

DISTRICT COURT, WELD COUNTY COLORADO 901 9th Ave, Greeley, CO 80631 (970) 475-2400	DATE FILED: June 22, 2022 10:05 PM FILING ID: 36B8503A141C2 CASE NUMBER: 2022CV30431
Plaintiff: WILDEARTH GUARDIANS v. Defendants: GOVERNOR JARED POLIS , in his official capacity; COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; AIR QUALITY CONTROL COMMISSION; and the AIR POLLUTION CONTROL DIVISION	▲ COURT USE ONLY ▲
<i>Attorney for Plaintiff</i> Katherine Merlin, Atty. Reg. No. 45672 WildEarth Guardians 3798 Marshall St. Suite 8. Wheat Ridge, CO 80033 P: (720) 965-0854 kmerlin@wildearthguardians.org	Case Number: Div: Crtm:
COMPLAINT	

PLAINTIFF WildEarth Guardians, through counsel and on behalf of its affected members, brings this lawsuit against Defendants Governor Jared Polis, in his official capacity, the Colorado Department of Public Health and Environment, Air Quality Control Commission, and the Air Pollution Control Division, submits the following Complaint:

INTRODUCTION

1. Plaintiff WildEarth Guardians (“Guardians”), a non-profit conservation organization, brings this suit to compel the Defendants Governor Jared Polis, in his official capacity, the Colorado Department of Public Health and Environment, the Air Quality Control Commission, and the Air Pollution Control Division (“Division”), to comply with their mandatory duty to timely grant or deny four air pollution operating permit applications for four large oil and gas production facilities in Weld County. The applications were submitted by Bonanza Creek Energy, Inc. for the Antelope CPF 13-21 Production Facility, Antelope O-1 CPF, State North Platte 42-26 CPF, and Pronghorn 41-32 CPF (“Bonanza Facilities”). Under the Colorado Air Pollution Prevention and Control Act (“Colorado Air Act”), the Division was required to grant or deny Bonanza’s permit applications within 18 months of receipt. To date, the Division has not acted.

2. Air pollution operating permits are required by the federal Clean Air Act, Title V. The U.S. Environmental Protection Agency (“EPA”) delegated authority to the Division to issue

these permits under the Colorado Air Act. The purpose of operating permits is to clearly incorporate all legally required air pollution control standards into a single document to ensure compliance with all applicable state and federal clean air laws and regulations. Owners of a source with an operating permit must annually certify that the source is in compliance with its permit. The Division must deny a permit if it cannot ensure a source operates in compliance with applicable requirements. Each operating permit application that the Division processes is subject to public comment and offers the public an opportunity for a hearing before the Defendant Colorado Air Quality Control Commission (“Commission”).

3. On or about November 19, 2020, Bonanza Creek Energy, Inc. (“Bonanza”), submitted to the Division initial applications for four Title V Major Source operating permits for four facilities located in Weld County. The Bonanza Facilities are each large tank battery facilities consisting of dozens of oil tanks and separators, and other related equipment for storing and transporting produced fossil fuels.

4. The Bonanza Facilities are in Weld County, approximately 12 miles east of the town of Kersey.

5. Pursuant to the Colorado Air Act, the Division was required to grant or deny each permit application within eighteen months of receipt of the completed permit application. *See* C.R.S. § 25-7-114.5(4).

6. Although more than 18 months have passed since the Division received completed applications for the Bonanza Facilities, it has not yet acted to grant or deny these applications.

7. The Bonanza Facilities are each classified as Major Sources for harmful air pollutants in the state of Colorado, and each has been operating without a validly authorized Title V Major Source operating permit.

8. Pursuant to the Colorado Air Act, the Defendants’ failure to grant or deny a permit application is final permit action for purposes of obtaining judicial review to require that Defendant Air Pollution Control Division take action on such applications “without additional delay.” C.R.S. § 25-7-114.5(7)(b). The Division must take timely action on the Bonanza Facilities’ operating permit applications to ensure adequate protection of air quality and public health in Colorado and to provide for public participation in and scrutiny of the regulation of air pollution from Parachute Facility.

PARTIES

9. Plaintiff WILDEARTH GUARDIANS (“Guardians”) is a non-profit conservation organization headquartered in Santa Fe, New Mexico with offices across the western U.S., including in Wheat Ridge, Colorado. Guardians is dedicated to protecting and restoring wildlife, wild rivers, wild places, and health of the American West. Guardians and its members work to reduce harmful air pollution in order to safeguard public health, welfare, and the environment. Guardians has more than 100,000 members and supporters, many of whom live, work, or recreate in Colorado.

Guardians brings this action on its own behalf and on behalf of its adversely affected members.

10. Guardians' members live, work, recreate, and conduct educational, research, advocacy, and other activities in and around Weld County, Colorado in areas where air pollution from the Bonanza Facilities harms these activities. Guardians' members have concrete plans to continue living in these areas and engaging in these activities. The Defendants' failure to act on the operating permit applications at issue causes Guardians and its members continuing concern about exposure to harmful air pollution and denies them the opportunity to engage in the administrative process set forth in the Colorado Air Pollution Prevention and Control Act. Guardians' and its members' interests have been, are being, and will continue to be irreparably harmed by the Defendants' failure to act.

11. The violations alleged in this Complaint have injured and continue to injure the interests of Guardians and its members. This injury is traceable to the Defendants' failure to act, which is considered final agency action under the Colorado Air Pollution Prevention and Control Act. Granting the requested relief would redress these injuries by compelling the Defendants to take action as required by the Colorado Air Pollution Prevention and Control Act.

12. DEFENDANT GOVERNOR JARED POLIS, in his official capacity, is vested with the supreme executive power of the State of Colorado and responsible for ensuring that its laws are faithfully executed. COLO. CONST. art. IV, § 2. "As such, the Governor is vested with authority and control over the Colorado Department of Public Health and Environment (CDPHE) and its subdivision, the Air Pollution Control Division (Division)." *Defend Colo. v. Polis*, 482 P.3d 531 (Colo.App. 2021) (citing §§ 24-1-119, 24-1-105(4), 25-1-102(1), 25-1-106, C.R.S. 2020). Governor Polis has the authority to ensure that his administrative agencies, including the Division, have adequate staffing and resources to necessary to faithfully execute Colorado law.

13. DEFENDANT COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT is the Colorado regulatory Department with jurisdiction and authority to implement the Colorado Air Act, C.R.S. § 25-7-101, *et. seq.* The Colorado Department of Public Health and Environment's mission is to protect and preserve the health and environment of the people of Colorado.

14. DEFENDANT AIR POLLUTION CONTROL DIVISION is an agency within the Department of Public Health and Environment that administers the State air quality programs. The Division has the jurisdiction, authority, and duty to grant or deny applications for operating permits under the Colorado Air Act. *See* C.R.S. § 25-7- 114.4(2).

15. DEFENDANT AIR QUALITY CONTROL COMMISSION is housed within CDPHE by virtue of a "type 1" transfer, which means that it "exercise[s] its prescribed powers, duties, and functions, including...the rendering of findings, orders, and adjudications, independently of the head of the principal department." §§ 24-1-119(7)(a), 24-1-105(1), and 25-7-125, C.R.S. To the extent that the Commission possesses independent discretion to extend the length of public hearings that are required as part of the process of permit adjudication by the Division, it may be a party in the absence of whom complete relief may not be afforded. C.R.C.P. 19.

JURISDICTION AND VENUE

16. This Court has jurisdiction under C.R.S. § 24-4-106 (State Administrative Procedure Act (“State APA”)), C.R.S. § 25-7-120 (judicial review provision of the Colorado Air Pollution Prevention and Control Act), C.R.S. § 25-7-114.5(7)(b) (providing judicial review for failure to act on permit applications), C.R.C.P. Rule 106(a)(2), and as a Court of general jurisdiction under the Colorado Constitution.

17. Venue is proper pursuant to C.R.S. § 25-7-120(3), because the air pollution sources affected by the Defendants’ inaction are located in this district.

LEGAL BACKGROUND

18. Colorado’s statutory and regulatory requirements regarding the permitting of sources of air pollution derive from the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*

19. The Clean Air Act aims “to protect and enhance the quality of the Nation’s air resources.” 42 U.S.C. § 7401(b)(1). To help meet this goal, the 1990 amendments to the Clean Air Act created the Title V permit program – an operating permit program that applies to all major sources of air pollution. *See* Clean Air Act Amendments of 1990, Pub.L. No. 101-549, §§ 501–507, 104 Stat. 2399, 2635–48 (codified at 42 U.S.C. §§ 7661–7661f (2000)) (“The intent of Title V is to consolidate into a single document (the operating permit) all of the clean air requirements applicable to a particular source of air pollution.”).

20. Title V operating permits are legally enforceable permits that permitting authorities grant to air pollution sources after the source has begun to operate. A Title V permit is federally enforceable and includes, in a single document, all Clean Air Act requirements for a source. Title V Permits apply to “major sources” of air pollution and ensure that major sources adequately monitor their pollution and operate in compliance with the Clean Air Act and applicable state requirements. 42 U.S.C. § 7661c(c). Major sources of air pollution are prohibited from discharging air pollutants unless they have a valid Title V operating permit. *Id.* § 7661a(a).

21. A “major source” for purposes of Title V is any source that has actual emissions or potential to emit above major source thresholds, which is generally 100 tons per year (tpy) of any criteria air pollutant, including Carbon Monoxide (CO), Volatile Organic Compounds (VOCs), and Oxides of Nitrogen (NO_x), 42 U.S.C. § 7602(j), or 10 tpy of any Hazardous Air Pollutant (“HAP”), or 25 tpy of any combination of HAPs. 42 U.S.C. § 7412(a)(1). However, these thresholds may be lower in some ‘non-attainment’ areas where air quality violates EPA’s health based National Ambient Air Quality Standards.

22. The Bonanza Facilities are located within the Denver Metro-North Front Range ozone non-attainment area, which includes Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, Jefferson, and portions of Larimer and Weld. This region is currently designated as being in Serious nonattainment by the U.S. EPA for the 2008 ozone National Ambient Air Quality

Standard. 84 Fed. Reg. 70,897 (Dec. 26, 2019).¹ Under the Serious nonattainment designation, the threshold for Major Sources is lowered to 50 tpy of VOCs, which are important ozone precursor pollutants. 42 U.S.C. § 7511a.

23. When a state permitting authority issues Title V permits, the terms of those permits must contain all air quality requirements that apply to the source of pollution, as well as conditions sufficient to assure the source's compliance with those requirements. 42 U.S.C. § 7661c(a). To that end, each permit must include a "schedule of compliance." *Id.* If a source is out of compliance when the permit is issued, the permit must also include "a schedule of remedial measures, including an enforceable sequence of actions . . . leading to compliance," 40 C.F.R. § 70.5(c)(8)(iii). *See also* 42 U.S.C. § 7661(3); 40 C.F.R. § 70.6(c), (c)(3).

24. The goal of the Title V program is "[i]ncreased source accountability and better enforcement." Operating permit Program, 57 Fed. Reg. at 32,250, 32,251 (July 21, 1992). Title V does not generally impose new substantive air quality control requirements. *Id.*; *Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006); *Sierra Club v. Johnson*, 436 F.3d 1269, 1272 (11th Cir. 2006). "Instead, in order to ensure compliance with existing requirements, Title V requires permits to contain monitoring, record keeping, reporting, and other conditions." *Sierra Club v. Johnson*, 436 F.3d at 1272.

25. Major source operators must submit applications for Title V operating permits within 12 months of becoming subject to such permitting requirements. 42 U.S.C. § 7661b(c). Each Title V permit must be renewed every five years, subject to the same requirements as initial permitting. 57 Fed. Reg. at 32,257; 42 U.S.C. § 7661a(b)(5)(B). Once a source has submitted a complete application it is granted a "shield" to operate its facility until the permitting authority takes final action on the permit application. 40 C.F.R. § 70.7(b).

26. The Clean Air Act provides that the Administrator of the EPA may approve state programs to administer the Title V permitting program with respect to sources within their borders. 42 U.S.C. § 7661a(d). EPA granted full approval to Colorado's administration of its Title V operating permit program in 2000. 65 Fed. Reg. 49,919 (August 16, 2000). Therefore, Defendants are responsible for issuing Title V permits in Colorado. To this end, with regards to Title V permitting, the requirements of the Clean Air Act and its implementing regulations have been incorporated into the Colorado Air Act. C.R.S. § 25-7-114, *et seq.* This program is codified at 5 CCR § 1001-5, Regulation No. 3, Part C.

27. As a prerequisite of federal approval for state administration of the Title V program the state is required to certify that it can and will provide adequate staffing and resources to execute its air quality implementation plans. 40 CFR 70.4(b)(8). *See also* 65 Fed. Reg. 49,919 (August 16, 2000). The state may not put forward rules and regulations for EPA approval and then refuse to

¹ Earlier this year EPA published notice that it intended to make a finding that the Denver Metro-North Front Range of Colorado (among other areas) did not attain the 2008 ozone standard by the August 3, 2021 deadline, which, when finalized, will have the effect of immediately 'bumping up' the region to the next higher category: 'Severe' ozone nonattainment. 87 Fed. Reg. 21,842 (April 13, 2022). This will again lower the emissions threshold for sources qualifying as "major," thereby greatly increasing the number of facilities required to obtain Title V operating permits.

adequately staff or resource its own agencies necessary to enforce and administer them. This violates not only the commitment to EPA to successfully implement important provisions of the Clean Air Act, but also the Colorado Constitution which requires the Governor to ensure that the laws of the state are faithfully executed.

28. To ensure that permit applications are processed in a timely manner, the Clean Air Act requires that the state permitting authority act to issue or deny permit applications within eighteen months of receiving a completed application. 42 U.S.C. § 7661b(c); 40 CFR Part 70.7(a)(2) (directing air permitting agencies to “take final action on each permit application within 18 months, or such lesser time approved by the Administrator, after receiving a complete application.”).

29. Accordingly, the Colorado Air Act requires the Division to grant or deny applications for operating permits within eighteen months after receipt of the completed permit application. C.R.S. § 25-7-114.5(4). The Division must deny a permit application if a source cannot meet applicable clean air laws and regulations. C.R.S. § 25-7-114.5(7)(a)(III.5).

30. Before final action can be taken on an operating permit application, the Division must at least provide for a 30-day public comment period. 5 C.C.R. § 1001-5, Part C, Section VI.B.8. The Division must also provide the EPA a 45-day period to object. 5 C.C.R. § 1001-5, Part C, Section VI.H. If the EPA does not object, the Division must subsequently grant or deny the permit.

31. While the Division is responsible for drafting and issuing permits, the Air Quality Control Commission has independent authority to extend the public comment period. C.R.S. § 25-7-119. Therefore, the Commission should be made a Defendant to prevent argument that complete relief cannot be afforded in its absence.

32. The Clean Air Act also provides that a state air pollution operating permit program must provide for judicial review in state court over the failure of a permitting authority to timely act on a permit application. 42 U.S.C. § 7661a(b)(7). To this end, the “[f]ailure of the [D]ivision or [C]ommission, as the case may be, to grant or deny [a] permit application” within the eighteen months prescribed by the statute “shall be treated as a final permit action for purposes of obtaining judicial review in the district court in which the source is located, to require that action be taken on such application by the commission or division, as appropriate, without additional delay.” C.R.S. § 25-7-114.5(7)(b).

FACTUAL BACKGROUND

33. The Antelope CPF 13-21 Production Facility, Antelope O-1 CPF, State North Platte 42-26 CPF, and Pronghorn 41-32 CPF (“Bonanza Facilities”) are all large oil and gas well and production sites located in Weld County

34. The Bonanza Facilities became Major Sources subject to Title V requirements when the U.S. EPA redesignated the Denver Metro-North Front Range area, including Weld County, from Moderate to Serious nonattainment for the 2008 ozone National Ambient Air Quality Standard, effective January 27, 2020. 84 Fed. Reg. 70,897 (Dec. 26, 2019).

35. Bonanza submitted applications for Title V Major Source operating permits for the facilities on or about November 19, 2020.

36. The Division gave the Title V Permit application for the Antelope CPF 13-21 Production Facility a permit ID of 20OPWE417.

37. The Division gave the Title V Permit application for the Antelope O-1 CPF facility a permit ID of 20OPWE418.

38. The Division gave the Title V Permit application for the State North Platte 42-26 CPF facility a permit ID of 20OPWE419.

39. The Division gave the Title V Permit application for the Pronghorn 41-32 CPF facility a permit ID of 20OPWE420.

40. The Bonanza Facilities each qualify as a “Major Source,” triggering Title V Major Source operating permitting requirements, due to each having the potential to emit over 50 tons per year of VOCs. VOCs contribute to the Colorado Front Range region’s ozone pollution problem.

41. The Defendants continued, and continue to this day, to allow the Bonanza Facilities to emit Major quantities of air pollution and have never taken final action on Bonanza’s applications for operating permits.

42. In the meantime, Colorado’s failure to grant or deny the Bonanza Facilities’ permit applications means the facilities are not operating under up-to-date, legally adequate, and effective Title V permits. Among other requirements, a Title V permit must include emission limitations and standards, monitoring, and reporting to ensure a source of pollution operates in compliance with applicable requirements under the Clean Air Act. *See generally* 40 C.F.R. § 70.6.

CLAIM FOR RELIEF

Failure to Approve or Deny Title V Applications for the Bonanza Facilities

43. Plaintiff incorporates the allegations in all preceding paragraphs of this Complaint as if set forth in full herein.

44. The Division has not taken final action to issue or deny Title V Major Source operating permit application for the Bonanza Facilities, Permit Nos. 20OPWE417, 20OPWE418, 20OPWE419, and 20OPWE420, within 18 months after receiving an application in accordance with C.R.S. § 25-7-114.5(4). By failing to take final action on the permit applications for the Bonanza Facilities, the Defendants violated the Colorado Air Act.

45. The Division’s failure to grant or deny Title V operating permits for the Bonanza Facilities within the 18 months prescribed by statute is final permit action subject to this Court’s review. *See* C.R.S. § 25-7-114.5(7)(b). This Court must therefore require that the Defendants grant or deny these permit applications “without additional delay.” *Id.*

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Order the Division and/or the Commission to act on the Title V permit initial applications for the Bonanza Facilities, in Weld County, Colorado, operating permit nos. 20OPWE417, 20OPWE418, 20OPWE419, and 20OPWE420, submitted by Bonanza on or about November 19, 2020, by issuing or denying the permits within 90 days of this Court's Order;
- B. Order Governor Polis to provide additional staffing, funding, and other administrative capacity to ensure that the requirements of Title V, as implemented by state law, are faithfully executed without unlawful delay;
- C. Award Plaintiff reasonable costs of litigation, including attorneys' fees; and
- D. Grant such other relief as the Court deems appropriate or necessary.

Respectfully submitted on June 22, 2022,

/s/ Katherine Merlin _____
Katherine Merlin
Attorney for Plaintiff WildEarth Guardians