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| DISTRICT COURT, ADAMS COUNTY, COLORADO 1100 Judicial Center Dr, Brighton, CO 80601 Phone: (303) 659-1161 | DATE FILED: February 17, 2021 10:47 AM FILING ID: 5CA0DFE64BE73 CASE NUMBER: 2021CV30213 |
| Plaintiff: WILDEARTH GUARDIANS v. Defendants: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, 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, submits the following Complaint:

INTRODUCTION

1. Plaintiff WildEarth Guardians (“Guardians”), a non-profit conservation organization, brings this suit to compel the Defendants, the Colorado Department of Public Health and Environment, and the Air Pollution Control Division (“Division”), to comply with their mandatory duty to timely grant or deny two air pollution operating permit applications submitted by Suncor Energy (U.S.A.), Inc. (“Suncor”), for its Commerce City Petroleum Refinery (“Refinery”) as required by the Colorado Air Pollution Prevention and Control Act (“Colorado Air Act”).

2. Air pollution operating permits are required by the federal Clean Air Act. 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 in order to ensure compliance with all applicable state and federal clean air laws and regulations. Owners of sources with operating permits must certify that the source is in compliance each year, and the Division must renew the permits every five years. The Division must deny a permit if it cannot ensure a source operates in compliance with applicable requirements. Each operating permit that is issued is subject to public comment and offers the public an opportunity for a hearing before the Colorado Air Quality Control Commission (“Commission”).

3. The Refinery consists of three plants: (1) the West Plant, or Plant 1, a petroleum refinery, located at 5801 Brighton Boulevard; (2) the East Plant, or Plant 2, also a petroleum refinery, located at 5800 Brighton Boulevard; and (3) Plant 3, an asphalt plant, located at 3875 East 56th Avenue. The Refinery is located in Commerce City in Adams County, Colorado.

4. Plants 1 and 3 share a common air pollution operating permit, which the Division has assigned number 96OPAD120. Suncor was first issued an air pollution operating permit from the Division for Plants 1 and 3 in August 2004 and was issued a renewed operating permit once, in October 2012.

5. On or about September 16, 2016, Suncor submitted an application to the Division for the renewal of its air pollution operating permit for Plants 1 and 3.

6. Plant 2 operates under a separate air pollution operating permit, which the Division has assigned 95OPAD108. Suncor was first issued an air pollution operating permit for Plant 2 in October 2006. A renewed permit has not been issued since.

7. On or about October 1, 2010 Suncor submitted an application to the Division for the renewal of its air pollution operating permit for Plant 2.

8. Pursuant to the Colorado Air Act, the Division was required to grant or deny Suncor's permit renewal applications within eighteen months of receipt of a completed permit application. *See* C.R.S. § 25-7-114.5(4). Although several years have passed since Defendants received completed applications from Suncor, Defendants have not yet acted to grant or deny these applications.

9. Pursuant to the Colorado Air Act, the Defendants' failure to grant or deny a permit application or permit renewal application is final permit action for purposes of obtaining judicial review to require that Defendants take action on such applications "without additional delay." C.R.S. § 25-7-114.5(7)(b). Defendants must take timely action on these 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 Suncor's Refinery.

PARTIES

10. Plaintiff WILDEARTH GUARDIANS ("Guardians") is a non-profit conservation organization, with an office in Wheat Ridge, Colorado. Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in 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.

11. Guardians' members live, work, bike, recreate, and conduct educational, research, advocacy, and other activities in and around Commerce City, Colorado in areas where air pollution from the Suncor Refinery 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.

12. 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.

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).

JURISDICTION AND VENUE

15. 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.

16. 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.

17. This Complaint is timely filed because the ongoing failure of the Defendants to take mandatory, non-discretionary action to approve or deny applications for the air pollution operating permit renewals is a continuing and repeated violation. Renewal of operating permit applications is required every five years and thus the failure cannot be considered a discrete one-time violation.

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 documents 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. When a state permitting authority issues Title V permits (including renewals), 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).

22. 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.

23. 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). Prior to six months before the expiration date of an operating permit, a source must submit a “renewal” application. 40 C.F.R. § 70.5(a)(1)(iii). Once a source has submitted a complete application for renewal it is granted a “shield” to operate its facility under the expired Title V permit until the permitting authority takes final action on the permit application. 40 C.F.R. § 70.7(b).

24. 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.

25. 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 (including a request for permit modification or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application.”).

26. Accordingly, the Colorado Air Act requires the Division to grant or deny applications for renewable 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).

27. 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 or permit renewal 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 or permit renewal 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).

28. The failure to approve or deny Title V permit renewal applications within 18 months of the receipt of a completed permit application is a continuing and repeated violation. Under the continuing violations doctrine, non-compliant conduct from both inside and outside the limitations period is combined into a single, timely claim. *Hamer v. City of Trinidad*, 924 F.3d 1093, 1100 (10th Cir. 2019). Under the repeating violations doctrine, each day that a defendant fails to remedy non-compliant conduct constitutes a discrete violation. *Id.* at 1103. It is an ongoing violation because the Defendant’s duty to approve or deny Title V permit renewal applications does not terminate after passage of the 18-month deadline, and there are no “default” approvals. 40 C.F.R. § 70.8(e). It is a repeating violation because the Defendant has not remedied their failure to act on the operating permit renewals.

FACTUAL BACKGROUND

29. Suncor’s Commerce City oil Refinery is located in Commerce City. The facility consists of three separate, but related and adjacent plants: A west plant, called Plant 1, an east plant, called Plant 2, and an asphalt plant, called Plant 3. Plant 1 and Plant 3 are located at 5801 Brighton Blvd., Commerce City, CO 80022. Plant 2 is located at 5800 Brighton Blvd., Commerce City, CO 80022. The Refinery consists of numerous sources of air pollution, including storage tanks, fluid catalytic cracking units, internal combustion engines, heaters, boilers, sulfur recovery units, flares, and more.

30. According to Suncor’s air quality permitting information on file with the Division and data reported to the U.S. Environmental Protection Agency (“EPA”), the Refinery has the potential to release more than 900,000 tons of dangerous air pollutants, including particulate matter, sulfur dioxide, and greenhouse gases.

31. The Refinery also releases a number of pollutants that are known to be especially toxic for human health, including benzene, a known carcinogen, and hydrogen sulfide, which is lethal at high levels. According to EPA’s Toxic Release Inventory data from 2019, the Refinery releases thousands of pounds of toxic emissions. See EPA, Toxic Release inventory report for the Suncor refinery, *available* at <https://echo.epa.gov/air-pollutant-report?fid=110032913024> (last accessed Feb. 11, 2021). An abbreviated list of these toxic pollutants and total emissions is detailed in the table below:

| 2019 Air Toxics Emissions Reported From Suncor’s Commerce City Refinery | |
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| Pollutant | Potential Emissions (pounds per year) |
| Ammonia | 2,253 |
| Benzene | 4,220 |
| Ethylbenzene | 271 |
| Hydrogen cyanide | 33,032 |
| Hydrogen sulfide | 6,068 |
| Lead compounds | 80 |
| Mercury compounds | 3.49 |
| Propylene | 14,707 |
| Toluene | 6,334 |
| Xylene | 9,382 |

32. The Refinery is located in a community that is disproportionately impacted by pollution from numerous sources. A 2017 study found that the neighborhood surrounding the Suncor Refinery (zip code 80216) was the most polluted area in the U.S., rating worse than the area in New York State that was home to the notorious Love Canal disaster.

33. Suncor is a chronic violator of state and federal clean air laws at the Commerce City Refinery. The company is a “high priority violator.” According to the EPA, the Refinery is currently in violation of clean air laws and regulations and has been continuously for at least the past three years. Even after settling with the Division in early 2020 over numerous air quality violations, the Refinery continues to violate. As Adams County Commissioner Steve O’Dorisio commented in a recent news story, “The health and safety of our children depends ending this constant cycle of problem-apology-repeat.” See Finley, B., “Suncor boiler fails, causing spike in air pollution at Commerce City oil refinery,” *Denver Post* (May 27, 2020), available at <https://www.denverpost.com/2020/08/13/suncor-refinery-boiler-failure-pollution-colorado/> (last accessed Feb. 11, 2021).

34. The Refinery’s emissions, which are often illegal, also disproportionately impact minority and low-income communities. According to the EPA, more than 55% of the population within three miles of the refinery live below the poverty level, and more than 75% are minority.

35. The Refinery, which is 90 years old, is the state’s largest single non-coal-related source of greenhouse-gas emissions. It is also the state’s second-largest stationary source of fine particulate matter – a type of pollution consisting of microscopic airborne particles posing a wide variety of risks to human health – and is the fourth-largest source of volatile organic compounds, which lead to ozone formation and some of which are known to cause cancer.

36. The Suncor Refinery operates under two Title V permits issued by the Division.

37. One permit governs operations of Plant 2, or the East Plant. This permit, which has been assigned permit number 95OPAD108 by the Air Division, was first approved on October 1, 2006 and has yet to be renewed.

38. The second permit governs operations of Plants 1 and 3, or the West Plant and Asphalt Unit. This permit, which has been assigned permit number 96OPAD120 by the Division, was first issued on August 1, 2004, renewed once on October 1, 2012, and has yet to be renewed since.

39. The Division received Suncor’s completed application for permit renewal for Title V permit 95OPAD108, which governs operations of Plant 2, on October 1, 2010. By law, Colorado was required to take action to either approve or deny the application by April 1, 2012.

40. The State of Colorado received Suncor’s application for permit renewal for Title V permit 96OPAD120, which governs operations of Plants 1 and 3, on September 16, 2016. The APCD was required to take affirmative action to either approve or deny the application by March 16, 2018.

41. Since receiving applications to renew permits 96OPAD108 and 96OPAD120 for the Suncor oil Refinery, the State of Colorado has yet to grant or deny the applications. It has now been more than 15 years since the state first approved the Plant 2 Title V permit and nearly eight years since the state approved the most recent Plant 1 and 3 Title V permit renewal. Although the Division has approved several permit modifications, Colorado has yet to fully renew Suncor’s expired Title V permits.

42. In the meantime, Colorado's failure to grant or deny Suncor's permit applications means the Refinery is 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. In light of Suncor's chronic noncompliance with clean air laws, the current permits are inadequate under the Clean Air Act.

FIRST CLAIM FOR RELIEF

Failure to Approve or Deny Title V Renewal Application for Plants 1 & 3

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

44. The Division has failed to take final action to issue or deny Suncor's Title V air pollution operating permit application for Plants 1 and 3, Permit No. 96OPAD120, within 18 months after receiving an application in accordance with C.R.S. § 25-7-114.5(4), thereby violating the Colorado Air Act.

45. The Division's failure to grant or deny a Title V operating permit for Suncor's Plants 1 and 3 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 this permit renewal application "without additional delay." *Id.*

SECOND CLAIM FOR RELIEF

Failure to Approve or Deny Title V Renewal Application for Plant 2

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

47. The Division has failed to take final action to issue or deny Suncor's Title V air pollution operating permit application for its Plant 2, Permit No. 96OPAD108, within 18 months after receiving an application in accordance with C.R.S. § 25-7-114.5(4), thereby violating the Colorado Air Act.

48. The Division's failure to grant or deny a Title V operating permit for Suncor's Plant 2 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 Division and/or the Commission grant or deny this permit renewal application "without additional delay." *Id.*

PRAYER FOR RELIEF

HEREFORE, Plaintiff respectfully requests that the Court:

- A. Order the Division and/or the Commission to act on the Title V permit renewal applications for Suncor's oil and gas Refinery in Commerce City, Colorado, Operating Permits No. 96OPAD120 and 95OPAD108, submitted by Suncor on or about September 16, 2016 and October 1, 2010, respectively, by issuing or denying the permits, without further delay and after adhering to a process that provides for robust public involvement and meaningful consideration of public input;
- B. Award Plaintiff reasonable costs of litigation, including attorneys' fees; and
- C. Grant such other relief as the Court deems appropriate or necessary.

Respectfully submitted on February 16, 2021,

/s/ Katherine Merlin _____

Katherine Merlin
Atty. Reg #: 45672

Attorney for Plaintiff WildEarth Guardians