

DISTRICT COURT, ADAMS COUNTY, COLORADO 1100 Judicial Center Dr., Brighton, CO 80601 Phone: (303) 659-1161	DATE FILED: September 24, 2021 4:53 PM FILING ID: F17442C37565A CASE NUMBER: 2021CV30213
Plaintiff: <b>WILDEARTH GUARDIANS</b> v. Defendants: <b>COLORADO DEPARTMENT OF          PUBLIC HEALTH AND ENVIRONMENT, and          the AIR POLLUTION CONTROL DIVISION</b>	↑ COURT USE ONLY ↑
<i>Attorney for Plaintiff</i>  Katherine Merlin Attorney Reg. No. 45672 WildEarth Guardians 3798 Marshall St. Suite 8. Wheat Ridge, CO 80033 P: (720) 965-0854	Case Number: 21CV30213 Div: C Crtm: 505
<b>MOTION FOR SUMMARY JUDGMENT</b>	

PLAINTIFF WildEarth Guardians (“Guardians”), through counsel, submits the following Motion for Summary Judgment pursuant to C.R.C.P. Rule 56:

### CERTIFICATE OF CONFERRAL

Counsel for Plaintiff attempted to confer with Defendants on August 31<sup>st</sup>. Counsel for the Defendants responded asking to see the Motion. Counsel for Plaintiff explained the basis for the Motion in an email. Counsel for the Defendants did not state support or opposition to the Motion or its basis, but counsel said that they “reserved the right to respond in opposition.”

### INTRODUCTION

This action is a simple and straightforward missed deadline case. Title V of the federal Clean Air Act requires operators of ‘major sources’ of air pollution to renew their operating permits no less frequently than every five years. States oversee the federal Title V program and promulgate regulations to implement the federal requirements into state law. The Environmental Protection Agency (“EPA”) approves the “State Implementation Plan” containing the Title V permitting requirements. The Colorado Department of Public Health and Environment (“CDPHE”) through its Air Pollution Control Division (“Division”) are the agencies that oversee implementation of the Clean Air Act in Colorado through their permitting obligations. These “Agency Defendants” have a mandatory deadline of 18 months to take final action on Title V applications (whether initial applications or applications for renewal). At issue in this case are

two distinct Title V permits for a single major source of air pollution, the Suncor refinery. The renewal applications for these two permits were filed in October of 2010 and September of 2016, respectively. The Defendants do not deny failing to take final action on either permit.

Because of the Defendants' failure to act on these applications, one of Colorado's largest emitters of greenhouse gasses, as well as one of its largest emitters of toxic air pollutants, has been operating without any changes to its operations or pollution controls which might be required during its compliance review. The purpose of the mandatory five-year renewal period is to ensure that the operating permits remain up to date, and that the operations of these major polluters do not violate state or federal health and safety standards. The Defendants' neglect of their Title V program, and of these permits in particular, has caused serious harm to Colorado's air quality. However, the legal analysis in this case does not require complex scientific analysis of the Suncor refinery -- it simply requires looking at a calendar.

### **UNDISPUTED FACTS**

1. Suncor Energy (U.S.A.), Inc. ("Suncor Energy") owns and operates the Suncor Refinery, which is located in Adams County, Colorado.
2. The Suncor Refinery is a major source of air pollution under the Colorado Air Pollution Prevention and Control Act. It is a "major source" of Volatile Organic Compounds ("VOCs") and Oxides of Nitrogen ("NO<sub>x</sub>") in the Nonattainment New Source Review Area because it emits more than 50 tons per year of each. It is a Prevention of Significant Deterioration major stationary source because it has the Potential to Emit more than 100 tons/year each of Particulate Matter ("PM"), PM<sub>10</sub>, SO<sub>2</sub>, NO<sub>x</sub> and CO.
3. Pursuant to the Clean Air Act, EPA has delegated the responsibility to issue Title V permits for major sources located in Colorado to the Division. The Division issues Title V permits to major sources of air pollution located within the State of Colorado.
4. The Suncor Refinery consists of: (1) the West Plant, a petroleum refinery (herein referred to as "Plant 1"); (2) the East Plant, a petroleum refinery (herein referred to as "Plant 2"); and (3) an asphalt unit (herein referred to as "Plant 3").
5. The Division issued Title V permit number 96OPAD120 to Suncor Energy for Plants 1 & 3 ("Plants 1 & 3 Title V permit").
6. The Division issued Title V permit number 95OPAD108 to Suncor Energy for Plant 2 ("Plant 2 Title V Permit").
7. The Suncor Refinery's Plants 1 & 3 Title V permit was first issued on August 1, 2004.
8. The Suncor Refinery's Plants 1 & 3 Title V permit was last renewed by the Division on October 1, 2012.
9. On September 16, 2016, Suncor Energy submitted an application to the Division to renew its Title V permit for Plants 1 & 3.
10. On October 3, 2016, the Division determined that Suncor Energy's application to renew

its Title V permit for Plants 1 & 3 was complete and sent a letter to Suncor Energy to inform them of that determination.

11. The Division has not yet approved or denied Suncor Energy's Title V permit renewal application for Plants 1 & 3.

12. The Division first issued the Suncor Refinery's Plant 2 Title V permit on October 1, 2006. The Plant 2 Title V permit has not yet been renewed.

13. On October 1, 2010, Suncor Energy submitted an application to the Division to renew its Title V permit for Plant 2.

14. On November 18, 2010, the Division determined that Suncor Energy's application to renew its Title V permit for Plant 2 was complete and sent a letter to Suncor Energy to inform them of that determination.

15. The Division has not yet approved or denied Suncor Energy's Title V permit renewal application for Plant 2.

### **STANDARD OF REVIEW**

According to C.R.C.P. 56(c), a defendant's liability may be established at summary judgment when the plaintiff shows "there is no genuine issue as to any material fact and that [the plaintiff] is entitled to a judgment as a matter of law." *McIntyre v. Bd. of Cnty. Comm'rs*, 86 P.3d 402, 406 (Colo. 2004). As demonstrated below, there is no genuine dispute that the Defendants failed to take final action on Suncor Refinery's Title V major source operating permit applications within the 18-month deadline prescribed by statute and therefore this court should render a decision in favor of Plaintiff as a matter of law.

### **ARGUMENT**

#### **I. Plaintiff WildEarth Guardians has Representational Standing to Bring this Claim.**

According to the Colorado Supreme Court, to establish standing "a plaintiff must establish that (1) he suffered an injury in fact, and (2) his injury was to a legally protected interest." *Wimberly v. Ettenberg*, 194 Colo. 163 at 168, 570 P.2d 535 at 539 (1977). "The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Id.* An interest is contemplated by statutory or constitutional provisions where it "is explicit or fairly inferable from the statutory provisions under which an agency acts or if the legislature expressly confers standing. . . ." *Cloverleaf v. Colo. Racing Comm.*, 620 P.2d 1051, 1057 (Colo. 1980). *See also Nat'l Wildlife Fed'n v. Cotter Corp.*, 665 P.2d 598, 603 (Colo. 1983) (holding "business, economic, aesthetic, governmental, recreational, or conservational interests" to be among some of the interests that can form the basis for an injury in fact to confer standing). Plaintiffs enjoy a "relatively broad" definition of standing in Colorado. *Ainscough v. Owens*, 90 P.3d 851, 855-56 (Colo. 2004).

Standing can be established through the complaint “along with any other evidence submitted on the issue of standing.” *Bd. of Cty. Comm’rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992). When deciding whether a party has standing, “all averments of material fact in a complaint must be accepted as true.” *State Bd. for Cmty. Colls. & Occupational Educ. v. Olson*, 687 P.2d 429, 434 (Colo. 1984). The trial court may receive any competent evidence pertaining to the motion, including sworn Plaintiff declarations. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (1993).

An organization has representational standing to assert claims on behalf of its members if it shows (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 in the lawsuit.” *Conestoga Pines Homeowners’ Ass’n v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)). In this case, Plaintiff WildEarth Guardians (“Guardians”) has organizational standing to challenge the Defendants’ inexcusable delay. Guardians’ members live, work, and recreate in and around the neighborhoods impacted by Suncor’s pollution. See Exhibit 1 (sworn declaration of Luz E. Molina). This attestation, along with the allegations in the Complaint, demonstrate that Guardians’ members would otherwise have standing to sue in their own right. Guardians’ purpose is stated in the Complaint at paragraph 10, which is in part to reduce harmful air pollution including greenhouse gas emissions to protect the health and safety of Guardians members, the public, and the environment. The interests that Guardians seeks to protect are the health and safety of its members and the public living near the Suncor refinery as well as to prevent greenhouse gas emissions from the refinery, which is germane to the purpose of the organization. Neither any claim nor the relief requested require the participation of any individual Guardians member in the lawsuit. Therefore, Guardians has satisfied the three prongs of representational standing.

## **II. The Defendants’ Failure to Act is Reviewable by the Court.**

Pursuant to the Colorado Administrative Procedures Act (“APA”), the district court “shall . . . compel any agency action to be taken that has been unlawfully withheld or unduly delayed . . . if the court finds that the agency action is (I) arbitrary or capricious; (II) a denial of statutory right; . . . [or] . . . (IX) otherwise contrary to law.” C.R.S. § 24-4-106(7)(b). Only ‘final’ agency actions are subject to judicial review. C.R.S. § 24-4-106(3). Under Colorado’s Air Quality Control Act (“Air Act”), the Defendants’

failure 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.

§ 25-7-114.5(7)(b).

Because Defendants have failed to meet their discrete, nondiscretionary duty to take final action on either of the two outstanding Title V major source operating permits within 18 months

of submission, such failure represents an unlawful withholding of a statutory duty, was arbitrary and capricious, denies a statutory right, and is otherwise contrary to law. The remedy prescribed by the Air Act is for this Court to compel action without additional delay.

### **III. The Defendants' Failure to Act on Suncor's Title V Operating Permits is a Violation of State Law.**

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.* 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."). 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.

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 includes, in a single document, all enforceable operating conditions for a source. Title V permits apply to "major sources" of air pollution<sup>1</sup> 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).

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).

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<sup>1</sup> A major source has actual or potential emissions at or above the major source threshold for any "air pollutant." The major source threshold for any air pollutant is 100 tons/year (this is the "default value"). Lower thresholds apply in non-attainment areas (but only for the pollutant that are in non-attainment). For example, the Colorado Metro Denver-North Front Range region (including the site of the Suncor facility) is in "serious" non-attainment for ozone, which means the threshold for a major source of ozone precursors is only 50 tons/year. Major source thresholds for "hazardous air pollutants" (HAP) are 10 tons/year for a single HAP or 25 tons/year for any combination of HAP.

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).

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.

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 C.F.R. 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.”). 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); 5 CCR 1001-5 Part C (IV)(C). 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).

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).

The Defendants received applications for the renewal of the Title V operating permits for the Suncor refinery on September 16, 2016 (for Plants 1 & 3) and October 1, 2010 (for Plant 2) and have failed to grant or deny the permit renewal applications. The deadline for the Defendants to act on the first submittal was March 16, 2018 -- nearly 3 1/2 years ago -- and April 1, 2012, nearly 9 1/2 years ago for the second submittal. Defendants’ delay is inexcusable given that the Suncor refinery is one of the biggest polluters in the state and is located in a densely populated, disproportionately impacted urban area.

## CONCLUSION

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.

Guardians respectfully requests that the Court find that the Defendants are in violation of state law, C.R.S. § 25-7-114.5(4). Therefore, partial summary judgment on liability should be entered against the Defendants forthwith, with a proceeding to determine the remedy to follow.

Respectfully submitted on September 24, 2021,

*/s Katherine Merlin*

Katherine Merlin

Atty. Reg #: 45672

*Attorney for Plaintiff WildEarth Guardians*

## CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing Motion for Summary Judgment upon all parties below electronically via the Colorado Courts E-File system this September 24, 2021:

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