

Jennifer Berman, Office of Legislative Legal Services, Presentation to the Ozone Air Quality Committee 11/8/23

Disclaimer Statement:

Jennifer Berman with the Office of Legislative Legal Services will give a brief, high-level overview of the facts and findings set forth in the report regarding the independent investigation of alleged nonenforcement of national ambient air quality standards by CDPHE. As nonpartisan staff for the General Assembly, Jennifer had neither involvement in the events and circumstances leading up to the report nor in the development of the report itself. Jennifer is here merely to give a summary of the facts and findings laid out in the report. As such, please direct questions to our expert panelists here today, and not to Jennifer.

Introduction:

I'm going to provide a high-level summary for you a report of the Independent Investigation of alleged nonenforcement of national ambient air quality standards by CDPHE

The report was prepared by Troutman Pepper Hamilton Sanders LLP on behalf of the AG's Office to perform an independent investigation of allegations that 3 CDPHE employees filed in a letter to the EPA's Office of Inspector General on March 30, 2021. The independent investigative report was completed on September 22, 2021. It is that report that I will be summarizing.

Regulatory background

Before summarizing the allegations and the facts and findings of the independent investigative report, I want to give a brief summary of the relevant regulations discussed in the report.

For a specific air pollutant, the EPA is tasked with establishing national ambient air quality standards, referred to as NAAQS, that are "requisite to protect public health". NAAQS identify a threshold concentration of an air pollutant over a specified measurement of time. Most relevant to our discussion today are the NAAQS for nitrogen dioxide (NO₂) and sulfur dioxide (SO₂).

In 2010, the EPA issued new NAAQS for nitrogen dioxide at a level of 100 parts per billion over a one-hour averaging time and for sulfur dioxide at a level of 75 parts per billion over a one-hour averaging time.

To determine if attainment of these NAAQS is met, measurements may be obtained at air quality monitoring stations, but NAAQS attainment may also be evaluated using computer

modeling. The allegations and the independent investigative report concern the issue of air quality modeling, and specifically if and when it is required for minor stationary sources, and how it is conducted.

Under CPDHE's Regulation 3, which, in part, concerns stationary source permitting, air quality modeling is not required for review of all permit applications for minor stationary sources. CDPHE, however, does have discretion to require modeling for any minor stationary source permit application. While air quality modeling is discretionary for minor stationary sources, the EPA requires states to establish "legally enforceable procedures" for determining, with regard to any minor stationary source, whether the source will result in interference with NAAQS attainment.

Within CDPHE, the air pollution control division is tasked with implementing these "legally enforceable procedures" by reviewing permit applications. The division consists of various units, including separate units for permitting and modeling. The modeling unit within the division created the Colorado Modeling Guidelines, establishing a threshold for emissions that would be unlikely to cause an exceedance of the nitrogen dioxide NAAQS, which threshold is equivalent to 2 tons of nitrogen dioxide emissions per year. Therefore, the Modeling Guidelines required modeling for permit applications for any minor stationary source with emissions over this 2 tons per year threshold.

The permitting unit also created its own modeling guidelines, PS Memo 10-01, which do not require modeling for any minor stationary source with nitrogen dioxide or sulfur dioxide emissions below 40 tons per year. Implementation of these inconsistent modeling guidelines forms the basis of some of the allegations that CDPHE employees raised against CDPHE claiming nonenforcement of NAAQS.

Allegations

The CDPHE's allegations can be summarized as follows:

On March 30, 2021, 3 CDPHE employees submitted a letter to the EPA's Office of Inspector General alleging, that "on March 15, 2021, CDPHE issued a blanket prohibition on air quality modeling for reviewing NAAQS compliance for hourly [nitrogen dioxide and sulfur dioxide] limits" and other short-term limits. The employees also alleged that air quality modeling is required for minor stationary sources

The employees also challenged the guidance set forth in PS Memo 10-01 on which CDPHE's blanket prohibition was based, claiming that the memo has been used to supersede statutory and regulatory requirements for air quality modeling, including modeling requirements regarding the short-term NAAQS for nitrogen dioxide and sulfur dioxide.

The employees also alleged that, with respect to a specific permit issued in November 2020 for the Cripple Creek & Victor Gold Mine in Teller County, data was falsified and suppressed in relation to air quality modeling that was performed, and that a permit for the gold mine was issued despite modeling indicating NAAQS exceedances.

Finally, the employees asserted that the air pollution control division director, Garrison Kaufman, failed to report that he had a conflict of interest related to the Cripple Creek & Victor permit application when working on reviewing the permit application, and that his failure to report his conflict invalidated the permit.

Findings and conclusions

The findings and conclusions of the independent investigative report can be summarized as follows:

With respect to the allegations regarding the blanket prohibition against modeling for minor source permit applications, the independent investigative report found that:

- Air quality modeling for minor stationary sources is discretionary, and the EPA has not issued express guidance on if and when modeling is warranted for minor sources
- The state is, however, required to establish legally enforceable procedures for ensuring that even minor sources will not violate NAAQS
- CDPHE, in an attempt to resolve the conflict between the two modeling guidelines, determined that modeling would not be conducted for any minor source permit applications with regard to the one-hour nitrogen dioxide and sulfur dioxide NAAQS. The prohibition was issued in reliance on the PS Memo 10-01 guidelines
- The report concluded that PS Memo 10-01 and CDPHE's reliance on it were not sufficiently justified because they did not provide a legally enforceable procedure for ensuring that minor sources do not violate NAAQS, but, the report also concluded that there is no indication that permits issued under CDPHE's reliance on the memo actually violate NAAQS

With respect to the air quality modeling that was performed for review of the Cripple Creek and Victor Gold Mine permit application, the independent investigative report found that:

- CDPHE failed to follow EPA guidelines on air quality modeling set forth in Appendix W to 40 CFR Part 51
- Some of the modeling inputs relied on were unjustified, but the report found that it does not appear that any of the inputs were fabricated as alleged
- Nevertheless, the report found that the EPA guidelines should have been followed because, when conducting modeling, there is no apparent reason that modeling for minor sources should be done differently from modeling for major sources

- Ultimately, the report concluded that CDPHE did not rely only on modeling in approving the Cripple Creek and Victor permit application, and air quality monitoring that CDPHE also performed for the source indicated that the source was unlikely to exceed NAAQS

With respect to the allegation that the division director, Garrison Kaufman, had an unreported conflict of interest at the time of reviewing the Cripple Creek and Victor permit application, and that the conflict invalidated the permit, the independent investigative report found that:

- The division director in fact had a potential conflict of interest that he should have reported because, when he left CDPHE for a period of time, he advocated on behalf of a client for issuance of the permit and when he rejoined CDPHE, he supervised the review of that permit application for 2.5 years
- He was eventually removed from supervising the review of the permit application, but a draft permit had already been developed by that time
- At the time of the permit's issuance in 2020, Kaufman had no involvement in review or approval of the permit and had indicated that he had no financial interest in the issuance or nonissuance of the permit once he rejoined CDPHE
- The report concludes that, although Kaufman did have a potential conflict of interest that he should have reported, there is no evidence that his failure to report provided grounds for invalidating the permit approval