

**DISTRICT COURT, DENVER COUNTY,
COLORADO**

1437 Bannock St.
Denver, CO 80202
(303) 606-2300

Plaintiffs: CENTER FOR BIOLOGICAL
DIVERSITY, COLORADO LATINO FORUM,
and SIERRA CLUB

v.

Defendant: COLORADO DEPARTMENT OF
PUBLIC HEALTH AND ENVIRONMENT,
AIR POLLUTION CONTROL DIVISION

and

Intervenor-Defendant: AMERICAN
PETROLEUM INSTITUTE COLORADO

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2021CV30886)

Division: 209

**BRIEF OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS
CENTER FOR BIOLOGICAL DIVERSITY, COLORADO LATINO FORUM,
AND SIERRA CLUB**

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with C.A.R. 28, 29, and 32, and C.R.C.P. 10, including formatting requirements in these rules. This brief contains 4295 words, and complies with C.A.R. 29 because it contains this certification, a concise statement of the identity and interest of the amicus curiae, and an argument in support of the Plaintiffs' position.

Respectfully submitted April 7th, 2023.

/s/ Joseph A. Salazar

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STATEMENT OF ISSUES

Public Employees for Environmental Responsibility (PEER) submits this amicus brief in support of the Plaintiffs, the Center for Biological Diversity, Colorado Latino Forum, and Sierra Club, who allege that the Colorado Department of Public Health and Environment (CDPHE) acted arbitrarily and capriciously by issuing minor source permits as General Permits 9, 10, and 11. As issued, these three permits can cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS) contrary to the Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101 et seq. and applicable regulations. Based on PEER's last ten years of work with CDPHE Air Pollution Control Division (APCD) employees, we seek to provide additional context regarding CDPHE's longstanding willful blindness to known deficiencies in the minor source permitting process, as well as provide information on how Michigan complied with the law in similar circumstances.

INTRODUCTION

As required by the Clean Air Act (CAA), the Environmental Protection Agency (EPA) has established health-based limits for six criteria pollutants, these are called the National Ambient Air Quality Standards (NAAQS). 42 U.S.C. §7409. Pursuant to the CAA, states develop State Implementation Plans (SIPs) with emission limits and control measures to achieve and maintain the NAAQS. 42 U.S.C. §§ 7407 (a), 7410 (a) (1)-(2). A key component of the state's air permit

program under the SIP are procedures and demonstrations to ensure that emissions will not interfere with the attainment of the national standards in the NAAQS.¹

In Colorado, EPA has delegated authority and responsibility under the CAA to the CDPHE. Colorado regulations address the requirements for construction permits for all air pollution sources, major and minor. 5 C.C.R. §1001-5, Regulation No. 3, Part B. Colorado law requires as a condition for issuing an air permit, that the proposed new facility or modification complies with the NAAQS. *Id.* at Part B, § III.D.1.c. The state requires that prior to issuing an air permit, the CDPHE prepare a Preliminary Analysis to determine if the proposed facility or modification will comply with the NAAQS. The regulations explain how to demonstrate compliance: “All estimates of ambient concentrations required under this Regulation Number 3 shall be based on the applicable air quality models, databases, and other requirements generally approved by U.S. EPA and specifically approved by the Division.” *Id.* Part A, § VIII.A.I. Finally, 5 C.C.R. §1001-5, Regulation No. 3, § III.F.1 indicates that failure to comply with the provisions of Part B § III.D.1 will result in a written denial of the permit.

¹ 40 C.F.R. §51.160(f) requires that the state program “discuss the air quality data and the dispersion or other air quality modeling use to meet the requirements of this subpart,” and requires that modeling performed must be based on the Guideline on Air Quality Models or an approved substitute; *see also* 40 C.F.R. Part 51, App W (Guideline on Air Quality Models).

However, for the vast majority of permits, CDPHE's has granted air permits without ensuring compliance with these legal requirements. This includes "streamlined" General Permits 9,10, and 11.

The data supports this. The CDPHE Air Permitting Dashboard shows that from 2016-2021, the APCD granted between 1,460 and 1,817 General Permits a year. CDPHE, [APCD Permitting Dashboard](https://cohealthviz.dphe.state.co.us/t/EnvironmentalProgramsPublic/views/PermitMetricsMay212020/APCDPermittingDashboard?%3Aiid=1&%3AisGuestRedirectFromVizportal=y&%3Aembed=y), (Last visited Apr. 7, 2023) <https://cohealthviz.dphe.state.co.us/t/EnvironmentalProgramsPublic/views/PermitMetricsMay212020/APCDPermittingDashboard?%3Aiid=1&%3AisGuestRedirectFromVizportal=y&%3Aembed=y>. A July 2021 internal CDPHE email states that between June 2016 through June 2021, CDPHE issued 11,626 permits and 1,332 permit modifications involving criteria pollutants. Email from Emmett Malone, Supervisor, Modeling and Emissions Inventory Unit, to Garry Kaufman, CDPHE, et al. (July 16, 2021, 09:29 MST) <https://peer.org/cpdhe-emails-pdf/>. That is in total about 2,592 permits per year. **During the five-year period, of all these permits, only 42 went through a NAAQS compliance verification.** Bradley Rink, DeVondria Reynolds, and Rosendo Majano, CDPHE Air Modeling Unit, Presentation to Regional Administrator KC Becker, EPA Region 8, "Implementation of the Minor Source Permitting Program in Colorado from 2010 – 2021" at 15 (Jan. 5, 2022), <https://peer.org/colorado-permitting-presentation-pdf/>. Thousands of air permits are being granted without compliance verification. Plaintiffs argue, and PEER agrees, that General Permits 9,10, and 11 exempt facilities from the regulatory

requirement of demonstrating compliance with the NAAQS for specific criteria pollutants.

INTEREST OF AMICUS CURIAE

PEER is a nonprofit environmental organization representing public employees who work to protect the environment. PEER has decades of experience supporting public employees in their anonymous advocacy to protect the environment and public resources that they are charged with protecting. PEER has a unique perspective on the issue of CDPHE air pollution permitting as we have been working for over ten years with multiple employees inside the agency—anonymous whistleblowers, and whistleblowers who decided to speak publicly. These CDPHE employees have reached out to us with their concerns about the implementation of the minor source air permitting program, CDPHE's failure to comply with the CAA and state law, and failure to ensure that permits do not cause or contribute to violations of the NAAQS, as well as the CDPHE's failure to enforce limits set in permits. These failures have serious implications for public health and the environment, and the Court must act to address the deficiencies in General Permits 9,10, and 11.

ARGUMENT

I. ACCORDING TO EMPLOYEE EXPERTS, CDPHE IS JEOPARDIZING PUBLIC HEALTH BY FAILING TO MEET THE REQUIREMENTS OF COLORADO CLEAN AIR REGULATION.

The act of whistleblowing can be risky and can result in employer retaliation against those who speak out. PEER encourages employees to remain anonymous as it is often the safest option. Therefore, in this brief we are maintaining employee confidentiality and have not named our anonymous clients and intakes.

CDPHE has a long history of disregarding the concerns of its own scientists and employees in its implementation of the CAA. Of all the Colorado state agencies that contact PEER, we hear more from Air Pollution Control Division employees than employees from any other agency.

In response to employee CAA concerns, PEER has engaged in countless exchanges and meetings with CDPHE, commented on multiple permitting actions, policy changes, working groups, and commissions. PEER has requested oversight on multiple state issues from EPA and the Governor. PEER has worked closely with multiple members of the legislature on employee's CAA concerns including Representative Diane DeGette, Senator Chris Hansen, and Representative Steven Woodrow. PEER has submitted open records requests to CDPHE to make its failures public, and we have worked to elevate the issues with multiple media outlets, through conversations, press releases, and op-eds.

Over the last two weeks, we reached out to the four anonymous employees referenced in this amicus to obtain their consent to cite to their work with us and receive their approval of how we characterized their concerns when they approached us.

A. First Employee Account

From approximately 4/2011 to 10/2012 PEER (Chandra Rosenthal) worked with an anonymous employee in the APCD Modeling, Meteorology, and Emission Inventory Unit (MMEIU) or “air modeling unit” who stated that the CDPHE was failing to ensure that air permits did not cause or contribute to the NAAQS.² When the employee first came to PEER, they let us know that EPA had recently established a new standard for nitrogen dioxide and APCD set a “completely arbitrary” threshold and told the staff that they should not model impacts from new emissions below this threshold to expedite permit issuance. See Primary National Ambient Air Quality Standards for Nitrogen Dioxide; Final Rule, 75 Fed. Reg. 6474 (Feb. 9, 2010) (to be codified at 40 C.F.R. Pts. 50 & 58),

<https://www.govinfo.gov/content/pkg/FR-2010-02-09/pdf/2010-1990.pdf>.

The employee also pointed out that while the 2008 draft General Permit 2 included specific language to require assessment of ambient air impacts (modeling) from new emission sources to ensure attainment with health standards set by the

² Since this time, the name of the MMEIU has since been changed to the Modeling Emission Inventory Unit (MEIU).

NAAQS, CDPHE removed this requirement when they finalized General Permit 2. The employee stated that CDPHE made this important change without providing the public an opportunity to comment.

The employee stated that the General Permit provides the public with no assurance that air pollution levels are within acceptable limits and circumvents Colorado's regulations and the protections established by the Clean Air Act and State Implementation Plans.

B. Second Employee Account

From approximately 1/2012 to 7/2012 PEER (Chandra Rosenthal) worked with an anonymous employee in the CDPHE APCD who stated that the APCD overlooked violations of air permits in violation of state regulations. PEER worked with this employee to file a complaint with the EPA which it investigated and resolved.

C. Third Employee Account

From approximately 4/2018 to 4/2019 PEER (Chandra Rosenthal) worked with an anonymous employee in the APCD who was concerned with the increasing ozone pollution and attributed it to CDPHE's failure to implement the CAA and failures in the permitting process. They informed us that the air modeling unit was not performing compliance demonstrations and not verifying that sources applying for air permits do not cause or contribute to a NAAQS violation.

The employee stated that the Reciprocating Internal Combustion Engines (RICE) General Permit (General Permit 2) is used to circumvent the requirement of demonstrating compliance with the one-hour nitrogen dioxide (NO₂) NAAQS. The employee stated that General Permit 6, also for RICE, is another “pre-approved permit” that does not require or allow for any analysis by CDPHE prior to approval. The employee stated that General Permit 6’s significant emission rates are arbitrary thresholds that are being used to exempt multiple engines from the requirement to demonstrate compliance with the NO₂ and carbon monoxide (CO) NAAQS. The employee was concerned because there are several hundreds of these engines at oil and gas facilities inside or near the Ozone non-attainment area and NO₂ and volatile organic compounds (VOC) are the main precursors of Ozone.

D. Fourth Employee Account

PEER represented three air scientist whistleblowers from the CDPHE air modeling unit. On March 30, 2021, the entire staff of the air modeling unit publicly filed a complaint with the EPA Office of Inspector General (OIG). Press Release, PEER, Colorado Orders Staff to Ignore Air Pollution Violations (Mar. 30, 2021), <https://peer.org/colorado-orders-staff-to-ignore-air-pollution-violations/> (linking to the employees’ Complaint to EPA and other materials). The state employees, Bradley Rink, DeVondria Reynolds, and Rosendo Majano brought forward the fact that CDPHE management prevented them from completing the demonstration (modeling) to determine whether minor source permits would cause or contribute to

a violation of the NAAQS in violation of the CAA. The employees identified eleven permits that CDPHE issued illegally as representative of the thousands of other permits issued by the CDPHE in the same manner.

E. Fifth Employee Account

In April of 2021, after seeing the whistleblower complaint in the press, PEER (Chandra Rosenthal) heard from another former air quality scientist and modeler from CDPHE. The former modeler said that at the time of their employment in the CDPHE air modeling unit, from 2016 until 2019, the agency was failing to ensure that sources applying for air permits did not cause or contribute to the NAAQS.

F. Consistent Staff Concerns Revealed by Open Records Requests

One example of the fact that there have been longstanding employee concerns that the permitting program is illegal is found in internal emails from 2012 that have been released to the public. In the email exchanges, the entire staff of the CDPHE air modeling unit at the time discussed how a proposed permit would likely fail to be protective of the NAAQS and should be modeled. CDPHE Project Notes, Project ID: 457-111116, Cherokee Power Plant – combined cycle turbine facility at 2, 5, 7–8 (2011), <https://peer.org/wp-content/uploads/2021/05/Cherokee-Documents.pdf> (CDPHE air scientist, Chuck Machovec states, “I believe an impact analysis is warranted . . . this management decision on a technical item is surprising and inconsistent with existing guidance, practices, and applicable rules.”); CDPHE air scientist Doris Young, says, in response to a management inquiry, that

for a facility of this size: “modeling for all NO2 NAAQS is warranted. . . . modeling for all CO NAAQS is warranted. . . . modeling for all PM10 NAAQS is warranted. . . . modeling for all PM2.5 NAAQS is warranted. . . . modeling for all SO2 NAAQS . . . is warranted.”; CDPHE staff Jackie Joyce says that without modeling “We cannot say in any response to comments that we know that the NAAQS will be met.”). The modelers raised the additional issues of the impact of pollution on the overburdened “environmental justice community” around Cherokee Power Plant and the fact that the area has “some of the worst air quality (Commerce City) in Colorado.” See id. at 3. Ultimately management made a deal with the facility owner to not require modeling, contrary to the expert opinions offered by staff and CDPHE issued the permit. Id. at 9. Note that these three employees; Doris Jung, Jackie Joyce, and Chuck Machovec, are an entirely different set of staff from those that raised the same type of concerns with the OIG more than ten years later.

G. Consistent News Reports of CDPHE Staff Statements

There are widespread public allegations that the state is failing to enforce air permit violations. See the article from 2019 in which Jeremy Murtaugh, a former APCD Air Pollution Inspector, speaks out against the state’s implementation of the pro-development political agenda in disregard of the CAA legal requirements.

Daniel Glick, [A former Colorado air quality inspector speaks out](https://www.coloradoindependent.com/2019/04/16/colorado-oil-gas-emissions-), Colo.

Independent, Apr. 16, 2019,

<https://www.coloradoindependent.com/2019/04/16/colorado-oil-gas-emissions->

[regulation/](#) (“Murtaugh says he wants people in the state to know that the reassurances they have received about the health department adequately overseeing oil and gas industry emissions have been overstated. ‘Nobody’s really looking’ to track the amounts – or the impacts – of different toxic air pollutants and climate-altering gases, he says, since there are many stages of oil and gas production that fall outside of meaningful regulation”). Colorado Newline chronicled the failings of the air permitting and permit enforcement program at CDPHE in an award-winning four-part series in 2021. See Chase Woodruff, [At Colorado’s tight-lipped air pollution agency, a ‘culture of fear’ prevails](#), Colo. Newline, Sep. 20, 2021, <https://coloradonewline.com/2021/09/20/colorados-air-pollution-agency-culture-fear/>; Chase Woodruff, [Smokescreen: Who killed ETRP, Colorado’s traffic-reducing climate rule?](#), Colo. Newline, Sep. 21, 2021, <https://coloradonewline.com/2021/09/21/smokescreen-killed-etrp-colorado-traffic-climate/>; Chase Woodruff, [Smokescreen: Are Colorado officials countering misinformation on smog — or hiding behind it?](#), Colo. Newline, Sep. 22, 2021, <https://coloradonewline.com/2021/09/22/smokescreen-are-colorado-officials-countering-misinformation-on-smog-or-hiding-behind-it/>; Chase Woodruff, [Smokescreen: Years of internal complaints suggest air agency’s favoritism toward polluters](#), Colo. Newline, Sep. 23, 2021, [11](https://coloradonewline.com/2021/09/23/smokescreen-whistleblower-complaints-</u></p></div><div data-bbox=)

[favoring-polluters-air-agency/](#). The articles included multiple APCD employee accounts of concerns with CDPHE's implementation of the CAA.

Taken together, these allegations and accounts strongly suggest that the leadership of the air permitting division within the CDPHE has been captured by industry interests and is failing to adhere to Colorado air regulations or enforce air permit violations. These accounts support Plaintiffs' position that to comply with the CAA, CDPHE must develop and implement a well-supported policy for ensuring that all minor sources do not emit pollution that cause exceedances of NAAQS. The Court can assist CDPHE in this work by invalidating the three General Permits at issue in this case.

II. EPA RESPONSE TO THE AIR MODELER WHISTLEBLOWERS' POSITION.

On July 14, 2021, EPA's regional office with oversight authority over CDPHE, Region 8, completed its investigation of the PEER whistleblower OIG complaint and issued a report supporting the whistleblower claims. EPA Region 8, Review of EPA's Office of Inspector General Hotline Complaint No. 2021-0188 (July 2022), https://www.epa.gov/system/files/documents/2022-07/EPA_Region8_CDPHE_NSR_Complaint_Report.pdf. EPA required that CDPHE remedy the eleven identified permits and demonstrate that the permits comply with the NAAQS. The state agency has not fully implemented EPA's recommendations, even now. CDPHE has had ample opportunity to ensure that minor source air permits comply with the NAAQS. CDPHE employees raised the issues with their

supervisors for years prior to filing the complaint. Yet as of March 3, 2023, the date of PEER's last conversation with CDPHE, the agency has not remedied these specific permits and still issues pre-approved permits through the General Permit program without prior compliance verification.

To our knowledge, and consistent with our clients' representation to us, there has never been modeling or a NAAQS compliance demonstration for a CDPHE General Permit, including the three at issue in this case.

III. MICHIGAN ELIMINATED A GENERAL PERMIT AFTER IT FOUND THAT IT DID NOT ASSURE COMPLIANCE WITH THE CRITERIA POLLUTANT STANDARDS.

One CDPHE employee raised the issue with agency supervisors that in 2010 the State of Michigan eliminated a general permit for diesel generators because Michigan's modeling studies found that the general permit is not protective of the NAAQS one-hour standard for NO₂. The employee urged CDPHE to do the same analysis and modeling to see if its own general air permits merited review or recission. Managers in the department refused to do so.

In a July 6, 2010, letter signed by the Air Quality Division Chief, the State of Michigan Department of Natural Resources and Environment (MDNRE)³ suspended its "General Permit to Install" for "Diesel Fuel-Fired Engine Generators" because the EPA had updated the NAAQS for NO₂ and a MDNRE modeling study

³ This agency has since been renamed to The Michigan Department of Environment, Great Lakes, and Energy (EGLE). EGLE, About Us, "History of the Department," <https://www.michigan.gov/egle/about>.

found that the existing general permit would no longer verify that sources would not exceed the one-hour NO₂ limit. Letter from G. Vinson Hellwig, MDNRE Air Quality Division Chief, to whom it may concern (July 6, 2010),

<https://peer.org/letter-permits-diesel-michigan-pdf/>. The agency explained its process and reasoning in this manner:

On January 22, 2010, the United States Environmental Protection Agency signed a final rule containing a new NAAQS for NO₂ based on a 1-hour averaging time. On April 12, 2010, 188 µg/m³ became effective as the 1-hour NAAQS for NO₂. The applicability criteria and special conditions in the general permit for generators have been re-evaluated to determine the impact of this new standard. **Dispersion modeling was done for a hypothetical generator to determine the maximum ambient 1-hour NO₂ impact.** A representative building and various stack parameters were used and the modeling assumed the generator stack to be an isolated facility with no other sources considered in the analysis. All alternative stacks showed a total impact to be above the 1-hour NO₂ NAAQS.

Id. (emphasis added). Because the general permit was no longer in compliance with state and federal law, as shown by the agency's expert modeling, "the general permit to install for diesel fuel-fired engine generators is being suspended from use at this time, until the applicability criteria and special conditions can be revised to ensure compliance with the new 1-hour NO₂ standard." Id. This letter goes on to state that until another general permit is issued on this topic the agency will issue such permits on a case-by-case basis. Id.

Nearly thirteen years have elapsed since Michigan's suspension of its general permit and to PEER's knowledge this general permit has not been reinstated.

Currently the Michigan Department of Environment, Great Lakes, and Energy

(EGLE) website says in reference to the general permit for Diesel Fuel-Fired Engine Generators with Maximum Capacity of Five Megawatts (5 MW):

This General [Permit to Install (PTI)] is not being revised at this time. As of July 6, 2010, the General PTI for diesel fuel-fired generators is suspended from use due to the new federal National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO₂). Installation of a new diesel fuel-fired generator will require a case-by-case PTI.

EGLE, Air Quality General Permits to Install (PTI), “Diesel Fuel-Fired Engine Generators with Maximum Capacity of Five Megawatts (5 MW),”

<https://www.michigan.gov/egle/about/organization/Air-Quality/air-permits/new-source-review/general-permits> (underline in original, hyperlink).

Unlike Michigan, CDPHE has not completed a hypothetical dispersion study for any of its general permits and has not proven that the general permits at issue in this case will protect the NAAQS.

Compliance with the NAAQS depends on many other factors besides the emission rate. Models consider factors such as the topography, meteorology, the existence of other nearby facilities emitting the same pollutants and having a cumulative effect, and the height of the stacks. Setting an arbitrary threshold for a general permit does not take into account those factors.

Michigan is able to continue issuing permits on a case-by-case basis that ensures compliance with the NAAQS and grant permittees’ need for electricity generators. This example shows that CDPHE can eliminate the General Permits and still issue permits case-by-case and include individualized analysis that

demonstrate that the permits will not cause or contribute to a violation of the NAAQS. Case-by-case permits can also be fashioned with controls and limits to better assure that NAAQS are met, and facilities do not emit so much as to rise to major source status.

Michigan's example demonstrates that CDPHE's lack of modeling and assessment for General Permits is not a standard practice and that the agency should follow the lead of EGLE and complete "hypothetical facility dispersion models" to assure that General Permits could never violate the NAAQS. In the alternative CDPHE can choose to eliminate the General Permits because one size often does not fit all, and CDPHE's expert staff can administer minor permits on a case-by-case basis in a way that does not violate the NAAQS or fail to put meaningful guard rails on facilities.

CONCLUSION

For the reasons stated above, this Court should invalidate General Permits 9, 10, and 11 as arbitrary and capricious and not in accordance with the law and require that all permits issued under the General Permit program be proved to comply with the NAAQS.

Respectfully submitted April 7th, 2023.

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Certificate of Service

I certify that on April 7, 2023, a copy of the above was served upon all parties herein electronically via the Colorado Courts E-Filing System.

/s/ Joseph A. Salazar
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