



Colorado's Air Permitting Program Targeted From Multiple Fronts: Ozone Concerns Drive This Train

First came the [whistleblowers' letter](#) from Colorado state agency staff to the Environmental Protection Agency's (EPA) Office of the Inspector General (OIG). The EPA's OIG referred the matter to EPA's Region 8 office for review. Then came the [Troutman Report](#) requisitioned by the Colorado Attorney General.

Now, on July 12, 2022, comes the rather scathing report from EPA's Region 8; view the EPA's announcement [here](#) and the full the Region 8 Report [here](#).

With its focus on ozone – particularly along the front range – and the Air Quality Control Division's (APCD) new source review (NSR) air permitting for minor sources, Region 8 concluded that the state's implementation of the program is inconsistent with the requirements in Colorado's State Implementation Plan (SIP) and provided recommendations for actions the agency must take to address the concerns.

The EPA targeted specific permits (11 in total) for its review and provided a detailed discussion in its report of four – *i.e.*, (1) Bighorn Pad, Jackson County; (2) Cripple Creek & Victor Gold Mine, Teller County; (3) Martin Marietta Materials Highway 34 Facility, Weld County; and (4) Williams Willow Creek Gas Plant, Rio Blanco County, stating:

These permits were selected based on the size of the permit records, ranging from a complex multi-year project that contained multiple separate permit actions (*e.g.*, Cripple Creek & Victor Gold Mine) to one that contained few actions (*e.g.*, Martin Marietta Materials Highway 34 Facility). In addition, the records for each of these permits included air quality modeling reports that allowed us to assess the validity and reasonableness of APCD's approach to modeling. All of the selected permits are also minor source construction permits. Additional permits beyond these four were not reviewed because our findings remained

consistent across these four permits; we believe that evaluating additional permits would not significantly add to our findings.

Repeated Failures

EPA found inconsistencies between the Air Pollution Control Division's (APCD) implementation of the minor source air permit program and the requirements of the Colorado SIP. Regulations implemented by the Colorado Department of Public Health and the Environment (CDPHE) require the APCD to provide adequate information in agency records to demonstrate that the minor source will not cause violations of the National Ambient Air Quality Standards, (NAAQS). The EPA found, however, that "the state repeatedly failed to include any record supporting the required demonstration that construction...would not cause NAAQS violations." And, "in several instances CDPHE apparently disregarded modeling results ..."

After EPA asked for further documentation from the CDPHE, EPA found that state agency, "management and staff acknowledged that the permit records may lack documentation demonstrating how potential modeled NAAQS violations were addressed before issuing the permits," and that the records did not contain the requisite "analyses or other data to support the permit conditions and decisions for the final permits."

EPA's Recommendations

EPA acknowledged that, since the submission of the whistle blowers' letter to the OIG, the CPDHE had undertaken a review of its minor source air permitting program including engagement with affected stakeholders, but recommended specific measures to deal with EPA's concerns including those summarized here.

1. Ensure that all future minor NSR permit records are complete and include sufficient documentation...As needed, undertake additional qualitative or quantitative air quality analyses...and include these analyses in the permit record.
2. For the 11 permit records identified in the [whistle blowers'] complaint, amend permit actions as appropriate by conducting refined modeling and incorporating additional/revised permit conditions.
3. Maintain complete public records for all NSR permits. Records should be retained for 10 years after the permit expires, is terminated, or withdrawn, or longer if

required under state law.

4. Improve communication and coordination among the APCD groups that work on NSR permits.
5. Ensure that complex and multi-year projects are covered under the proper major or minor source program permit requirements based on appropriate aggregation considerations.
6. During quarterly meetings between APCD and EPA Region 8 permitting managers, provide status reports on newly issued Minor NSR permits.

Notice of Intent to Sue – Pressure From Another Direction

The July 24, 2022 EPA Region 8 report was preceded on July 5 by a 60-day [notice of intent to sue](#) filed with EPA by the Center for Biological Diversity and the Center for Environmental Health. With its headline that “Ground-Level Ozone Pollution is Harmful to Public Health and the Environment,” the Center’s notice outlines alleged violations of SIP requirements in Colorado, California, North Dakota, and Pennsylvania. For Colorado, for example, the notice states:

Colorado submitted a SIP to EPA on March 22, 2021. The SIP submittal addressed Clean Air Act Section 182(c) requirements for the Denver Metro/North Front Range Serious nonattainment area under the 2008 Ozone NAAQS. In a completeness determination letter dated June 2, 2021, EPA determined the SIP submittal fulfills the completeness criteria. Pursuant to 42 U.S.C. § 7410(k)(2), EPA had a mandatory duty to take final action on the submittal by no later than June 2, 2022. However, EPA has not taken final action on Colorado’s SIP to address Section 182(c). Therefore, EPA is in violation of its nondiscretionary duty pursuant to 42 U.S.C. § 7410(k)(2)-(4).

Absent significant interactions to address the issues between EPA and the Center during the 60-day notice period, the Center will file its complaint in federal court.

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