DISTRICT COURT, WELD COUNTY, COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631 Mailing Address: P.O. Box 2038, Greeley, CO 80632 Phone Number: (970) 475-2400	DATE FILED: March 23, 2023 3:57 PM CASE NUMBER: 2022CV30431
Plaintiff: WILDEARTH GUARDIANS v. **Defendants:** GOVERNOR JARED POLIS, in his official capacity, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; COLORADO AIR QUALITY CONTROL COMMISSION, COLORADO AIR POLLUTION CONTROL DIVISION	▲ COURT USE ONLY ▲ Case Number: 2022CV30431 Div. 3

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Plaintiff Wildearth Guardians' *Motion for Summary Judgment* filed December 9, 2022. Defendants filed a *Response* and Plaintiff filed a *Reply*. **THE COURT** having reviewed the file and arguments of counsel hereby **FINDS** as follows:

BACKGROUND

This case is a dispute between Plaintiff Wildearth Guardians (WEG), Defendants Governor Jared Polis, the Colorado Department of Public Health and Environment (CDPHE), Colorado Air Quality Control Commission (Air Commission), and the Colorado Air Pollution Control Division (Division). The Court's Order on October 26, 2022, dismissed Governor Polis from this action.

This dispute arises because of the Division's failure to grant or deny Bonanza Creek Energy, Inc. (Bonanza)'s four permit applications 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) for major sources within eighteen months of filing as required by the Colorado Air Pollution Prevention and Control Act (Colorado Air Act). Bonanza filed their initial applications for Title

V Major Source operating permits on November 19, 2020. Each of the Parties concede that, to this date, the Division has yet to grant or deny the permits for the four facilities located in Weld County. The delay exceeds 28 months at the time of this Order.

WEG contends that the Division's inaction implicates CDPHE because the Division is housed within the CDPHE, and the Department possesses the authority to implement Colorado's Air Act. The Air Commission is implicated in WEG's action because of their ability to extend the length of public hearings that are a critical step in the process of permit approval. Additionally, WEG contends that the Division's inaction is in violation of the Colorado Air Act and requests that the Court require the Division to act on Bonanza's applications without additional delay. WEG seeks the firm timeline of 90 days after Court order for the Division to remit these four permits to the EPA. WEG asserts that 90 days is appropriate and necessary because the Division's inaction is chronic and in violation of the Colorado Air Act's intent to ensure timely final action. Lastly, WEG requests reasonable attorney's fees under C.R.S. § 13-17-102 to compensate it for the expense of pursuing this action.

Defendants in their *Response* ask the Court to find that they have failed to comply with the permitting deadline, but request that their remedy be adopted and that the request for attorney's fees be denied. Defendants assert that it would be reasonable and attainable to deliver the draft permits for public comment by April 15, 2023. Defendants offer no dates for submission of the draft permits to EPA or for the final publication of the permits. Further, Defendant's ask the Court to reject Plaintiff's plea for attorney's fees.

ISSUES

I. Whether Plaintiff's Motion for Summary Judgment on Defendants' liability should be granted.

II. What is the appropriate remedy for Defendants' inaction?

STANDARD OF REVIEW

Motions for Summary Judgment

"Summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact, and that all legal prerequisites are clearly established." *Peterson v. Halsted*, 829 P.2d 373, 375-76 (Colo. 1992) (citations omitted); C.R.C.P. 56. "A material fact is simply a fact that will affect the outcome of the case." *Peterson*, 829 P.2d at 375. "The purpose of the summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on undisputed facts, one party could not prevail." *Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984) (citation and quotation marks omitted).

"The burden of establishing the lack of any genuine factual issue is on the moving party, but once this burden is met, the opposing party must then demonstrate that a controverted factual question exists. If the party opposing summary judgment fails to meet this burden, then the court may properly enter summary judgment on behalf of the moving party as long as the operative legal principles entitle it to such judgment." *Pueblo West Metro Dist. v. Southeastern Colorado Water Conservancy Dist.*, 689 P.2d 594, 600-01 (Colo. 1984) (citations omitted). The court must give the nonmoving party "any favorable inferences that may reasonably be drawn from the facts, and all doubts must be resolved against the moving party." *Friedland v. Travelers Indem. Co.*, 105

P.3d 639, 643 (Colo. 2005). In addition, "even where 'it is extremely doubtful that a genuine issue of fact exists,' summary judgment is not appropriate." *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991).

However, a genuine issue of material fact cannot be raised solely by means of argument. *Sullivan v. Davis*, 172 Colo. 490, 495-96, 474 P.2d 218, 221 (1970). The party opposing a motion for summary judgment cannot rest upon the allegations or denials in its pleading, but must, rather produce specific facts showing there is a genuine issue for trial. *Fed. Land Bank of Wichita v. Deatherage*, 739 P.2d 905, 906 (Colo. App. 1987).

LEGAL ANALYSIS

Standing

As an initial matter, Plaintiff must demonstrate that it has standing to bring this suit. Plaintiff asserts that it has representational standing, also called associational standing. Defendant does not contest Plaintiff's standing. However, the Court is required to establish standing as a threshold issue before it can proceed to the Party's claims on the merits.

Wimberly's two-prong standing test determines if individuals have standing in Colorado. "To satisfy the *Wimberly* test, a plaintiff must establish that (1) he suffered an *injury in fact*, and (2) his injury was to a *legally protected interest." Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (2014) *(citing Wimberly v. Ettenberg*, 570 P.2d 535, 539 (1977).

In Colorado, "an organization has associational standing when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members of the lawsuit." *Colo. Union of Taxpayers Found. v. City*

of Aspen, 418 P.3d 506, 510 (2018) (citing *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 687–88 (Colo. 2008)).

WEG asserts that its "members live, work, recreate, and conduct educational activities, research, advocacy, and other activities in and around Weld County, Colorado" in and around the areas impacted by air pollution originating from the Bonanza facilities and are injured by the threat of excessive air pollution." Pl.'s Complaint, ¶10; Pl.'s Motion for Sum. J., 6. The Supreme Court has acknowledged that legally protected interests alleged to have been injured may be "aesthetic, conservational, and recreational' as well as economic values." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (internal quotations omitted). Colorado's Supreme Court has also acknowledged that a legally protected interest can arise from the deprivation of a legally created right. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004).

WEG's members have suffered injury through increased air pollution stemming from the Bonanza Facility's construction and subsequent operation under the construction permit but have been denied their ability to participate in the permitting process as required under the Colorado Air Act. Additionally, WEG's submissions assert that the Bonanza Facility is impacting its members ability to recreate, view local wildlife, and enjoy local waters and lands. WEG's members have suffered an injury in fact to their statutory, recreational, conservational, and aesthetic interests. Therefore, because WEG's members have standing to sue on their own behalf, WEG satisfies prong one of the associational standing test.

Next, WEG's stated purpose is to protect and restore wildlife, wild rivers, wild places, and the health of the American West. Pl.'s Complaint, 9. It asserts that its work and the work of its members is focused on reducing harmful pollution to "safeguard public health, welfare, and the environment. *Id.* Through this suit, WEG seeks to enforce the Colorado Clean Air Act to ensure

that its members and the public located near the Bonanza Facility receives the environmental protections they are entitled to as part of the Title V permitting process. The Court finds that WEG's purpose aligns with the interests it seeks to protect in this case. Part two of the associational standing test has been satisfied.

Finally, the relief WEG requests are a court order requiring Defendants to remit the Bonanza Facility permits to EPA within 90 days and the award of attorney's fees. Neither of these requests require the participation of individual members. The final part of the associational standing test has been satisfied.

The Court finds that Wildearth Guardians has associational standing to bring suit in this matter.

Liability

The Parties each acknowledge that Bonanza's four permit applications submitted on November 19, 2020, have neither been granted nor denied by the Division. The Division has delayed their decision for more than 28 months, well beyond the eighteen months prescribed by statute.

The Colorado Air Act states that "applications for renewable operating permits shall be approved or disapproved [by the Division] within eighteen months after the receipt of the completed permit application . . ." C.R.S. § 25-7-114.5(4). The Colorado Air Act also states that:

> "[f]ailure of the division or commission, as the case may be, to grant or deny the permit application or permit renewal application within the time prescribed 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)(emphasis added).

The Court acknowledges the submissions of both Parties and finds that the Defendants have clearly failed to meet their statutory duty by failing to grant or deny the Bonanza Facilities permits within the required eighteen months of their receipt. Defendants' statutory deadline expired May 19, 2022, and no action has been taken since then. Under the Colorado Air Act, this action is ripe for judicial review to ensure that action is taken without additional delay.

Remedy

WEG seeks the firm timeline of 90 days after Court order for the Division to remit the four Bonanza Facility's permit applications to EPA. WEG requests a new date-certain deadline to replace the date-certain deadline which the Defendants failed to meet and to curtail the open-ended permit review process it believes Defendants are engaging in. Alternatively, Defendants assert that it would be reasonable and attainable to deliver the draft permits for public comment by April 15, 2023. Defendants offer no dates for submission of the draft permits to EPA or for the final publication of the permits.

Through the enactment of the Colorado Air Act, the State of Colorado established that it was "the policy of this state to achieve the maximum practical degree of air purity in every portion of the state, to attain and maintain the National Ambient Air Quality Standards, and to prevent the significant deterioration of air quality in those portions of the state where the air quality is better than the National Ambient Air Quality Standards." C.R.S. § 25-7-102. This Act "declared that the prevention, abatement, and control of air pollution in each portion of the state are matters of

statewide concern and are affected with a public interest and that the provisions of this article are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state." *Id.*

The Colorado Air Act establishes an eighteen-month timeframe for the Division to grant or deny permit applications. C.R.S. § 25-7-114.5(7)(b). After a permit has been drafted and before it is finalized, the public is allotted thirty days to submit written or oral comments on the proposed permit. *Id.* at 5 & 6. The public is also entitled to request a public hearing which must occur "within sixty calendar days after receipt of the application, comments, and analysis, . . . to elicit and record the comment of any interested person regarding the sufficiency of the preliminary analysis and whether the permit application should be approved or denied." *Id.* at 6(b). The Division is required to "respond in writing to all significant comments raised during the public participation process, including any such written comments submitted during the public comment period and any such comments raised during any public hearing on the permit." 40 C.F.R. 70.7(h)(6). After review and response to public comments, the Division is expected to alter the draft permit and submit the final permit to the EPA to allow the Agency the opportunity to object.

Here, the Court finds that Defendants have displayed a history of noncompliance with the Colorado Air Act. Defendants own admissions inform the Court that at least eleven permits are outstanding beyond the Act's statutory timeline with additional indications that the Division very rarely meets its obligation to grant or deny permit applications within the statutory timeframe.

Case law allows for some flexibility in prescribed timelines. See *DiMarco v. Dep't of Revenue, Motor Vehicle Div.*, 857 P.2d 1349, 1352 (Colo. App. 1993) (Generally, courts have construed time limitations imposed on public bodies as being directory rather than mandatory if interpreting the time limitation as mandatory would divest the acting Agency or Department of the

ability to act on their statutory directive.) However, Defendants' inaction spans many months beyond the prescribed deadline and the Colorado Air Act prescribes a specific remedy for noncompliance: judicial review. Defendants' inaction undermines the Act's purpose and denies the public the ability to meaningfully participate in the permit review process. Further, Defendants consistent failure to comply with the laws of this State conveys to the public a lack of governmental transparency and undermines public trust in the State of Colorado to perform prescribed statutory functions.

In fashioning the appropriate remedy, the Court considered the Parties suggestions, the requirements and purpose of the Act, and Defendants' concerns about feasibility. The Division estimates that the draft permits will be finalized and delivered for public review and comment by April 15, 2023. This date is more than 28 months after the permit applications were filed. However, in the interest of submitting to the public a draft that is as complete as possible, the Court will adopt this date for submission of draft permits. The Court requires Defendants to deliver the draft permits for the Antelope CPF 13-21 Production Facility, Antelope O-1 CPF, State North Platte 42-26 CPF, and Pronghorn 41-32 CPF for public comment by April 15, 2023. Further, the Court requires Defendants to submit the proposed permits to the EPA no later than June 14, 2023, and to publish the final permits within 15 days of the expiration of the EPA's objection period if no objection arises. Based on the Defendants' disregard for the statutorily mandated deadline, the Court finds that a stringent timeline is necessary to give effect to this Act as the Legislature intended.

Attorney's fees

WEG asks for attorney's fees to compensate the Organization for the expense incurred in seeking judicial review of Defendants' lack of compliance with the Act. Defendants assert that Colorado law allows the awarding of attorney's fees only if authorized by statute, rule, or contract.

In civil matters, Colorado's attorney fees statute provides "the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action . . . that the court determines lacked substantial justification." C.R.S. § 13-17-102(2). An action lacks substantial justification if it is "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* "A claim is frivolous if the proponent has no rational argument to support it based on evidence or the law. A claim is groundless if there is no credible evidence to support the allegations in the complaint. A vexatious claim or defense is one… maintained in bad faith." *E.g., Zivian v. Brooke-Hitching*, 28 P.3d 970, 974 (Colo. App. 2001) (citation omitted); *Black v. Black*, 482 P.3d 460, 488 (Colo. App. 2020). "Bad faith may include conduct that is arbitrary, abusive, stubbornly litigious, or disrespectful of the truth." *E.g., In re Marriage of Roddy and Betherum*, 228 P.3d 1070, 1077 (Colo. App. 2014).

Since the advent of this case both Parties have agreed that Defendants failed to comply with their statutory duty. Defendants readily acknowledge the Division failed to issue a timely decision on the permit applications. Defendants have not raised frivolous, groundless, or vexatious defenses in an effort to avoid liability. Defendants have provided reasons or excuses to explain why they have not complied with the statutory deadline, so they have sought to avoid imposition of a judicial remedy by way of explanation. However, Defendants have not refused to acknowledge the fact of their failure to comply with the statutory deadline and, in doing so, have admitted liability.

The Court is, nonetheless, troubled that this case appears to represent a larger trend of Defendants routinely exceeding the statutory deadline for approving or disapproving applications for renewable operating permits. Moreover, Defendant have asked the Court to endorse a partial remedy inconsistent with the Act's requirement for action without additional delay. The Act establishes an eighteen-month timeline for the Division to grant or deny permit applications. The Act's intention is for a final permit to have been drafted, submitted for public comment, the comments responded to by the Agency, potentially objected to by the EPA, and for the final permit to be issued to the applicant within the statutory timeframe. The Court acknowledges the possible novelty of these specific permits and the labor of the Defendants to compile the necessary documentation and cooperate with the applicant. However, by the time these draft permits are available to the public on April 15, 2023, over *twenty-eight months* will have passed since their submission on November 19, 2020. The Title V permitting process is barely underway and yet Defendants suggest a partial remedy to the Court that would allow for interminable delays and no indication of when they intend to finalize these permits by granting or denying them. Defendants suggested remedy is made to allow for further delay and severely out of statutory compliance.

The Court is remarkably close to concluding that Defendants defended a civil action that lacked substantial justification based on their unreasonable request for indefinite delay but their candor in acknowledging their lack of compliance with the statutory deadline convinces the Court that Defendants did not raise defenses that lacked substantial justification.[1] Therefore, the Court denies the request for reasonable attorney's fees resulting from this action.

[1] Should the same conduct persist in the future and again be accompanied by a request for indefinite delay, the Court may not be willing to make the same finding since repeated conduct would suggest Defendants are engaged in a willful pattern of statutory violations. Similarly, a pattern of refusing to accept a reasonable schedule for compliance and instead proposing a remedy to allow for indefinite delays would suggest ongoing failure be accountable in a manner consistent with the statutory framework for permitting.

CONCLUSION

For the foregoing reasons, the Court hereby:

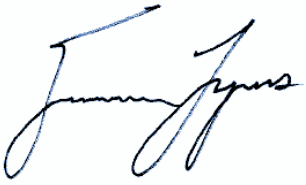
1. GRANTS Plaintiff's Motion for Summary Judgment on Defendants liability.
2. DENIES Plaintiff's suggested remedy and ORDERS:

   Defendants to deliver the draft permits for the Antelope CPF 13-21 Production Facility, Antelope O-1 CPF, State North Platte 42-26 CPF, and Pronghorn 41-32 CPF for public comment *by* April 15, 2023; to submit the proposed permits to EPA by June 14, 2023; and to publish the final permits within 15 days of the expiration of the EPA's objection period if no objection arises.

3. DENIES Plaintiff's request for reasonable attorney's fees arising from this case.

Dated: March 23, 2023

By Order of the Court:



SHANNON D. LYONS
DISTRICT COURT JUDGE