

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

On Petition for Writ of Certiorari from the Colorado
Court of Appeals, Opinion issued by Judge Fox,
(Judge Tow and Judge Yun concurring) Case No.
21CA2032;

Denver County District Court No. 20CV32320
Honorable Christopher J. Baumann, Judge

ENVIRONMENTAL DEFENSE FUND, Petitioner,

v.

COLORADO DEPARTMENT OF PUBLIC
HEALTH AND ENVIRONMENT, COLORADO
AIR QUALITY CONTROL COMMISSION, and
COLORADO AIR POLLUTION CONTROL
DIVISION, Respondents,

and

PUBLIC SERVICE COMPANY OF COLORADO,
Intervenor-Respondent.

Attorney for Amicus

Michael Foote, Reg. # 34358
Foote Law Firm, LLC
357 S. McCaslin Blvd., Suite 200
Louisville, CO 80027
(303) 519-2183
mfoote@footelawfirm.net

▲ COURT USE ONLY ▲

Case number: 2022SC947

**AMICUS BRIEF OF SENATOR DONOVAN IN SUPPORT OF
ENVIRONMENTAL DEFENSE FUND'S PETITION FOR WRIT OF
CERTIORARI**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This amicus brief complies with the applicable word limit set forth in C.A.R. 53(g).

It contains 2,096 words (does not exceed 3,150 words).

Additionally, this amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 53.

/s/ Michael Foote

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

INTRODUCTION1

IDENTITY AND INTEREST OF AMICUS CURIAE2

ARGUMENT.....2

 a. The plain language in Senator Donovan’s SB-96 required the AQCC to propose GHG abatement rules to meet the state’s GHG reduction goals ..3

 b. The plain language of the statute unambiguously conveys Senator Donovan’s intent.....5

CONCLUSION10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

Cases

<i>Env't Def. Fund v. Colo. Dep't of Pub. Health</i> , 2022 COA 130	1, 4, 6, 9, 10
<i>In re Marriage of Chalat</i> , 112 P.3d 47 (Colo. 2005)	7
<i>Mook v. Bd. of Cnty. Comm'rs</i> , 457 P.3d 568 (Colo. 2020)	6
<i>Nieto v. Clark's Mkt., Inc.</i> , 488 P.3d 1140 (Colo. 2021).....	6, 7
<i>People v. Benavidez</i> , 222 P.3d 391 (Colo. App. 2009)	9
<i>People v. Diaz</i> , 347 P.3d 621 (Colo. App. 2015).....	7
<i>People ex rel. Rein v. Meagher</i> , 465 P.3d 554 (Colo. 2020).....	9
<i>Smith v. Exec. Custom Homes, Inc.</i> , 230 P.3d 1186 (Colo. 2010).....	7

Statutes

C.R.S. § 24-75-112(1)(d)(I)	9
C.R.S. § 25-7-102(2)(a)	1
C.R.S. § 25-7-102(2)(b)	1
C.R.S. § 25-7-105(1)(e)(XI)(A)	8
C.R.S. § 25-7-140(2)(a)(I)	5, 8
C.R.S. § 25-7-140(2)(a)(III).....	<i>passim</i>

Other authorities

Senate Bill 19-096	<i>passim</i>
--------------------------	---------------

I. INTRODUCTION

The General Assembly has indicated climate change “adversely affects Colorado’s economy, air quality and public health, ecosystems, natural resources, and quality of life.” C.R.S. § 25-7-102(2)(a). It is a time sensitive challenge for a state “already experiencing harmful climate impacts[.]” C.R.S. § 25-7-102(2)(b). The General Assembly has passed several bills amending Colorado’s Air Pollution Prevention and Control Act, including Senate Bill 19-096 (“SB-96”), in an effort to mitigate climate change. Fulfilling those legislative directives, however, relies on executive action. Respondents have not fulfilled their statutory obligation to act by proposing regulations to reduce greenhouse gas (“GHG”) emissions as required by SB-96.

The Environmental Defense Fund’s petition for writ of certiorari centers around the interpretation of C.R.S. § 25-7-140(2)(a)(III), which was placed in statute by SB-96 and reads:

The commission shall...[b]y July 1, 2020, publish a notice of proposed rule-making that proposes rules to implement measures that would cost-effectively allow the state to meet its greenhouse gas emission reduction goals.

In *Env’t Def. Fund v. Colo. Dep’t of Pub. Health*, 2022 COA 130, a division of the Court of Appeals departed from the plain meaning of C.R.S. § 25-7-140(2)(a)(III) and effectively rewrote the provision to only require rules related to

the *collection* of GHG emissions data rather than rules that related to the *reduction* of GHG emissions. *Id.* at ¶ 25.

Senator Kerry Donovan, the Senate sponsor of SB-96, disagrees with the Court of Appeals interpretation. She encourages the Supreme Court to grant certiorari and read the single sentence of § 25-7-140(2)(a)(III) according to its plain meaning. The plain meaning of the provision can only reasonably be read to require GHG reduction rules, not GHG data collection rules.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Senator Donovan represented Senate District 5 from 2015 to 2022. Senate District 5 included Chaffee, Delta, Eagle, Gunnison, Hinsdale, Lake, and Pitkin Counties. Senator Donovan introduced several bills designed to avoid or mitigate the worst effects of climate change during her terms in the state Senate. One of those bills was SB-96. Senator Donovan was the prime sponsor of the bill in its chamber of introduction and responsible for its drafting, introduction, Senate passage, and Senate repassage after House amendments. She files this amicus brief in support of the Environmental Defense Fund's petition for certiorari to provide the Court with her insights regarding § 25-7-140(2)(a)(III), and to encourage the Court to grant certiorari on the matter.

III. ARGUMENT

- a. The plain language in Senator Donovan’s SB-96 required the AQCC to propose GHG abatement rules to meet the state’s GHG reduction goals.**

The Colorado General Assembly recognizes climate change poses a clear and present danger to the health and welfare of Colorado residents. It has passed several laws to address GHG emissions since 2019, including but not limited to SB-96. The General Assembly has also provided extensive additional funding to state agencies to assist their efforts in carrying out legislative directives, including funding for three additional full-time positions within the Colorado Department of Public Health and Environment (“CDPHE”) in SB-96.¹

Senator Donovan represented Senate District 5 from 2015 to 2022. She served four years on the Vail Town Council prior to her service in the Senate. All of the counties in Senator Donovan’s district have already felt the effects of climate change, with average temperatures in several counties rising faster than much of the rest of Colorado and destructive wildfires eclipsing previous records. The ski and agricultural industries in the district stand to suffer even more in the near future without a significant reduction of GHG emissions to mitigate of the effects of climate change. Senator Donovan’s constituents were keenly aware of the issue and

¹ Legislative Council Staff, “Final Fiscal Note” August 8, 2019, available at: https://docs.google.com/viewer?url=http%3A%2F%2Fleg.colorado.gov%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2F2019A%2Fbills%2Ffn%2F2019a_sb096_fl.pdf

consistently encouraged her to support and pass laws to both measure and lower GHG emissions. That is why she conceived, drafted, introduced, and was the prime sponsor of SB-96.

SB-96 had three separate and distinct purposes. It required the Air Quality Control Commission (“AQCC”) to: (1) adopt rules by June 1, 2020 related to the collection and reporting of GHG emissions data; (2) direct the CDPHE’s Air Pollution Control Division to update its statewide GHG emissions inventory every two years; and (3) propose rules by July 1, 2020 to meet the state’s 2025, 2030, and 2050 GHG emission reduction goals. That final provision is at issue in the present case.

The disputed provision of SB-96 added C.R.S. § 25-7-140(2)(a)(III). That section requires the AQCC to “[b]y July 1, 2020, publish a notice of proposed rule-making that proposes rules to implement measures that would cost-effectively allow the state to meet its greenhouse gas emission reduction goals.” A division of the Court of Appeals held that provision only “requires the Commission to propose rules that implement measures – meaning more than one measure – *related to data collection and the corresponding statewide inventories.*” *Env’t Def. Fund* at ¶ 25 (emphasis added).

Senator Donovan disagrees with the Court of Appeals’ interpretation of C.R.S. § 25-7-140(2)(a)(III). By its plain terms, that subparagraph of her bill does

not require rules to be proposed for data collection. That was the purpose of a previous subparagraph of the bill, enacted as C.R.S. § 25-7-140(2)(a)(I). Rather, § 25-7-140(2)(a)(III) requires the AQCC to propose rules that would result in the state meeting its GHG emission reduction goals – in other words, for the AQCC to do precisely what a plain meaning reading of the provision says it must do.

b. The plain language of the statute unambiguously conveys Senator Donovan’s intent.

Senator Donovan clearly could have drafted § 25-7-140(2)(a)(III) to require rules solely related to GHG data collection had that been her intent. For example, the section could have read “by July 1, 2020, promulgate rules related to GHG emissions data collection and corresponding statewide inventories” or “by July 1, 2020, publish notice of proposed rule-making related to GHG emissions data and corresponding statewide inventories” if she wanted. But that would have been duplicative of § 25-7-140(2)(a)(I), which does, in fact, require the promulgation of rules related to GHG data collection. Instead, § 25-7-140(2)(a)(III) was drafted, introduced, and unamended before final passage with the purpose of requiring proposed regulations to reduce GHG emissions.² Senator Donovan purposely chose

² The different versions of the bill can be found on the General Assembly’s webpage for the bill, available at: <http://leg.colorado.gov/bills/sb19-096>. See e.g., SB-96 Introduced version, p. 5 ln. 4-7, available [here](#); SB-96 Reengrossed version, p. 5 ln. 5-8, available [here](#); and SB-96 Signed Act, p. 3, available [here](#).

the language of § 25-7-140(2)(a)(III) as an aggressive but achievable deadline for the publication of a notice of proposed emissions reduction rules because directives without deadlines often lead to inadequate progress. That concern has turned out to be well-founded in this instance. The AQCC still has not noticed proposed rules sufficient to meet the state’s GHG emission reductions mandates, over three years since the passage of SB-96 and two years after SB-96’s July 1, 2020 deadline for the proposal(s). The Air Pollution Control Division’s August 2022 report to the AQCC indicated GHG emissions reductions are not projected to meet the state’s 2025 mandate.³ See C.R.S. § 25-7-102(2)(g) (26% GHG emissions reduction from 2005 baseline required by 2025). Indeed, the Agency Respondents stipulated they have not proposed rules or promulgated regulations sufficient to meet the state’s GHG emission reduction goals. *Env’t Def. Fund* at ¶ 10.

Questions of statutory interpretation are subject to de novo review. *Mook v. Bd. of Cnty. Comm’rs*, 457 P.3d 568, 574 (Colo. 2020). When interpreting a statute, a court seeks to ascertain and effectuate the legislature’s intent. *Nieto v. Clark’s Mkt.*,

³ Colorado Air Pollution Control Division, “Greenhouse Gas Reduction Goals Progress Report to Air Quality Control Commission – August 2022,” at 21-22. Available at: <https://drive.google.com/drive/folders/1HDQVvevAfEtJiNewa5u3MOhz-15749G9>. See also Michael Booth, “Colorado is falling behind on its mandate to cut greenhouse gases,” *Colorado Sun*, September 19, 2022. Available at: <https://coloradosun.com/2022/09/19/colorado-failing-greenhouse-gas-air-pollution-goals/>.

Inc., 488 P.3d 1140, 1143 (Colo. 2021). To do so, "we look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary meanings." *Id.* Courts "look first to the plain language of the statute, giving the language its commonly accepted and understood meaning." *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo. 2010) (citations omitted). Where the statutory language at issue is unambiguous, the court must apply it "as written." *Nieto* at 1143.

Statutory language is unambiguous if it is susceptible of only one reasonable interpretation. *People v. Diaz*, 347 P.3d 621, 624 (Colo. App. 2015). "If the statute is clear and unambiguous on its face, then we will apply the statute as written, because it may be presumed that the General Assembly meant what it clearly said." *In re Marriage of Chalat*, 112 P.3d 47, 54 (Colo. 2005) (quotations and citations omitted).

The language in § 25-7-140(2)(a)(III) is unambiguous and consistent with Senator Donovan's intent in drafting the provision. Observations further supporting a plain language reading of the provision include:

- The clause requiring the "rules to implement measures . . . to meet [the state's] greenhouse gas emission reduction goals" refers to actions to reduce – not collect data about – GHG emissions;

- The “cost-effectively allow the state to meet its greenhouse gas emission reduction goals” clause of the provision does not describe cost-effective data collection rules, but instead cost-effective rules that meet the state’s GHG emission reduction goals, which is consistent with the definition of “cost-effective” elsewhere in the Act. C.R.S. § 25-7-105(1)(e)(XI)(A);
- The “allow the state to meet its greenhouse gas emission reduction goals” clause also does not specify GHG data collection goals, but rather the state’s GHG emission reduction goals;
- Rules that "allow the state to meet" the GHG reduction goals does not mean rules to allow the state to meet its data collection requirements, or else the provision would have indicated such a directive;
- Because SB-96 already included a June 1, 2020 deadline for the AQCC to adopt GHG monitoring and data reporting rules in § 25-7-140(2)(a)(I),⁴ it was erroneous for the Court of Appeals to find § 25-7-140(2)(a)(III) was directed toward the same purpose particularly due to its plain wording to the contrary. These two separate provisions with separate deadlines and distinct mandates cannot reasonably be read as a single data collection requirement; and

⁴ The General Assembly subsequently repealed the June 1, 2020 deadline language in C.R.S. § 25-7-140(2)(a)(I) after the deadline passed. 2021 Colo. Sess. Laws. Ch. 411, p. 2749 § 17 (H.B. 21-1266).

- The Court of Appeals decided reading § 25-7-140(2)(a)(III) as requiring the development of proposed GHG reduction rules “in a mere thirteen months” would be absurd. *Env’t Def. Fund* at ¶ 27. However, the General Assembly was confronting an urgent task, and it approved an appropriation for three additional full-time employees – equivalent to over 6,000 person-hours annually – to write proposed GHG reduction rules as required by § 25-7-140(2)(a)(III).⁵ It would be unreasonable to assume three employees working over 6,000 hours annually would only be tasked with writing GHG data collection rules.⁶

“[I]n interpreting a statute, we must accept the General Assembly’s choice of language and not add or imply words that simply are not there.” *People v. Benavidez*, 222 P.3d 391, 394 (Colo. App. 2009); *see also People ex rel. Rein v. Meagher*, 465 P.3d 554, 560 (Colo. 2020) (courts do not add or subtract words when interpreting legislation). However, that is what the Court of Appeals did in this case when it departed from the statute’s plain language and mistakenly interpreted C.R.S. § 25-7-140(2)(a)(III) to apply only to rules related to data collection and GHG

⁵ One full-time equivalent (“FTE”) employee is the budgetary equivalent of at least 2,080 hours of work per year with adjustments for paid leave. C.R.S. § 24-75-112(1)(d)(I) (2022).

⁶ Specifically, the General Assembly funded 3.1 FTE positions in fiscal year 2019-2020 and 3.4 FTE positions in fiscal year 2020-2021. Legislative Council Staff, “Final Fiscal Note,” *see note 1, supra*.

inventories. *Env't Def. Fund* at ¶ 25. The Court of Appeals effectively legislated a new § 25-7-140(2)(a)(III) instead of enforcing the § 25-7-140(2)(a)(III) Senator Donovan drafted and the General Assembly passed.

IV. CONCLUSION

The General Assembly, with the Governor's signature, enacted § 25-7-140(2)(a)(III) as drafted by Senator Donovan in SB-96. She disagrees with the Court of Appeals interpretation of that provision. For the reasons outlined in this amicus brief in support of the petition for certiorari, Senator Donovan encourages the Court to grant certiorari in this matter.

Respectfully submitted on this 5th day of January, 2023, by:

/s/ Michael Foote
Michael Foote, Reg. #34358
Foote Law Firm, LLC
Attorney for Amicus Curiae
Senator Kerry Donovan

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of January, 2023, a true and correct copy of this **AMICUS BRIEF OF SENATOR DONOVAN IN SUPPORT OF ENVIRONMENTAL DEFENSE FUND'S PETITION FOR WRIT OF CERTIORARI** was filed via the Colorado courts e-filing system and served to the following parties via the e-filing system and e-mail:

Attorney for Petitioner:

Reed Zars, Reg. #17627

Attorney at Law

910 Kearney St.

Laramie, WY 82080

E-mail: reed@zarslaw.com

Attorneys for Agency Respondent:

Thomas A. Roan, Reg. #30867, First Assistant Attorney General

David Beckstrom, Reg. #44981, Assistant Attorney General

1300 Broadway, 7th Floor

Denver, CO 80203

E-mail: tom.roan@coag.gov

E-mail: david.beckstrom@coag.gov

Attorneys for Intervenor-Respondent Public Service Company of Colorado:

Franz Hardy, Esq., Reg. #32286

Stephanie S. Brizel, Esq., Reg. #50827

GORDON REES SCULLY MANSUKHANI, LLP

555 Seventeenth Street, Suite 3400

Denver, CO 80202

E-mail: fhardy@grsm.com

E-Mail: sbrizel@grsm.com

Matthew S. Larson, Esq., Reg. #41305

WILKINSON BARKER KNAUER, LLP

2138 West Thirty-Second Avenue, Suite 300

Denver, CO 80211

Email: MLarson@wbklaw.com

/s/ Michael Foote