



Air Permitting in Colorado Flawed

Report to Colorado Attorney General Details Failings of Agency Permitting Procedures

An earlier Spencer Fane [blog post](#) in May detailed the whistleblowers' allegations that were contained in their letter to the EPA's Office of the Inspector General ("OIG").

The allegations caused the state's Attorney General, Phil Weiser, to hire outside counsel to investigate. The [Troutman Pepper report](#), released last week on September 22, concluded that fraud (or an intent to circumvent the law) on the part of the agency was not an issue; but, the permitting process needs improvement lest continuing "confusion" taints the process.

Rather than attempt a summary, we have provided the report's conclusions directly from the report.

This report addresses two issues raised in the letter to EPA OIG. The **first issue is** *whether* air quality modeling is required or warranted for minor sources. The **second issue is** *how* the modeling of specific minor sources was conducted.

For the second issue, the report primarily focuses on allegations regarding the modeling analysis conducted for a specific permit application for the Cripple Creek & Victor Gold Mine (CC&V), including claims of falsified data, suppression of information, and a conflict of interest.

With **highlighting** provided by this blog post, the primary findings of the investigation are:

1. Modeling of minor sources is discretionary, but the law requires state permitting authorities to have a justified and enforceable means of ensuring all sources will not violate EPA's health-based national ambient air quality standards (NAAQS).
2. Due to the discretionary nature of the relevant statutory and regulatory provisions and a lack of EPA guidance on the issues, the **requirements for modeling minor sources are sometimes unclear.**
3. **CDPHE had two conflicting policies on minor source modeling**, one based on an unsupported extension of EPA's permitting threshold for existing major sources, and one that was well-supported by technical analyses, but overly conservative. **The coexistence of these two conflicting policies caused confusion within CDPHE.**
4. CDPHE's decision to rely solely on EPA's permitting threshold for existing major sources in determining whether to model minor sources left CDPHE without a well-supported policy for ensuring minor source permits would not exceed a NAAQS. **However, that decision was not motivated by an intent to circumvent the law, but rather to resolve the conflict in CDPHE's policies.**
5. CDPHE issued permits with unaddressed modeled NAAQS exceedances, although modeled exceedances do not necessarily indicate a permitted minor source has actually violated or will violate the NAAQS.
6. **CDPHE admitted that the modeling analysis for CC&V contained errors**, but CDPHE used an ambient monitoring strategy to demonstrate compliance with the NAAQS following issuance of the permit.
7. **The allegations in the letter from CDPHE employees to EPA OIG regarding claims of "falsified data" and "suppressing information" in the context of modeling the CC&V facility are unsubstantiated.**
8. Air Pollution Control Division (APCD) Director Garrison Kaufman had a potential conflict of interest with respect to the CC&V mine, which he did not report for two and a half years in violation of CDPHE policy, but the conflict was resolved prior to issuance of the final permit.

The EPA's OIG has referred the matter to EPA's Region 8 office for review. It is clear that the Troutman Pepper report may aid the EPA in its assessment of the Colorado minor source program, but the OIG is not foreclosed from reaching its own conclusions.

The Appendix to the report can be found [here](#).

This blog post was drafted by [John Watson](#). He is an attorney in the Denver, CO office of Spencer Fane. For more information, visit www.spencerfane.com.