



February 23, 2021

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**RE: CDPHE Memo Rule 10-01 is Used to Illegally Exempt Sources of Air Pollution from Demonstrating Compliance with the National Ambient Air Quality Standards, Endangering Public Health and the Environment in Colorado**

Dear Executive Director Ryan:

On September 10, 2020, Public Employees for Environmental Responsibility (PEER), the Center for Biological Diversity (the Center), and a coalition of environmental groups sent you a letter discussing the negative impacts that CDPHE's PS Memo 10-01 is having on the public health and welfare of Colorado's citizens by allowing minor sources with nitrogen oxides (NO<sub>2</sub>) and sulfur dioxide (SO<sub>2</sub>) air pollution emissions below a threshold of 40 tons per year to be exempted from the requirement of demonstrating compliance with the 1-hr NO<sub>2</sub> and 1-hr SO<sub>2</sub> National Ambient Air Quality Standards (NAAQS).

In that letter, we requested the repeal of the memo and provided several arguments, both legal<sup>1</sup> and technical, to support our petition, and we provided an example of an actual case, the Sandridge Exploration and Production LLC Bighorn Pad facility, which received an air permit from CDPHE under the umbrella of PS Memo 10-01, without any prior demonstration of compliance with the 1-hr NO<sub>2</sub> NAAQS, but which resulted in a violation of this standard when it was modeled by CDPHE's own staff, and confirmed by an independent air quality modeling expert.

Since that time, you have not repealed PS Memo 10-01. Quite to the contrary, CDPHE's Air Pollution Control Division has issued dozens of air pollution permits in violation of the Clean Air Act's core requirement that permits cannot be issued unless the polluter demonstrates that they will not cause or contribute to a violation of a national ambient air quality standard. This

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<sup>1</sup> PS Memo 10-01 violates the Administrative Procedure Act C.R.S. Title 24, Article 4; and Colorado Reg.3, Part B, §III.D.1, §III.B.5, and §III.F.1.

would be a horrible outcome during any period of time, but it is even worse during the COVID 19 pandemic. The available science concludes that pollutants like NO<sub>2</sub>, as well as particulate matter and ozone, which NO<sub>2</sub> contributes to, cause worse health outcomes from COVID 19.

We are writing to you again to provide further and more compelling evidence that the PS Memo 10-01 is ineffective in protecting the 1-hr NO<sub>2</sub> NAAQS, especially in the ozone nonattainment area, in which thousands of individual NO<sub>2</sub> sources are already in operation emitting significant amounts of this ozone precursor.

On December 22, 2020, CDPHE's Air Pollution Control Division issued a public notice indicating that it had made a preliminary determination of approval of the air permit application for the JBS Swift Beef Company, located in Greeley, Weld County, CO.<sup>2</sup> In the documents that were made available to the public during the 30-day comment period, there was no information referencing any NAAQS compliance analysis, and yet CDPHE had determined that the application should be approved and the permit should be issued because it believes PS Memo 10-01 trumps public health and the law.

The Center hired an independent air quality modeling expert to conduct a 1-hr NO<sub>2</sub> modeling analysis and determine whether the JBS Swift Beef Company facility can cause and contribute to 1-hr NO<sub>2</sub> NAAQS. This modeling was conducted with emissions information from the corresponding APENs that are publicly available in CDPHE's website<sup>3</sup> and with meteorological data and background concentrations provided by the Air Pollution Control Division. The results show violations of the 1-hr NO<sub>2</sub> NAAQS with values as high as 122.55 ppb (230.56 µg/m<sup>3</sup>). This exceeds the corresponding NAAQS of 100 ppb (188.14 µg/m<sup>3</sup>). The modeling report is enclosed with this letter.<sup>4</sup> As the modeling report explains, due to limited time and data,<sup>5</sup> our modeling very likely underestimated the impacts from the permitted facility. For example, our modeling did not include four emission points at the facility because we did not have relevant information to plug those emission points into the modeling.

The modeling shows the violations of the 1-hr NO<sub>2</sub> NAAQS occur in an area where there is a mobile home park as well as a bridge that is often used for shelter for people experiencing homelessness. These are the most vulnerable amongst us who CDPHE should be working to protect. Instead, CDPHE allows pollution to be illegally dumped on them, exacerbating the effects of COVID-19 which has already disproportionately impacted their communities.

The key point is the NO<sub>2</sub> emissions from the JBS Swift Beef Company facility are only 33 tons per year, below the PS Memo 10-01 threshold of 40 tons per year.

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<sup>2</sup> <https://cdphe.colorado.gov/apens-and-air-permits/air-permit-public-notice>

<sup>3</sup> <https://oitco.hylandcloud.com/CDPHERMPublicAccess/index.html>

<sup>4</sup> *Attached*, Air Dispersion Modeling Analysis for Verifying Compliance with the One-Hour NO<sub>2</sub> NAAQS: JBS Swift Beef Company Greeley, Colorado.

<sup>5</sup> The Air Pollution Control Division did not require the permittee to conduct its own modeling.

PS Memo 10-01 has been in effect for over a decade now, and while it is officially a non-binding guidance document, in practice the Air Pollution Control Division has treated it with the full force and effect of a rule. The consequence has been an unfettered growth of ozone precursor emissions, causing the Denver-North Front Range ozone nonattainment area to go from a designation of “Marginal” nonattainment in 2012 for the 2008 ozone NAAQS<sup>6</sup>, to a designation of “Serious” nonattainment in 2020 and clearly headed to a designation of “Severe.”<sup>7</sup>

Specifically, the deadline for the Denver-North Front Range area to comply with the 2008 ozone NAAQS is July 20, 2021, but the compliance assessment is based on monitored data from the 2018-2020 period. Monitoring results<sup>8</sup> show that the standard will not be met and that Colorado’s nonattainment area will be downgraded to “severe” nonattainment as soon as the U.S. Environmental Protection Agency (EPA) gets around to taking action on this matter. This rapid deterioration of air quality in Colorado could have been prevented, or at least slowed down, if policies like the PS Memo 10-01 had not been in place.

Minor sources continue to be rapidly and carelessly permitted without verification of NAAQS compliance for NO<sub>2</sub>, one of the two main ozone precursors. We believe that if the 1-hr NO<sub>2</sub> NAAQS had been enforced since its promulgation in 2010, the ozone situation in the Denver-North Front Range would be different. For a full decade, none of the ozone reduction strategies implemented by CDPHE have worked, in part because minor sources continue to be permitted in overwhelming quantities.

CDPHE has the authority and the obligation to reject permit applications if NAAQS compliance cannot be demonstrated.<sup>9</sup> It is at the core of the Clean Air Act to ensure that new industrial activity will not interfere with the attainment and maintenance of the NAAQS, and it is CDPHE’s responsibility to ensure that its air permitting program accomplishes that objective.<sup>10</sup> This opinion has been shared by the EPA for decades, as clearly spelled out in the enclosed letter<sup>11</sup> sent by EPA Region III to the Virginia Department of Environmental Quality (Virginia DEQ).

In this letter, EPA discusses concerns about the negative impacts of permitting many sources in a limited geographical area that is close to an ozone nonattainment area and to a protected Class I area, and it indicates that *“The Clean Air Act requires that air quality analyses be performed to assess the impact of emissions from any new facility, whether major or minor, to insure protection of the National Ambient Air Quality Standards (NAAQS)...”*

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<sup>6</sup> <https://archive.epa.gov/ozonedesignations/web/html/region8f.html>

<sup>7</sup> <https://cdphe.colorado.gov/ozone-planning-information-for-industry>

<sup>8</sup> [https://www.colorado.gov/airquality/html\\_resources/ozone\\_summary\\_table.pdf](https://www.colorado.gov/airquality/html_resources/ozone_summary_table.pdf)

<sup>9</sup> Colorado Reg.3, Part B, §III.F.1. *“If the Division determines that a source cannot comply with the provisions of Part B, Section III.D., of this regulation, the Division shall issue its written denial of the permit application stating the reasons for such denial.”*

Colorado Reg.3, Part B, §III.D.1.c *“...the Division shall grant the permit if it finds that: ... The proposed source or activity will not cause an exceedance of any National Ambient Air Quality Standards;”*

<sup>10</sup> Section 110(a)(2)(C) of the CAA, and 40 CFR § 51.160 through §51.166.

<sup>11</sup> Letter from W. Michael McCabe, EPA Region III Administrator, to John Paul Woodley, Virginia Secretary of Natural Resources, attached.

EPA not only reminded Virginia DEQ of the obligations imposed by the Clean Air Act, but issued specific instructions on how the state agency should proceed to meet its obligations:

*“I am requesting that the Commonwealth take the following steps to ensure against unacceptable environmental impacts. First, the cumulative environmental impacts of these plants must be assessed regardless of their major or minor status to ensure that individually and collectively they do not cause or contribute to a violation of the NAAQS and applicable PSD increments. The DEQ should use all credible information available in making this assessment, including ambient monitoring data and modeling analyses.”*

The situation described in the EPA letter is not different from the situation that we are experiencing in the Denver-North Front Range ozone nonattainment area and its proximity to the Rocky Mountain National Park. The negative impacts on air quality of a decade of unlawfully permitting many sources in a limited geographical area is evident, and the solution, as outlined by EPA, is to assess all sources, regardless of their major or minor source status, to ensure that both individually and collectively, they don't cause or contribute to violations of the 1-hr NO<sub>2</sub> NAAQS.

Because of PS Memo 10-01, there are hundreds, if not thousands of sources that have received their air permits from CDPHE while causing violations to the 1-hr NO<sub>2</sub> NAAQS, perpetuating and aggravating the ozone problem. The agency in charge of protecting human health and the environment should not knowingly continue to operate with a policy that has resulted in exposing a large portion of the state population living and working in the nonattainment area to unsafe levels of air pollution.

**We respectfully request again that you reconsider CDPHE's policy of unlawfully exempting minor sources from the legal obligation to demonstrate compliance with all applicable NAAQS prior to obtaining an air permit and revoke PS Memo 10-01 immediately.**

Sincerely,

Chandra Rosenthal

Kevin Bell

cc:

Clean Air Coalition Members

Regional Administrator Deborah Thomas, EPA Region 8

Attorney General Phil Weiser

Senator Chris Hansen

Representative Stephen Woodrow

Attachments with email:

Clean air coalition letter to Director Jill Hunsaker Ryan requesting repeal of Memo 10-01, September 10, 2020.

Letter from Regional Administrator W. Michael McCabe, EPA Region III, to The Honorable John Paul Woodley, Secretary of Natural Resources of Virginia.

Air Dispersion Modeling Analysis for Verifying Compliance with the One-Hour NO<sub>2</sub> NAAQS: JBS Swift Beef Company Greeley, Colorado, Lindsey Meyers, February 2, 2021.