motor vehicle emissions inspections and maintenance programs." C.R.S. § 25-7-130(1) (emphasis added).

49. Therefore, the Division's motor vehicle emission control studies are required to examine the effects of motor vehicle emission controls on a Colorado specific basis, including the unique social and economic effects of contemplated motor vehicle emission controls for Coloradans.

50. The Division must also "develop a pilot program for the purpose of testing a representative sample of motor vehicles with various vehicle emission control alternatives which may include emission testing and maintenance, air pollution control tune-up, *and vehicle modification alternatives* as determined by the [C]ommission." C.R.S. § 25-7-130(2)(a) (emphasis added).

51. Then, "[b]ased upon the results of the pilot program and emission control studies, the [C]ommission *shall develop recommendations for . . . the control of motor vehicle emissions*." C.R.S. § 25-7-130(2)(b) (emphasis added).

52. Any program recommended by the Commission "*shall be based upon establishing statewide minimum standards* and shall include more stringent standards for motor vehicles registered in air quality control basins defined by the commission." C.R.S. §25-7-130(2)(b) (emphasis added).

53. Therefore, both the motor vehicle emission control studies, and the recommendations by the Commission based on those studies, must consider available motor vehicle emissions control equipment and technology, and the social problems, economic impacts, effectiveness, and costs involved in the use of such technology on a Colorado specific basis.

54. Regulation 20, by imposing motor vehicle emission control standards on all light-duty passenger vehicles, light-duty trucks, and medium-duty passenger vehicles sold in Colorado for model years 2022-2025, is a motor vehicle emission control rulemaking subject to the requirements of C.R.S. §25-7-130.

55. Additionally, Regulation 20, by requiring that all Aftermarket Catalytic Converters offered for sale, or advertised for sale or use in Colorado after January 1, 2021 to comply with the requirements for Aftermarket Catalytic Converters under California's LEV III regulations, is a motor vehicle emission control rulemaking further subject to the requirements of C.R.S. §25-7-130.

56. Therefore, before promulgating emission control regulations under the Colorado APPCA or the AIR Program, the Division must complete motor vehicle emission control studies, and the Commission must make recommendations based on those motor vehicle emission control studies "for the control of motor vehicle emissions." C.R.S. § 25-7-130(2)(b).

D. Colorado Statutes Governing Commission Rulemaking Procedures

57. The Colorado APA requires that any agency, when a rulemaking is contemplated, "make diligent attempts to solicit input from representatives of each of the various stakeholder interests that may be affected positively or negatively by the proposed rules." C.R.S. § 24-4-103(2).

58. The Colorado APA also declares that "an agency should not regulate or restrict the freedom of any person to conduct his or her affairs, use his or her property, or deal with others on mutually agreeable terms unless it finds, after a full consideration of the effects of the agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state. … [A]gency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced economic efficiency, reduced consumer choice, increased producer and consumer costs, and restrictions on employment. … [A]gency rules can negatively impact the state's business climate by impeding the ability of local businesses to compete with out-of-state businesses, by discouraging new or existing businesses from moving to this state, and by hindering economic competitiveness and job creation. Accordingly, it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest." C.R.S. § 24-4-101.5 (entitled legislative declaration).

59. The Colorado APPCA mandates that an initial economic impact analysis ("Initial EIA") is prepared and provided to the Commission with the submission of a proposed rulemaking action. C.R.S. § 25-7-110.5(4)(a).

60. The Colorado APPCA then mandates that a final economic impact analysis ("Final EIA") is prepared and provided to all parties five working days prior to the prehearing conference for that rulemaking. C.R.S. § 25-7-110.5(4)(a).

61. Pursuant to C.R.S. § 25-7-110.5(4)(c) the EIA is required to consider the "cumulative" or "direct" costs of the regulation on Colorado consumers and industry.

62. The Colorado APPCA also mandates that a final EIA "shall be in writing and delivered . . . to all parties of record five working days prior to the prehearing conference" for the applicable rulemaking. C.R.S. § 25-7-110.5(4)(a).

63. After publication of a proposed rulemaking, "[a]ny person may . . . request that the department of regulatory agencies require the agency submitting the proposed rule or amendment to prepare a [CBA]." C.R.S. § 24-4-103(2.5)(a).

64. Pursuant to C.R.S. § 24-4-103(2.5)(a)(I)-(IV) a CBA "shall include" the "anticipated costs of the rule or amendment, which shall include the direct costs to the government to administer the rule or amendment and the direct and indirect costs to business and other entities required to comply with the rule or amendment," and "[a]ny adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness."

65. Additionally, "[a]ny person may request" that the agency engaging in rulemaking issue a RA, the development and provision of which then becomes mandatory. C.R.S. § 24-4-103(4.5)(a).

66. Pursuant to C.R.S. § 24-4-103(4.5)(a) a RA "shall contain" a "description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule," and a "comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction."

67. Under the Colorado APA, agency action shall be held unlawful if that action is "arbitrary or capricious," "contrary to constitutional right, power, privilege, or immunity," "an abuse or clearly unwarranted exercise of discretion," and "unsupported by substantial evidence when the record is considered as a whole." C.R.S. § 24-4-106(7)(b).

II. The Regulation 20 Rulemaking.

A. The Governor's Executive Order

68. On June 18, 2018, Colorado Governor Hickenlooper issued Executive Order B 2018 006, entitled "Maintaining Progress on Clean Vehicles."

69. The Executive Order specifically referenced the ongoing Federal SAFE Vehicles Rule rulemaking aimed at amending the current GHG and CAFE standard for vehicles model years 2022 and beyond, and stated that the Federal rulemaking "could also have serious consequences for Colorado's efforts to meet our clean energy goals."

70. The Executive Order stated that because "the federal government's standards fail to meet [Colorado's] clean air goals," Colorado should adopt California's LEV III Regulations.

71. Therefore, "[i]n order to maintain progress in reducing greenhouse gas emissions" and to achieve the Governor's clean energy goals, the Executive Order required the CDPHE to develop a Colorado Low Emission Vehicle ("LEV") program that adopts California's LEV III regulations under the CAA.

72. The Executive Order directed the CDPHE to follow a truncated rulemaking schedule, stating that CDPHE "shall" develop and propose the LEV III regulation to the Commission at its August 16, 2018 monthly meeting for adoption into the Colorado Code of Regulations by December 30, 2018.

73. The Governor's Executive Order gave the CDPHE less than two months to develop and propose a LEV III regulation in Colorado, and dictated that the entire rulemaking process for adopting the LEV III Regulation must conclude in just three months, before the end of 2018.

B. The Regulation 20 Rulemaking

74. On August 1, 2018, before releasing any rulemaking packet to the public, the Division drafted and sent a proposed LEV III regulation ("Proposed Regulation 20 rulemaking packet") to the Commission.

75. On August 3, 2018, the Division held a single stakeholder meeting where the Division released the Proposed Regulation 20 rulemaking packet, which was only provided to the public a day in advance of the meeting via a posting on the Division's website.

76. On August 16, 2018, at the Commission's regularly scheduled monthly meeting, the Division presented to the Commission the same Proposed Regulation 20 rulemaking packet (with non-material changes), conceding that "[d]ue to the short timeframe and the narrow directive in the Executive Order, the Division chose not to engage stakeholders until after the proposed rule was drafted and sent to the Commissioners August 1."

77. The Proposed Regulation 20 sought to adopt select provisions of California's LEV III regulations relating to light-duty passenger vehicles, light-duty trucks, and medium-duty passenger vehicles for model years 2021-2025.

78. The Proposed Regulation 20 separately sought to adopt California's standards for Aftermarket Catalytic Converters sold, offered for sale, or advertised for sale or use in Colorado after January 1, 2021, regardless of the age or model year on which those catalytic converters are installed.

79. The August 16, 2018 Proposed Regulation 20 rulemaking packet included an Initial EIA prepared by the Division, which claimed that Regulation 20 would generate a net cost savings of $2.15 billion. The Initial EIA did not include many of the elements an EIA is mandated to contain under C.R.S § 25-7-110.5(4). The Initial EIA also primarily relied on EPA and NHTSA's Draft TAR, which was based on 2016 data and information that the EPA and NHTSA had subsequently withdrawn as outdated and no longer accurate.

80. The Proposed Regulation 20 rulemaking packet was not accompanied by the findings of any motor vehicle emission control studies, as mandated by C.R.S § 25-7-130.

81. At the August 16, 2018 monthly meeting, and without any meaningful opportunity for public review and input on the matter, the Commission voted unanimously to move forward with the Regulation 20 rulemaking on the exact truncated timeline mandated by Governor Hickenlooper's Executive Order.

82. The Commission released a Notice of Rulemaking Hearing on August 24, 2018, which stated:

"Although Colorado Revised Statute is silent about the Commission's authority to adopt vehicle emission standards, the Commission has authority to adopt policies to 'achieve the maximum practical degree of air purity,' Section 25-7-102."

83. The Commission's Notice of Rulemaking Hearing named Commissioner Anthony Gerber as the hearing officer for the Regulation 20 rulemaking, included instructions for applying for party status, set the rulemaking schedule, and set the Regulation 20 rulemaking hearing before the Commission for November 15-16, 2018.

84. The schedule in the Commission's Notice of Rulemaking Hearing required the submittal of Prehearing Statements by October 9, 2018, a prehearing conference on October 19, 2018, and the submittal of Rebuttal Statements by October 24, 2018.

85. The Commission published the Notice of Rulemaking Hearing in the *Colorado Register* on September 10, 2018.

86. CADA applied for party status in the Regulation 20 Rulemaking proceeding on September 10, 2018.

87. On September 11, 2018, CADA submitted a written request to the Department of Regulatory Agencies ("DORA") asking that DORA require the Division to complete a CBA for Proposed Regulation 20 that complied with the requirements of C.R.S. § 24-4-103(2.5). CADA's September 11, 2018 request set forth the legal and technical insufficiencies of the Division's Initial EIA as support for DORA requiring the Division to complete a CBA for the proposed Regulation 20.

88. On September 11, 2018, CADA submitted a written request to the Division, asking that the Division conduct and complete a RA for the proposed Regulation 20 pursuant to C.R.S. § 24-4-103(4.5).

89. DORA granted CADA's request for a CBA via email on September 18, 2018, noting in the granted request that the Division was required to complete a CBA on or before November 4, 2018.

90. The Commission granted CADA's application for party status at a status conference held by Commissioner and Hearing Officer Gerber on September 20, 2018.

91. On September 28, 2018, CADA filed a Motion to Continue Rulemaking Hearing and Revise Rulemaking Schedule with Commission, requesting that the Commission continue the Regulation 20 rulemaking hearing one month, until December 20-21 of 2018, in order to allow the parties sufficient time to both review the Divisions Final EIA, CBA, and RA (which would not be submitted until after all parties' Prehearing statements were filed, and in the case of the CBA and RA would not be submitted until after all parties' Rebuttal Statements were filed), and to allow the parties to be informed by information submitted up to the close of the public comment period in the parallel and related Federal rulemaking which was proposing to amend the current GHG and CAFE standards for vehicle model years 2022 - 2025.

92. Hearing Officer and Commissioner Gerber issued an order denying CADA's motion to continue the rulemaking hearing on October 4, 2018. The order set forth no analysis or basis for the denial decision.

93. On October 9, 2018, CADA submitted its Prehearing Statement pursuant to the schedule set forth in the Commission's Notice of Rulemaking Hearing.

94. On October 9, 2019, the Division also submitted, pursuant to the schedule in the Commission's Notice of Rulemaking Hearing, its Prehearing Statement along with what the Division described at the time as its Final EIA (when in reality the Division would file another, and significantly revised Final EIA almost a month later, on November 1, 2018).

95. CADA's Prehearing Statement specifically pointed out that the Commission lacked statutory authority to promulgate Regulation 20 as the motor vehicle emission control studies required by the Colorado APPCA had not been completed by the Division and the Colorado Department of Revenue.

96. CADA's October 9, 2018 Prehearing Statement also responded to the Regulation 20 proposal and identified the flaws in Regulation 20 and the flaws in the Division's Initial EIA offered as an economic justification for Regulation 20.

97. CADA also submitted an economic analysis of Regulation 20 with its Prehearing Statement that refuted the Division's Initial EIA showed, based on the most recent and updated data released by EPA and NHTSA, that Regulation 20 would have a net cost to Colorado of over $2 billion.

98. However, the Division's Initial EIA that CADA was responding to no longer represented the Division's current position in support of Regulation 20, as the Division had filed a Final EIA the same day as the Division submitted its Prehearing Statement, thus frustrating CADA's efforts to respond to and comment on the flawed economic justification the Division offered in support of Regulation 20 in its Initial EIA.

99. The Division's Final EIA revised its Initial EIA and no longer provided an estimated cumulative cost for implementation of Regulation 20 as the Division had in its Initial EIA, instead stating the costs of Regulation 20 on a non-cumulative per vehicle basis. Additionally, the Division relied significantly on new information and data to reach its per vehicle cost in the Final EIA that the Division had not relied upon in its prior Initial EIA.

100. On October 19, 2018, Hearing Officer and Commissioner Geber held a prehearing conference for the Regulation 20 Rulemaking. At the prehearing conference, CADA made an oral motion to continue the rulemaking hearing, which Hearing Officer and Commissioner Gerber rejected, stating that to continue the hearing would not comply with the timeline set forth Governor Hickenlooper's Executive Order for adoption of a LEV regulation by December 30, 2018.

101. A final Prehearing Order was issued by Hearing Officer and Commissioner Gerber on October 23, 2018, which directed that the Division's CBA was due by November 5, 2018 and the RA was due by November 9, 2018.

102. On October 24, 2018, CADA submitted its Rebuttal Statement pursuant to the schedule set forth in the Commission's Notice of Rulemaking Hearing. CADA's Rebuttal Statement included an analysis of the flaws in the Division's Final EIA, and continued to assert that the Commission lacked authority to promulgate Regulation 20 absent the statutorily mandated motor vehicle emission control studies being completed.

103. CADA's October 24, 2018 Rebuttal Statement also included an updated economic analysis that specifically responded to and rebutted the Division's Final EIA, dated October 9, 2018.

104. On October 26, 2018, the Division filed a Motion with the Commission seeking leave to file a Revised Final EIA, on the asserted basis that doing so was necessary to "refine its analysis of the economic costs and benefits of Regulation 20."

105. On October 31, 2018, CADA filed a statement of non-opposition to that motion, setting forth CADA's understanding that the Division's analysis was being refined, not completely reworked, and on the condition that CADA would have an adequate opportunity to respond to the contents of any Revised Final EIA.

106. Hearing Officer and Commissioner Gerber granted the Division's motion to file a Revised Final EIA on November 1, 2018.

107. On November 4, 2018, after all of the parties' prehearing submissions had been submitted pursuant to the schedule set forth in the Commission's Notice of Rulemaking Hearing, the Division filed its CBA, and attached to the CBA its Revised Final EIA. The Revised Final EIA was not merely a refinement of the Division's prior Final EIA, but rather was a wholesale substantive revision. The Revised Final EIA contained 18 new pages of purported analyses, with the prior Final EIA previously only spanning 7 pages. The 18 new pages in the Revised Final EIA include analyses of previously undiscussed factors such as: taxes, insurance, purchase costs,

maintenance, operating costs, loan terms and rates, CO_2 reductions, mobility benefits, and societal benefits. The CBA also significantly changed the Division's earlier justifications offered in support of proposed Regulation 20, citing to a new 14-page macro-economic report by Synapse Energy. The CBA and Revised Final EIA were thus substantially reworked from any prior analyses available to CADA, other parties to the rulemaking, and the public.

108. The Division's Revised Final EIA thus yet again changed the economic justifications offered in support of Regulation 20, rendering CADA's prior Prehearing Statement, Rebuttal Statements, and economic analyses responding to the Division's Initial EIA and Final (but subsequently revised) EIA no longer relevant, and leaving CADA almost no time to prepare yet another rebuttal to the Division's third iteration of its economic justification for Regulation 20.

109. On November 9, 2018, three business days before the Regulation 20 rulemaking hearing was set to begin on November 15, the Division filed its RA, attaching the Division's prior CBA and Revised Final EIA. The RA yet again presented and built upon the materially new and different economic analyses and purported justifications in support of proposed Regulation 20 submitted by the Division in its Revised Final EIA and CBA.

110. For example, the RA, along with the Revised Final EIA and CBA, provided an entirely new estimated net implementation cost for Regulation 20. The Division's prior estimates in its Initial EIA claimed a net savings of approximately $2 billion. The Final EIA only included per vehicle costs of implementation of Regulation 20, but those ranges of per vehicle costs consistently suggested a net savings. The Divisions Revised Final EIA, CBA, and RA now for the first time showed a range of per vehicle costs for implementing Regulation 20 that ranged from a net cost of $494 per vehicle, to a net savings of $1,682 per vehicle.

111. The Division's Revised Final EIA, CBA, and RA did not expressly address or respond to CADA's own economic analyses, submitted with its Prehearing and Rebuttal Statements.

112. CADA responded to the Division's CBA, Revised Final EIA, and RA on November 13, 2018, as required by the Commission's prehearing order, just nine days (and only six business days) after the Divisions CBA and Revised Final EIA were filed, and four days (and only one business day) after the Division's RA was filed. CADA response to the Division's CBA, Revised Final EIA, and RA pointed out the many material flaws in those analyses (both statutory and substantive), and the inadequate amount of time CADA had to prepare a response.

113. On November 15 and 16, 2018, the Commission held the Regulation 20 Rulemaking Hearing, in which CADA participated.

114. On November 16, after the conclusion of the Regulation 20 Rulemaking Hearing, the Commission voted to adopt Regulation 20 after deliberating for approximately one hour. The Commission's one hour deliberation was the only consideration it gave to the substantial testimony by parties, industry groups, and expert witnesses, and substantial public comment during the two days of the rulemaking hearing, and the substantial administrative record submitted as briefing for

the rulemaking hearing that spanned thousands of pages, including significant legal argument and expert report analyzing the costs and benefits of Regulation 20.

115. The Commission's adoption of Regulation 20 after minimal deliberation was issued without any detailed findings or conclusions addressing the many legal arguments raised against Regulation 20, including the Division's and Commission's failure to conduct the statutory prerequisite motor vehicle emission control studies as required by the Colorado APPCA, and the many material flaws in the Division's economic analyses (both legal failures under the Colorado APPCA and economic errors in the analyses) as pointed out by CADA and other parties to the Rulemaking hearing.

116. On December 10, 2018 Regulation 20 was published in the *Colorado Register.*

117. On December 30, 2018 Regulation 20 became effective pursuant to the timeline set forth in the *Colorado Register* publication and C.R.S. § 24-4-103(5).

118. Throughout the Regulation 20 rulemaking process, CADA consistently objected to adoption of Regulation 20 based on: (1) the failure of the Division and the Commission to complete motor vehicle emission control studies as required by C.R.S. § 25-7-130; (2) the flaws in the Division's technical and economic analyses of the proposed regulation; (3) the rushed nature of the rulemaking process, particularly given the complexity and importance of the rulemaking; (4) the adverse effect of the rushed rulemaking on CADA's ability to effectively participate in the rulemaking; and (5) the Division's and Commission's abdication of their statutory obligations as evidenced by their rigid adherence to the schedule dictated by the Governor's Executive Order and the seemingly predetermined outcome of the rulemaking.

119. Regulation 20 was adopted in violation of the Colorado APPCA and Colorado APA, and CADA, its members, and Colorado consumers are adversely impacted by Regulation 20, and this Court granting the relief requested herein will address those harms.

FIRST CLAIM FOR RELIEF

(Colorado Air Pollution Prevention and Control Act)
(Failure to Complete the Statutorily Prerequisite Motor Vehicle Emission Control Studies Require for Motor Vehicle Emission Control Rulemakings)

120. CADA hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

121. Sections 105, 106, and 109 of the Colorado APPCA, which authorize and constrain the Commission's authority to promulgate motor vehicle emission control regulations, each unequivocally require the Division to complete motor vehicle emission studies pursuant to Section 130, and the Commission make recommendations based on the same motor vehicle emission control studies, before the Commission may adopt motor vehicle emission control regulations.

122. Section 130 further requires that motor vehicle emission control studies be completed for "*existing and available motor vehicle emission control equipment and technology* and the social problems, economic impacts, effectiveness, and costs involved in the use of such technology in motor vehicle emissions inspections and maintenance programs as they may jointly recommend." C.R.S. § 25-7-130.

123. The Division and Department of Revenue never completed motor vehicle emission control studies aimed at investigating evaluating the effects and the "social problems, economic impacts, effectiveness, and costs involved" in implementing California's LEV III regulations in Colorado. C.R.S. § 25-7-130(1).

124. The Commission never reviewed a motor vehicle emission control study undertaken by the Division, nor made recommendations based on the motor vehicle emission control study that included "include information on the costs and air pollution control effectiveness of alternate control measures and legislative and regulatory measures necessary to implement an effective program" before initiating the Regulation 20 Rulemaking and adopting Regulation 20. C.R.S. § 25-7-130(2)(b).

125. The Commission's adoption of Regulation 20 violated the statutory prerequisites for a motor vehicle emission control rulemaking under the Colorado APPCA, C.R.S. § 25-7-130, as the Division failed to conduct motor vehicle emission control studies, and the Commission failure to make recommendations for adopting California's LEV III standards based on any motor vehicle emission control studies.

SECOND CLAIM FOR RELIEF
(Colorado Air Pollution Prevention and Control Act)
(Failure to Complete the Statutorily Prerequisite Motor Vehicle Emission Control Studies Require for Aftermarket Catalytic Converter Standards)

126. CADA hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

127. In addition to the provisions in Regulation 20 that set LEV standards relating to new motor vehicle emission controls, Regulation 20 also sets standards for Aftermarket Catalytic Converters.

128. Section 130 requires that motor vehicle emission control studies be completed for "*existing and available motor vehicle emission control equipment and technology* and the social problems, economic impacts, effectiveness, and costs involved in the use of such technology in motor vehicle emissions inspections and maintenance programs as they may jointly recommend." C.R.S. § 25-7-130.

129. The motor vehicle emission control studies required by Colorado law under C.R.S. § 25-7-130 apply to Aftermarket Catalytic Converters, which are a motor vehicle emission control equipment and technology.

130. The motor vehicle emission control studies required by Colorado law under C.R.S. § 25-7-130 also apply to regulations on motor vehicle inspections and maintenance programs under the AIR Program as established in Title 42, Article 4, of the Colorado Revised Statutes.

131. Under the AIR program, the Commission "shall develop and adopt, and may from time to time revise, regulations . . . [for] emissions standards for vehicle exhaust and evaporative gases," which standards "shall be proven cost-effective and air pollution control-effective on the basis of detailed research conducted by the department of public health and environment in accordance with section 25-7-130, C.R.S." C.R.S. § 42-4-306(6)(a).

132. Further, the Commission "shall continuously evaluate the entire AIR program . . . based on continuing research conducted by the department of public health and environment in accordance with section 25-7-130, C.R.S." C.R.S. § 42-4-306(9)(a)(I).

133. Those evaluations by the Commission "shall also include an assessment of the methods of controlling or reducing exhaust gas emissions from motor vehicles of the model year 1981 or a later, including "*the replacement of inoperative or malfunctioning emissions control components.*" C.R.S. § 42-4-306(9)(c).

134. The Division never completed a motor vehicle emission control study aimed at understanding the effects of California's LEV III regulations for Aftermarket Catalytic Converters in Colorado.

135. The Division's Revised Final EIA acknowledged that it had not conducted or completed the statutorily requisite motor vehicle emission control study that studied the effects of Aftermarket Catalytic Converters in Colorado, instead relying on California specific research to justify regulation of Aftermarket Catalytic Converters.

136. The Commission never reviewed a motor vehicle emission control study undertaken by the Division because no study was ever conducted, and therefore never made recommendations based on a motor vehicle emission control study relating to adopting California's LEV III and Aftermarket Catalytic Converter standards before initiating the Regulation 20 rulemaking and adopting Regulation 20.

137. The Regulation 20 Rulemaking, and the Commission's adoption of Aftermarket Catalytic Converter standards was therefore in violation of the statutory prerequisites for a motor vehicle emission control rulemaking, as required by the by Colorado APPCA and the AIR Program under C.R.S. § 42-4-306, due to the Division's failure to complete motor vehicle emission control studies, and the Commission's failure to make recommendations for adopting Aftermarket Catalytic Converter requirements based on the same as mandated by C.R.S. § 25-7-130, before engaging in the Regulation 20 Rulemaking.

<u>THIRD CLAIM FOR RELIEF</u>
(Colorado Air Pollution Prevention and Control Act and Colorado Administrative Procedure Act)
(The Division Failed to Comply with the Statutory Requirements of the Colorado APPCA and Colorado APA in its Revised Final EIA, CBA, and RA)

138. CADA hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

139. The Colorado APA declares that "it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest." C.R.S. § 24-4-101.5.

140. Section 103 of the Colorado APA is also designed to "accord interested persons an opportunity to participate" in agency rulemakings. C.R.S. § 24-4-103(1).

141. The Colorado APA mandates that any rule that is not adopted "in substantial compliance with the provisions" of Section 103 "shall be invalid." C.R.S. § 24-4-103(8.2)(a).

142. The Colorado APA also requires that courts set aside and hold unlawful any agency action that is a "denial of statutory right . . [i]n excess of statutory jurisdiction, authority, purposes, or limitations . . . or is otherwise contrary to law." C.R.S. § 24-4-106(7)(b).

143. The Division's Revised Final EIA, CBA, and RA all failed to comply with the statutory requirements of the Colorado APPCA and APA; and denied CADA its statutory right to effectively participate in the Regulation 20 Rulemaking.

<u>The Division's Revised Final EIA, CBA, and RA failed to adequately determine the costs of Regulation 20 in violation of the Colorado APPCA and APA.</u>

144. The Colorado APA and the APPCA require that each of the EIA, CBA and RA determine an anticipated cost and impact of a proposed regulation.

a. C.R.S. § 24-4-103(2.5)(a)(II)-(III) states that a CBA is statutorily required to include "economic benefits" and "anticipated costs" of the proposed regulation.

b. C.R.S. § 24-4-103(4.5)(a)(IV) states that a RA is statutorily required to include "a comparison of the probable costs and benefits of the proposed" regulation.

c. C.R.S. § 25-7-110.5(4)(c)(I)(A), (4)(c)(II), and (4)(c)(III) states that an EIA is statutorily required to identify either the "cumulative cost" or the "direct cost" of the proposed regulation on affected entities.

145. An EIA, CBA, and RA is statutorily designed to inform the Commission and parties to a proposed rulemaking on the expected costs and effects of a proposed regulation with some measure of precision – allowing public decision making on proposed regulations to proceed in an informed manner.

146. When an EIA, CBA, or RA fails to provide any reasonable precision in estimating the costs of a proposed regulation, they defeat the legislative purpose of requiring those instruments and analyses in the first place.

147. Instead of providing the analyses required by statute, the Division's Revised Final EIA, CBA, and RA instead set forth an enormous potential range of net costs per vehicle for implementing Regulation 20.

a. The Division's Revised Final EIA, CBA, and RA provide an estimated net compliance cost range that varies by a factor of four, swinging between a possible savings of $1,682 all the way to a cost of $494 per vehicle.

b. Using that range to calculate a "cumulative cost" by multiplying by the Division's expected 3.27 million vehicles sold by 2031 listed in its Revised Final EIA, CBA, and RA results in a cumulative cost of Regulation 20 of between a savings of $5.5 billion or a cost of $1.6 billion.

148. Therefore, the Division's final cost estimate, which represents a $7.1 billion range of uncertainty on the costs of Regulation 20, fails to meet the statutory requirements of a EIA, CBA, or RA, in violation of the Colorado APPCA and Colorado APA.

<u>The Division's Revised Final EIA, CBA, fail to quantify the costs of Regulation 20 on businesses and industry in violation of the Colorado APPCA and APA.</u>

149. The Division's Revised Final EIA also failed to quantify the significant impairment that Regulation 20 will cause on Colorado new motor vehicle dealerships.

150. An EIA, CBA, and RA are all required by Colorado Statute to include an analysis of the effects of a regulation on the classes of businesses or persons affected by a proposed rule:

a. An EIA is required to include an analysis of either the "cumulative cost including but not limited to the total capital, operation, and maintenance costs of any proposed controls for affected business entity or industry," "[i]ndustry studies that examine the direct costs of the proposal on directly affected entities that may be either in the form of a business analysis," or "the industrial and business sectors that will be impacted by the proposal." C.R.S. § 25-7-110.5(4)(c)(I)(A), (II), (III)(A).

b. A CBA is required to include an analysis of "[t]he anticipated costs of the rule or amendment, which shall include . . . the direct and indirect costs to business and other entities required to comply with the rule or amendment," and "[a]ny adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness." C.R.S. § 24-4-103(2.5)(a)(II), (IV).

c. A RA is required to include an analysis on "the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule," and "to the extent practicable, a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons." C.R.S. § 24-4-103(4.5)(a)(I)-(II).

151. Under motor vehicle emission regulations existing prior to the adoption of Regulation 20, dealerships frequently traded for available vehicle stock with dealerships in nearby states, a common industry practice known as Cross-Border Trading.

152. Under Regulation 20, dealerships will only able to trade for LEV III compliant inventory. All current LEV III states are not contiguous to or otherwise nearby Colorado and are instead located on the east and west coasts of the United States, which effectively restricts Colorado dealership's access to vehicle stock in nearby states. Colorado Dealerships will thus no longer be able to engage in Cross-Border Trading with adjacent states under Regulation 20, instead only being able to trade with dealerships that are thousands of miles away, which will raise the transaction costs and overall costs of new vehicles in Colorado.

153. Further, prices of new vehicles in Colorado are expected to rise substantially due to the adoption of California's LEV III standards. As the California LEV III standards are more stringent than the existing national standards, automobile manufacturers are required to implement new and costly technology in LEV III compliant vehicles in order to meet the standards, which in turn raises the cost of new LEV III compliant motor vehicles for Colorado dealers and consumers.

154. Due to the increased prices of vehicles in Colorado, it is likely that Colorado consumers will begin purchasing vehicles across Colorado's border to take advantage of reduced out of state prices as no neighboring states (or any nearby states) have adopted California's LEV II regulations. This market condition whereby consumers will avoid costly LEV III complaint vehicles in Colorado by purchasing affordable vehicles across state lines is known as Cross-Border Sales.

155. CADA raised concerns about the substantial adverse effects of Cross-Border Trading and Cross-Border Sales in its Prehearing and Rebuttal Statements.

156. CADA further provided extensive testimony at the Regulation 20 rulemaking hearing explaining how Cross-Border Trading and Cross-Border Sales would adversely impact CADA, its members, and Colorado consumers.

157. The Division never quantified the effects of Cross-Border Trading and Cross-Border Sales on Colorado dealerships under Regulation 20, noting in its Revised Final EIA that it did not have enough data to "reasonably quantify this potential cost."

158. The Division violated "the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest" (C.R.S. § 24-4-101.5) and the statutory requirements for an EIA, CBA, and RA under the Colorado APPCA and APA under C.R.S. § 25-7-110.5 and C.R.S. § 24-4-103 when it failed to search for comparable data on the impacts of Cross-Border Trading and Sales in other states that have adopted California LEV III.

<u>The Division's Regulatory Analysis failed to assess lost state revenues as required by the Colorado APA.</u>

159. A RA is required to contain "[t]he probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues." C.R.S. § 24-4-103(4.5)(a)(III).

160. The Division claimed in its Revised Final EIA, CBA, and RA that Regulation 20 will reduce fuel sales by "approximately 1.6 billion gallons," but failed to quantify how that reduction would affect tax revenues, when gas is taxed at 22 cents per gallon.

161. The Division's failure to calculate this lost state revenue, when the information was clearly known and available to the Division, is in violation of the Colorado APA.

<u>The Division's Final Revised EIA failed to comply with the statutory timeframe prescribed by the Colorado APPCA.</u>

162. The Colorado APPCA requires that a Final EIA be submitted "to all parties of record five working days prior to the prehearing conference or, if no prehearing conference is scheduled, at least ten working days before the date of the rule-making hearing." C.R.S. § 25-7-110.5(4)(a).

163. The Commission is allowed to "consider alternative proposals and alternative economic impact analyses that have not been submitted prior to the prehearing conference for good cause shown and so long as parties have adequate time to review them." C.R.S. § 25-7-110.5(4)(a).

164. Due to the Division substantially revising and resubmitting its Final EIA as a Revised Final EIA (well outside the statutorily required deadline for a final EIA), CADA had only six business days to review and respond to the Division's substantially Revised Final EIA which does not comply with the requirement in the Colorado APPCA that parties have "adequate time" to review alternative EIA's submitted outside the statutory timeframe – and thus CADA was denied of its statutory right to effectively participate in the Regulation 20 rulemaking.

165. The Division's submission of its substantially revised "Revised Final EIA" therefore was in violation of the Colorado APPCA, and any reliance by the Commission on that revised Final EIA in promulgating Regulation 20 is also in violation of the Colorado APPCA.

<u>The Division's statutorily flawed Revised Final EIA, CBA, and RA render the Regulation 20 Rulemaking invalid.</u>

166. The Division failed to comply with the statutory requirements for preparing an EIA, CBA, and RA as required by the Colorado APPCA and the Colorado APA by failing to adequately present a cumulative expected cost of Regulation 20; failing to consider the costs of Regulation 20 on Colorado businesses and industry; failing to consider the effects of Regulation 20 on state revenues;f and failing to allow parties adequate time to review and comment on the Revised Final EIA.

167. Therefore, Regulation 20 is invalid pursuant to C.R.S. § 24-4-103(8.2)(a) and 24-4-106(7) as it was adopted in violation of the Colorado APA and the Colorado APPCA, and this Court should set aside Regulation 20 as unlawful.

FOURTH CLAIM FOR RELIEF
(Colorado Administrative Procedure Act)
(The Commission's Reliance on the Division's Statutorily Flawed and Invalid Revised Final EIA, CBA, and RA Render the Commission's Decision to Adopt Regulation 20 Arbitrary and Capricious in Violation of the Colorado APA)

168. CADA hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

169. The Colorado APA requires that courts set aside and hold unlawful any agency action that is "[a]rbitrary or capricious . . contrary to a constitutional right, power, privilege, or immunity . . . is an abuse or clearly unwarranted exercise of discretion . . [b]ased upon findings of fact that are clearly erroneous on the whole record," or is "[u]nsupported by the record as a whole." C.R.S. § 24-4-106(7).

<u>The Division's Revised Final EIA, CBA, and RA were unsupported by substantial evidence and contained findings that were clearly erroneous.</u>

170. The Division's Revised Final EIA, CBA, and RA are materially and significantly flawed, are unsupported by substantial evidence, and reach incorrect conclusions on the cost of implementing Regulation 20.

171. The Division's final projected costs and benefits of Regulation 20 in its Revised Final EIA, CBA, and RA ranged between a savings of $1,682 per vehicle and a cost of $494 per vehicle. This cost range was inaccurate and misleading.

a. The projected cost of $1,682 per vehicle was based on 2025 model year vehicle, whereas the net cost of $494 was based on a 2029 model year vehicle.

b. The Division used a model year 2025 vehicle on the low-end of its cost range and a model year 2029 vehicle on the high-end of its costs range. These model years present an unequal playing field because a model year 2029 experiences more fuel cost savings, as it is a more efficient vehicle to begin with, and benefits from a lower fuel usage over its lifetime. Had the Division wanted a true "high-end and low-end range" of the costs of regulation 20 it would have needed to use model years on both ends of the implementation period for Regulation 20, not two cherry-picked and non-representative model years.

c. The Division's "range" of costs thus arbitrarily reduced the stated high-end cost of a vehicle by using a non-representative model year, significantly understating the high-end cost of Regulation 20 to Coloradans in its Revised Final EIA, CBA, and RA. Further, the Division's range of costs did not present an accurate cumulative cost of Regulation 20 even if extrapolated out, as the model years used are not representative of full time period covered by Regulation 20.

d. The Division also created an inaccurate and misleading estimate of the cost of proposed Regulation 20 by including only two model years, model years 2025 and 2029 even though Regulation 20 goes into effect with model year 2022, in its analysis of the costs and benefits of Regulation 20. The only accurate way to determine the cumulative cost of Regulation 20 is to take the net cost for each model year vehicle and then create a weighted average.

172. The Division's estimated range of costs for proposed Regulation 20 its Revised Final EIA, CBA, and RA were not supported by substantial evidence and based on inaccurate assumptions. For example, the Division assumed a flat 3% increase in new vehicle sales growth through 2031 to reach its projected cost ranges, when credible research completed by Ford Motor Company has shown that it is more likely that sales will decrease in the range of 4 to 9.4%.

173. The Division relied on outdated documents and data in calculating the costs and benefits of Regulation 20.

a. The Division relied heavily on the Draft TAR published by EPA and NHTSA in 2016 to justify Regulation 20 in its Revised Final EIA, CBA, and RA. The Draft TAR had already been withdrawn by EPA and NHTSA as based on outdated information and data before the start of the Regulation 20 rulemaking proceedings. Further, EPA and NHTSA had already published an updated MTE that refuted and revised the

conclusions in the Draft TAR in April of 2018. The Division's conclusions on the costs and benefits of Regulation 20, drawn from the defunct Draft TAR, are not supported.

b. Further, in relying on the Draft TAR, the Division consistently ignored data and analyses submitted by CADA, including two separate economic analyses CADA submitted that refuted the Division's estimated cost of Regulation 20 that were based on the updated MTE analysis completed by EPA and NHTSA.

174. The Division claimed in its Revised Final EIA, CBA, and RA that Regulation 20 will reduce gasoline fuel sales in Colorado by "approximately 1.6 billion gallons," but then wholly failed to quantify and include the economic cost and impact of that reduction on Colorado tax revenues in its economic analyses.

a. Colorado taxed gasoline at 22 cents per gallon in 2018. Applying that rate to the 1.6 billion gallons of gasoline fuel sales that will be lost under Regulation 20 represents an additional $352 million in lost tax revenue that is not reflected in the Division's analyses that would otherwise be available to maintain and repair Colorado's infrastructure. The Division also failed to account for the 18.4 cents per gallon Federal gas tax, representing an additional $294 million in Federal taxes, that Colorado will lose out on through recouped Federal highway funds under Regulation 20.

175. The Division's Final Revised EIA, CBA, and RA also erroneously cited to and relied on a report by Synapse Energy to justify their cost benefit calculations for Regulation 20.

a. The report by Synapse Energy was based on assumption about electric vehicle penetration in Colorado, claiming that an electric vehicle program in conjunction with proposed Regulation 20 could add $72 million to Colorado's GDP. However, the Commission specifically excluded any proposals based on electric vehicle mandates from the Regulation 20 rulemaking in its August 24, 2018 Notice of Rulemaking.

176. The Division's Revised Final EIA, CBA, and RA were thus based on findings of fact that are clearly erroneous and unsupported by the administrative record as a whole, in violation of the Colorado APA.

The Commission's reliance on the Division's Revised Final EIA, CBA, and RA was arbitrary and capricious.

177. The Division's final cost estimate in its Revised Final EIA, CBA, and RA, represented a potential range of costs or benefits for Regulation 20 of $7.1 billion, and therefore failed to meet the statutory requirements for an EIA, CBA, or RA that the analyses provide the

anticipated, probable, or cumulative costs of Regulation 20 with some measure of certainty in violation of the Colorado APPCA and Colorado APA.

178. The Division failed in its Revised Final EIA, CBA, and RA to calculate the costs of Regulation 20 on Colorado consumers and businesses, failing to recognize or quantify the significant costs of Cross-Border Trading and Sales that proposed Regulation 20 will cause on Colorado dealerships in violation of "the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest" (C.R.S. § 24-4-101.5) and the statutory requirements for an EIA, CBA, and RA under the Colorado APPCA and APA.

179. The Division failed to comply with the statutory timeline and requirements for submitting a Final EIA under the Colorado APPCA, C.R.S. § 25-7-110.5(4), denying CADA its statutory right to have "adequate time" to review the Revised Final EIA in violation of the Colorado APPCA.

180. Finally, the Division's Revised Final EIA, CBA, and RA were unsupported by substantial evidence and were clearly erroneous and unsupported by the record as a whole under the Colorado APA. C.R.S. § 24-4-106(7)(b)(VIII).

181. Therefore, the Commission's reliance on the materially and statutorily flawed Revised Final EIA, CBA, and RA as a justification for promulgating Regulation 20 renders the Commission's decision to adopt Regulation 20 arbitrary and capricious, a denial of statutory right, not in accord with the procedures or procedural limitations of the Colorado APA, based upon findings of fact that are clearly erroneous, unsupported by substantial evidence, and otherwise contrary to law. C.R.S. § 24-4-106(7)(b).

FIFTH CLAIM FOR RELIEF

(Colorado Administrative Procedure Act and the Colorado Constitution)
(The Commission's Rigid Adherence to the Governor's Executive Order Violated the Separation of Powers Required by the Colorado Constitution and was Arbitrary and Capricious under the Colorado Administrative Procedure Act)

182. CADA hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

183. The Colorado APA requires that any agency, when a rulemaking is contemplated, "make diligent attempts to solicit input from representatives of each of the various stakeholder interests that may be affected positively or negatively by the proposed rules." C.R.S. § 24-4-103(2).

184. The Colorado APA requires that a court hold unlawful and set aside an agency action that is "[a]rbitrary or capricious," "contrary to constitutional right, power, privilege, or

immunity," "[a]n abuse or clearly unwarranted exercise of discretion," or "[o]therwise contrary to law." C.R.S. § 24-4-106(7)(b).

185. The Colorado Constitution holds that the "powers of the government of this state are divided into three distinct departments . . . and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." COLO CONST., art 3.

186. State agencies and commission "are creatures of statute and have 'only those powers expressly conferred by the legislature'." *Pawnee Well Users, Inc. v. Wolfe,* 320 P.3d 320, 326 (Colo. 2013) (citing *Hawes v. Colo. Div. of Ins.,* 65 P.3d 1008, 1016 (Colo. 2003)).

187. The Governor is not vested with legislative authority over motor vehicle emission controls under the Colorado Constitution. The Governor further does not have the authority to order the Commission to promulgate any particular regulation, nor to do so by a date certain or pursuant to a particular process.

188. Governor Hickenlooper's Executive Order unlawfully dictated a rulemaking process for the Regulation 20 Rulemaking, mandating that the Division develop, and the Commission promulgate, Regulation 20 on a truncated rulemaking schedule.

189. The Governor's Executive Order thus unlawfully directed that the Division and the Commission ignore their statutory obligation in order to meet deadlines the Governor had no authority to set.

190. Further, the Governor's Executive Order unlawfully directed the Division and the Commission to conduct a motor vehicle emission control rulemaking without completing the statutorily required motor vehicle emission control studies under C.R.S. § 25-7-130.

191. Commissioner and Hearing Officer Gerber twice denied motions by CADA to continue the rulemaking hearing to allow adequate time for the parties to consider data from related federal rulemakings, and to allow adequate time for parties to review and respond to the Division's multiple and changing EIAs, CBA, and RA submitted at the last minute during the Regulation 20 rulemaking proceedings.

192. Commissioner and Hearing Officer Gerber, at the October 19, 2018 prehearing conference, asserted that continuing the Regulation 20 Rulemaking hearing would not allow Regulation 20 to be adopted in compliance with the Governor's Executive Order which required adoption by December 30, 2018, conceding that the Commission believed it was compelled to comply with the Executive Order.

193. Commissioner and Hearing Officer Gerber allowed the Division to submit its Revised Final EIA and CBA just six business days and its RA just one business day before the deadline imposed by Commissioner Gerber to evaluate and respond to those submissions (and just days before the Regulation 20 rulemaking hearing), effectively removing CADA's and other

parties ability to effectively evaluate and respond to the Division's constantly changing analyses and effectively participate in the Regulation 20 rulemaking.

194. The Commission voted to adopt Regulation 20 after deliberating for approximately one hour after conclusion of the Regulation 20 Rulemaking Hearing, despite the substantial testimony by parties, industry groups, and expert witnesses, substantial public comment, and substantial administrative record spanning thousands of pages.

195. The Commission's adoption of Regulation 20 was done without any detailed findings or conclusions addressing the many arguments raising against Regulation 20, including the Division's and Commission's failure to conduct motor vehicle emission control studies as required by the Colorado APPCA, the many economic flaws pointed out in the Divisions economic analyses, and the statutory insufficiency of those analyses.

196. The Commission's adoption of Regulation 20 falls short of the requirement in the Colorado APA that the Commission give "a full consideration to the effects of the agency action" such that it could conclude the action would not "regulate or restrict the freedom of any person to conduct his or her affairs" and "use his or her property," and "would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state." C.R.S. § 24-4-101.5.

197. The Commission's rigid adherence to the truncated rulemaking schedule in the Governor's Executive Order indicated that the Commission was uninterested in its statutory duty to "solicit input" from affected parties to the rulemaking, and that the Commission had predetermined an outcome for the Regulation 20 rulemaking hearing based on the Governor's Executive Order. The Commission thus allowed the Governor's Executive Order to improperly dictate the rulemaking process for Regulation 20.

198. Therefore, the Governor's Executive Order violated the separation of powers required by Article 3 of the Colorado Constitution by unlawfully dictating the rulemaking schedule for the Regulation 20 rulemaking, and the Commission's rigid adherence to the Governor's Executive Order violated the Colorado Constitution and the Colorado APA, and the Commission's adoption of Regulation 20 was an arbitrary and capricious decision, contrary to constitutional right, and a clear abuse and unwarranted exercise of discretion under the Colorado APA.

PRAYER FOR RELIEF

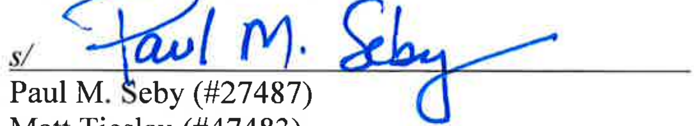
WHEREFORE, and for all of the reasons set forth herein, Plaintiff CADA request this Court to:

A. Hold unlawful, set aside, and enjoin enforcement of Regulation 20;

B. Grant any other such relief as this Court deems just and proper.

Respectfully submitted this 28th day of January, 2019.

GREENBERG TRAURIG, LLP



s/

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