



Regional Administrator KC Becker
Environmental Protection Agency
Region 8
1595 Wynkoop St.
Denver, CO 80202-1129

November 11, 2022

Dear Regional Administrator Becker,

I am writing to request a meeting with you to discuss the U.S. Environmental Protection Agency's (EPA) next steps regarding the Colorado Department of Public Health and the Environment's (CDPHE) October 21, 2022, response to EPA's July 2022 report, *EPA Region 8 Review of Issues Raised in PEER Complaint Concerning New Source Review Permitting by the Colorado Department of Public Health and Environment*.

In the July report, the EPA confirmed complaints by three air modelers that the CDPHE has failed to implement the Minor NSR permitting program in accordance with the requirements of the corresponding EPA-approved SIP, thus allowing the illegal release of deadly ozone precursors in areas already out of compliance with federal standards. EPA made recommendations to the state, asking it to address the findings in the report and asked the state to respond to the recommendations by October 21st.

Upon reviewing the October 21, 2022, CDPHE-APCD response, it is clear that the state is not taking EPA's recommendations seriously. We hope to meet with you to discuss our concerns and understand how you plan to address the public health implications of CDPHE's inactions on EPA's recommendations

Without enforceable direction from EPA, the APCD will continue to issue permits that do not meet the requirements of the CAA. For example, please see the attached minor source permit issued on October 4, 2022, to the Polar Service Center. The facility, located in the overburdened community of Commerce City, has applied for a permit. The APCD once again failed to conduct and include in the permit documentation a verification of compliance with the NAAQS prior to issuing the permit. See the attached November 4, 2022, District Court filing by the Center for Biological Diversity.¹

Based on its response to EPA, the CDPHE appears uninterested in working with EPA to address the issues in its permitting process. The state has known for many years about the 11 illegal permits that the whistleblowers presented as examples and yet has done nothing. The issues were raised internally first by the modelers, and then publicly in the OIG complaint filed in March 2021. Now that EPA has recommended that these permits be revised, the agency has said it will take another year to review the 11 permits. CDPHE continues to stall and is not prioritizing EPA's recommendations.

¹ The Center for Biological Diversity claims that the agency's failure to establish that the facility will not cause or contribute to any national ambient air quality standards is arbitrary and capricious.

The 11 permits the whistleblowers identified were just a sampling intended to show the larger pattern of faulty permitting in the state. However, CDPHE makes no mention of the thousands of permits issued over the years with the same failures. The agency has no plan to revisit these faulty, previously approved permits.

Then the agency goes further and attempts to shift the blame to EPA and says it does not think it has the authority to reopen the previously approved permits. Yet based on past interpretations of the CAA, if a facility that has already been permitted is found to be interfering with the attainment of the NAAQS, then the issue should be resolved by the regulating entity. Our concern is that CDPHE is not even attempting to discuss these problems with the corresponding companies and find a potential voluntary solution prior to resorting to any enforceable legal action that the agency could take. The mechanism to do that is through a source-specific SIP.

As we discussed with EPA in our meeting, the whistleblowers had discussed source-specific SIPs with their supervisors.² Everyone at APCD is aware of this option. EPA staff also indicated in our meeting that they were familiar with this procedure, agreed that it has been used in other states, and that it is an option in Colorado. From our perspective, we conclude that the state's failure to act on the permits puts the interest of the industry above the requirements of the CAA and public health.

The CDPHE continues to justify its actions with the years-old excuse that monitoring data show attainment with the NAAQS. In its response, CDPHE ignores the fact that the number of existing monitors in the state is very few and that their locations are completely outside of areas of high emissions-- such as areas where there is oil and gas activity and where most of the emissions and impacts take place. CDPHE uses a poorly designed monitoring network as an excuse to suggest that there are no air quality problems but offers no steps to improve and expand the network to the most polluted areas.

In addition, the CDPHE is refusing to take responsibility for breaking larger projects into smaller ones for the purpose to circumvent the NAAQS compliance requirement and therefore offering no steps to correct this problem. The CDPHE whistleblowers provided several examples of multiple permits issued, sometimes on the same date, to individual sources within the same facility, hiding significant cumulative emissions and impacts under the concept that each individual permit has emissions below the threshold. Despite this evidence, CDPHE continues to claim that these actions are only administrative and continues to falsely claim that NAAQS compliance is required for the total emissions of the facility.

Consider the ongoing permitting of the Cripple Creek & Victor (CC&V) Mine, one of the permits identified in the OIG complaint, that has another draft permit in review (See attached October 28, 2022 draft permit) and is an example of this situation.

² Note that Bradley Rink, one of the original whistleblowers that filed the petition, took an early retirement after 23 years of public service. He has said that it was too frustrating for him to continue in his position at APCD. He was denied the opportunity to participate in the process of reforming the permitting program and saw little progress.

In this case, CDPHE continues to justify breaking up the original large project into two or more projects, continues to give credibility to modeling results that were tampered with, as proved by documentation provided in the OIG complaint filed in March 2021, and continues to use the deficient monitoring results to claim that the facility does not cause any air quality problems.³

Furthermore, recently, on October 28, 2022, the APCD issued a public notice indicating that the current air permit 98TE0545 for the CC&V Mine is being modified and reissued to include an increase in throughput and, consequently, an increase in emissions. See attached Modeling Report. The 09/23/22 modeling report made available to the public explains that a mistake was made when this permit was issued in 2020 and that it is now being updated (i.e., reopened) to correct the throughput limit.

In short, CDPHE has told EPA in the October 21, 2022, letter that it does not have the authority to reopen previously issued permits when a correction is needed to address a NAAQS compliance deficiency that might force the companies to reduce their emissions, but then just a week later, on October 28, 2022, CDPHE is contradicting itself. CDPHE is now notifying the public that it will reopen the previously issued permit 98TE0545 for the CC&V Mine to address a mistake with the throughput limits that will allow the company to increase its throughput and its emissions.

At the same time that CDPHE is reopening the CC&V permit, allegedly without the authority to do so, it is also failing to address the issues identified in the OIG complaint filed in March 2021. The modeling report states that this particular correction is being made in the permit and the modeling analysis, but not the corrections flagged by PEER and EPA. The exact language in the report says:

“The response and any necessary remodeling with regards to the PEER/EPA comments on this facility will be provided in a separate modeling analysis memo. The purpose of this report is to evaluate the potential change in ambient air impacts, and how they compare with the NAAQS, as a result of making the identified amendment regarding the silo throughput.”

By doing this, CDPHE is prioritizing corrections in the permit that will benefit the CC&V mine. The agency is postponing, without any justification, the corrections that would enforce the NAAQS and benefit the health of the nearby population and the environment. CDPHE is also proving wrong its own argument that it does not have the authority to reopen a previously issued permit.

This modification to the CC&V permit is now being justified by arguing that the change in emissions in one silo will not change the modeled impacts for the entire mine from the 2018 permit. However, as EPA concluded in the July 2022 report, the 2018 NAAQS compliance demonstration for CC&V is flawed and needs to be revisited. Consequently, now in 2022, CDPHE is again issuing an illegal permit to CC&V by relying on the same flawed NAAQS

³ The monitor was placed near one of the five pits, seven years after the start of the project when that particular pit had already been mined and depleted, and the bulk of the mining activity was taking place several miles away at another pit in the opposite end of the mine.



compliance demonstration. There is no evidence in this 2022 permit documentation showing that the project will not interfere with the attainment or maintenance of the NAAQS.

In summary, CDPHE is offering insufficient steps to ensure that future permits will not contribute further to violations of the National Ambient Air Quality Standards. The proposed changes that CDPHE has suggested continue to leave the door open to the same abuses of authority and to the same pattern of disregarding air quality and public health and ignoring the total cumulative impact of the roughly 2,500 new permits it issues each year. Each permit issued makes attainment of ozone standards that much more difficult.

In our last meeting, EPA committed to following this issue closely and providing the state with guidance and support to address the issues. We urge the EPA to exercise its oversight authority and remedy these longstanding issues that are critical to public health and safety.

Sincerely,
Chandra

Chandra Rosenthal
Rocky Mountain Director

Cc:
EPA R8 Air Permitting and Monitoring Branch Manager Gail Fallon
EPA OIG Kevin Collins
CDPHE Director Jill Hunsaker-Ryan
Representative Diana DeGette
Attorney General Phil Weiser