

# Air Quality Control Commission Votes Down Cap and Trade

*Commissioners bristle at impact on market and low-income communities*

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State regulators on Feb. 19 rejected a request for the state to create a market-based mechanism to drive down greenhouse gas pollution from Colorado emitters. Without it, the fate of a legislative mandate to meet quantitative targets is left to Gov. Jared Polis' Greenhouse Gas Pollution Reduction Roadmap.

The Air Quality Control Commission chose to abide by a request from Polis that it set aside a petition from the Environmental Defense Fund to establish a cap-and-trade regulatory framework. Garry Kaufman, the director of the state's Air Quality Control Division, told commissioners during the hearing that the proposal is "very clearly at odds" with Polis' preferred approach for addressing greenhouse gas pollution and that AQCD would deem consideration of a rule to implement a cap-and-trade system "irresponsible."

Some commissioners appeared to recognize that — as Pam Kiely, EDF's senior director of regulatory strategy, said during the hearing — "Colorado needs a big program." "I think the long game here is that we're going to need to tap into this kind of system," said Jana Milford, a University of Colorado Boulder professor of mechanical engineering appointed to the AQCC by former Gov. John Hickenlooper in 2013.

The AQCC did not appear to focus on criticism of cap-and-trade programs leveled by Polis at the EDF proposal. The governor slammed it in a letter to the commission as likely to "risk shifting more pollution to communities that already bear the brunt of poor environmental quality."

Jonathan Skinner-Thompson, an associate clinical professor of environmental law at the University of Colorado Law School, explained that Polis' concern arises from a historical risk that some cap-and-trade systems will not ameliorate unequal pollution consequences in different communities. "Some of those programs could lead to hot spots of pollutants and some pretty dangerous co-pollutants like particulate matter, NOx, SO<sub>2</sub>, and hazardous air pollutants from some sources," he said, referring to types of non-greenhouse

gas pollutants. "The concern there is that those hot spots could be located in disparately-impacted communities, low-income communities, [and] communities where there are high concentrations of people of color."

EDF disputed Polis' assertion that the proposal would harm those already disparately affected by air pollution, pointing to specific provisions in the suggested cap-and-trade system to avoid those impacts. "Under no circumstances do we think this proposal is the only thing the state must do to advance climate justice," Kiely said.

Skinner-Thompson also said the EDF proposal for Colorado represented a meaningful effort to avoid such pollution impacts. "I really appreciate EDF's work on trying to address those concerns," he said. "It's good to

trade or market-based approach."

Polis also knocked the proposal as being likely to be "costly to administer" and "exceptionally complicated." Karen Sokol, an associate professor at Loyola University New Orleans College of Law, said the challenge involves assuring the market created by the program sends the desired economic signal. "It is extremely hard to design it in a way that it's going to account for all potential market uncertainties," she said. "The danger with air pollution is that you won't set the incentives in the right way — the price, your allowances — and it will result in a price that's too low and emissions that are too high."

Skinner-Thompson suggested the complexity does not necessarily mean a loss of efficiency. "I think that many advocates [in] industry

to make sense to me, as traditional command-and-control regulation is inherently inflexible, particularly with respect to air quality regulation and federal requirements prohibiting backsliding."

As for cost, Kaufman told commissioners the EDF proposal would require a "massive increase in division staff," perhaps by more than 40 full time-equivalent employees. But Skinner-Thompson said that, while Colorado's challenge in addressing climate change does need to consider budget and staffing constraints, AQCC might be downplaying a fiscal advantage of the EDF proposal. "I guess, in one sense, doing a sector-by-sector approach and sequential rulemakings has allowed [AQCC's] employees to focus on one sector at a time before moving on to the next," he said. "But I think that EDF's idea is that, 'well, you wouldn't have to do that sequential approach. You could just design one program and then enforce that and implement that one efficiently.'" Kiely took a different tack at the hearing, suggesting to commissioners that the market-based program cannot be assumed to be the more costly of the two options. "It is important to note at the outset that the state needs a robust regulatory agency regardless of which approach is taken," Kiely said.

Several commissioners pointed to the staffing concern as justification for their decision to vote against the request to commence a rulemaking process. "I recognize the division's hands are largely tied from a resources perspective," said Martha Rudolph, a former director of environmental programs at the Colorado Department of Public Health and Environment and former chairwoman of the Colorado Regional Air Quality Council. "This is probably the most complex rulemaking [petition] the division has ever seen." Chuck Grobe, a former Moffat County commissioner, said he agreed with that perspective. "It's such a heavy lift for the division right now," he said. Other AQCC members said that fixing the problem isn't within AQCD's power. "This is an issue for the governor and the legislature," said chairman Curtis

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see groups taking those concerns seriously and designing cap-and-trade programs that can help mitigate [them]." Skinner-Thompson said that he thought Polis might be resistant to the suggested cap-and-trade program because of the possibility that he would face blowback from critics of market-based approaches. "Right now, I suspect that many politicians are wary of market-based options," Skinner-Thompson said, pointing to the opposition to a potential nomination of California Air Resources Board chairwoman Mary Nichols to lead the Environmental Protection Agency in the Biden administration. "I would be curious to know whether any environmental justice groups or local community groups had come out publicly in favor of the EDF approach," he said. "I think that's one thing that would potentially sway the Polis administration and the government into maybe pursuing a cap-and-

[and] government believe, or at least recognize that, for adjusting greenhouse gases on their own, cap-and-trade or other market-based options like taxes or fees can be much more efficient than a sector-by-sector technology-based standard-setting process," he said.

Eric Waeckerlin, a partner at Brownstein Hyatt Farber Schreck, said one advantage of a cap-and-trade program is that, while indeed "complex," it also potentially offers quick responsiveness to actual pollutant impacts of industry. "What the program proponents would tell you is that there are inherent efficiencies in an economy-wide approach over a sector-by-sector approach because a cap and trade program takes a holistic approach and can be dialed down or up over time in reaction to real-time information and data about how the program is performing," he said in an email. "That seems

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Rueter, an executive at Noble Energy, Inc.

The vote to deny EDF's petition was 8-1, though one of the commissioners who voted no emphasized her belief that the AQCC urgently needs to do more to address greenhouse

gas emissions. "We are not keeping up with the climate crisis and more needs to be done," said Commissioner Elise Jones, a former Boulder County commissioner.

Kiely said she remains concerned that AQCC is not positioning itself to uphold binding greenhouse gas emission reduction goals included in a 2019 statute. "The legisla-

ture has spoken quite clearly about the need for the Air Quality Control Commission to adopt comprehensive regulations to achieve these binding targets," she said. "To us it is quite clear that the AQCC needs to act. We are less focused on whether the AQCC adopts our particular proposal or whether the AQCC actually adopts [other] regulations that are

capable of driving the quantifiable and enforceable reductions that are required under the law."

She explained that EDF has not yet decided whether to ask the General Assembly to push AQCC harder. "It wouldn't shock me if the legislature wanted to speak more forcefully than they already have," Kiely said. •

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