

DISTRICT COURT, GARFIELD COUNTY COLORADO 109 8th St., Ste. 104 Glenwood Springs, CO 81601 (970) 928-3065	DATE FILED: May 19, 2022 4:51 PM FILING ID: CCF0FC141B1E6 CASE NUMBER: 2022CV30024
Plaintiff: WILDEARTH GUARDIANS v. Defendants: THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT and the COLORADO AIR POLLUTION CONTROL DIVISION.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Attorneys for Defendants: PHILIP J. WEISER, Attorney General THOMAS A. ROAN, #30867* First Assistant Attorney General ALLISON KVIEN, #53143* WILLIAM MARSHALL, #48010* Assistant Attorneys General Natural Resources and Environment Section 1300 Broadway, 7th Floor Denver, CO 80203 Phone: 720-508-6000 Email: tom.roan@coag.gov allison.kvien@coag.gov william.marshall@coag.gov <i>*Counsel of Record</i>	Case Number: 2022CV30024 Div.: A
DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	

Defendants, Colorado Department of Public Health and Environment and Air Pollution Control Division (“Division”) (collectively, the “Agency Defendants”), by and through undersigned counsel, hereby submit their Response to WildEarth Guardians’ (“Guardians”) Motion for Summary Judgment.

I. INTRODUCTION

The Colorado Air Pollution Prevention and Control Act (“State Air Act”) requires that Agency Defendants take final action on Title V operating permit applications within 18 months of receipt of a complete application. § 25-7-114.5(4), C.R.S. The Agency Defendants do not dispute that their failure to take timely final action is reviewable by this Court. Agency Defendants agree with Guardians that the statute establishing the deadline for the Division’s processing of operating permit renewals is clear and unambiguous. Agency Defendants also do not dispute Guardians’ standing. Agency Defendants do dispute that portions of Plaintiff’s requested relief are authorized and appropriate.

II. FACTUAL BACKGROUND

A. Guardians’ Statement of Undisputed Facts

Agency Defendants dispute one fact contained within Guardians’ “Undisputed Facts” section of its Motion for Summary Judgment. The ponds at the Parachute Facility are not in different stages of treatment.¹ *See* Mot. Summ. J. at 2, ¶ 1. Next, Agency Defendants clarify that the Parachute Facility is a major source of air pollution for hazardous air pollutants, not criteria pollutants.² *See id.* at ¶ 2. Agency Defendants do not dispute the remaining facts contained within Guardians’ Undisputed Facts section of its Motion for Summary Judgment.

B. Additional Undisputed Facts

Agency Defendants also feel that it is critical to provide the below information concerning the status of the Parachute Water Management Facility’s Title V operating permit

¹ *See* Colorado Department of Public Health and Environment, Air Pollution Control Division, Technical Review Document for Draft Operating Permit 09OPGA330, 2, *available at* <https://drive.google.com/file/d/1jig35nmY3q25f5fyICMSix47dyehXBnX/view?usp=sharing>.

² *Id.* at 8.

(the “Subject Permit Application”). On March 31, 2022, the Division concluded drafting the Subject Permit Application and gave notice to initiate a 30-day public comment period on the Division’s draft permit decision.³ On April 28, 2022, the Grand Valley Citizens Alliance requested a public hearing on the draft permit before the Air Quality Control Commission (“Commission”).⁴ On May 10, 2022, the Commission set a public hearing for this draft permit on June 9, 2022.⁵

C. Disputed Facts

Agency Defendants dispute Guardians’ assertion that Agency Defendants’ inaction on the Subject Permit Application has caused “serious harm” to Colorado’s air quality. Mot. Summ. J. at 2. Guardians offer no factual basis for this allegation and cannot do so. While Agency Defendants believe this factual assertion is not relevant or material to Agency Defendants’ liability, if the Court finds that it is, Agency Defendants dispute it. A Title V permit “does not impose substantive new requirements.” 40 C.F.R. § 70.1(b). “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.” *Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006). Guardians has failed to meet any applicable standard by which the Court

³ See Colorado Department of Public Health and Environment, Air Pollution Control Division, Notice Of A Proposed Title V Operating Permit Warranting Public Comment: Terra Energy Partners, Rocky Mountain LLC – Parachute Water Management Facility – Garfield County (March 31, 2022), available at https://drive.google.com/file/d/1t8tJOKWotDFw_ri6xOCrKP9qZLBr0ary/view?usp=sharing.

⁴ See Grand Valley Citizens Alliance, Request for Public Hearing, Draft Title V Permit for TEP Parachute Water Management Facility, Parachute, Colorado, Garfield County, 09OPGA330 (April 28, 2022), available at https://drive.google.com/file/d/1LO_h0zGlapA9F9WTLkh94RrCvTDh3D41/view?usp=sharing.

⁵ Air Quality Control Commission, Notice of Public Hearing Regarding: Terra Energy Partners, Rocky Mountain LLC Parachute Water Management Facility – Garfield County Title V Operating Permit (09OPGA330), (May 10, 2022), available at <https://drive.google.com/file/d/1kAk-dp7wqcdAHsTfpBdyb6UTFdKviSU8/view?usp=sharing>.

can draw conclusions about any alleged harm to Colorado from the pleadings and materials filed in this case.

III. STANDARD OF REVIEW

Agency Defendants do not dispute the standard of review contained within Guardians' Standard of Review section of its Motion.

IV. PORTIONS OF PLAINTIFF'S REQUESTED RELIEF ARE NEITHER AUTHORIZED NOR APPROPRIATE

A. Declarative Relief Is Appropriate

Agency Defendants do not dispute Guardians is entitled to an order of this Court declaring that Agency Defendants have not taken final action on the Subject Permit Application within the time frames provided by the State Air Act.

B. Injunctive Relief Is Appropriate, but Not a 90-Day Timeframe.

Agency Defendants do not dispute that an order requiring Agency Defendants to take final action on the Subject Permit Application is available relief in this case. Agency Defendants also do not dispute that this Court has the jurisdiction to require the Division to take final action on the Subject Permit Application by a date certain.

1. A Ninety-Day Timeframe for Final Action on the Subject Permit Application Is Not Appropriate

Guardians is not entitled to its requested relief that Agency Defendants act on the Subject Permit Application within ninety (90) days of this Court's order on liability. Guardians offers no authority—or even rationale—for its request for a 90-day timeframe. There are many legally mandated steps the Division must take in the process of issuing a Title V operating permit, many of which are completely outside of the Division's control, and some of which can last ninety or more days *alone*.

The Division is currently in the public comment and hearing process of issuing the Subject Permit Application, as described above in Section II.B of this Response. Therefore, the Division must follow the remaining legally required steps before it can take final action on the Subject Permit Application:

1. At the conclusion of the public comment and hearing period, the Division must review, consider, and respond to public comments. *See* 5 C.C.R. § 1001-5:3C.VI.B.8. The Division has received dozens—occasionally even hundreds or thousands—of comments on draft permitting decisions it makes and publishes for public notice and comment. Decl. of Blue Parish, filed concurrently herewith, at ¶ 8. Depending on the volume and technical complexity of comments the Division receives, the Division’s review, consideration, and response to those public comments can require several months. *Id.* at ¶ 9.
2. After formulating responses to public comments, the Division must send its draft permit decision and its responses to comments to the United States Environmental Protection Agency (“EPA”) for a 45-day review period. 40 C.F.R. § 70.8(a)(1); *see also* Statement of Basis, Specific Statutory Authority, and Purpose, Adoption of Regulation 3 (July 15, 1993), C.C.R. § 1001-5:3F.I.L.I.B.2.
3. During or at the conclusion of its 45-day review period, EPA has the authority to object to conditions omitted from or contained within the Division’s draft permit. 40 C.F.R. § 70.8(c). If EPA does issue objections, it is possible—depending on the substance of the objections—that the Division will need to modify the permit and solicit additional public comment, in a second public comment period, to

remedy the objection. EPA's regulations provide the Division with ninety (90) days to remedy any objections it issues and return the permit to EPA for another review period. 40 C.F.R. § 70.8(c)(4).

4. At the conclusion of EPA's 45-day review process, if EPA issues no objections, it is still possible that the Division may need to make revisions in response to comments received from EPA. *See* Statement of Basis, Specific Statutory Authority, and Purpose, Adoption of Regulation 3 (July 15, 1993), C.C.R. § 1001-5:3F.I.L.I.B.2. Once the Division assesses any issues or comments raised by EPA and addresses them appropriately, the Division may take final permit action.

As the above outline of the remaining Title V operating permit issuance process demonstrates, a ninety (90) day timeframe is neither realistic nor consistent with the Division's legal requirements. Guardians is well-aware of the process and the associated legal requirements involved in Agency Defendants' Title V issuance process. In another similar Title V backlog lawsuit, Guardians and Agency Defendants filed a Joint Status Report with the Adams County District Court in February 2022 that outlines the above process. *See* Exhibit A, Joint Status Report, filed in Case No. 2021CV30213 on Feb. 15, 2022. In that same report, Guardians agreed that the Division's very aggressive schedule of 90 days to complete *just the initial drafting step* of the Title V permit issuance process was reasonable and complied with the Court's directive to act "without further delay." *See id.*; Exhibit B, Adams County District Court's January 10, 2022 Order on Liability, issued in Case No. 2021CV30213 on Jan. 10, 2022.⁶ Therefore, Guardians

⁶ Agency Defendants agreed to that timeline under the very specific facts and circumstances in that case, and in no way concede that a timeline of 90-days to issuance of a draft permit will always be reasonable or even feasible.

should know that its request that the Court order the Division complete *all steps* in the issuance process and take final action within 90 days is unreasonable and would conflict with the Division's legal obligations.

2. *The Division's Requested Remedy*

Once the Commission concludes its public hearing on June 9, 2022, or later,⁷ the Division must: 1) review, consider, and respond to public comments, 2) send the draft permit decision to the EPA for its the 45-day review period, and 3) if applicable, navigate any objections raised by EPA. The Division estimates it will be able to take final action on the Subject Permit Application no later than April 1, 2023. This date is based on allocating the following amounts of time for the remaining procedural steps:

- 12 days to accommodate the Commission extending the public comment period or holding additional hearings after June 9, 2022, if it so chooses;⁸
- 90 days for the Division to review, consider, and respond to public comments at the conclusion of the Commission's public hearing(s);
- 45-day EPA review period pursuant to 40 C.F.R. § 70.8(c)(1);
- 90 days to remedy any EPA objections that could be issued pursuant to 40 C.F.R. § 70.8(c)(4);⁹
- 45 days for EPA to review the permit once any objections are remedied; and
- 14 days for the Division to review any further EPA comment, and to format and publish its permitting decision.

⁷ The Commission, which is not a party to this lawsuit, has the authority to further extend the public comment period beyond the date of a requested public hearing if it so chooses. *See* Commission Procedural Rules, 5 C.C.R. § 1001-1:VII.D.12.

⁸ *See supra* note 7. In the case of the Suncor Plant 2 draft Title V permit, the Commission extended the comment period for a similar amount of time; hearings were held on May 1 and 4, and public comment was extended through May 11, 2021. *See* Technical Review Document for Renewal / Modifications to Operating Permit 95OPAD108, at 148 (March 4, 2022), *available at* https://drive.google.com/file/d/1WaPJZC85P5k_juZ27FGbzbez4NC4g3k/view?usp=sharing.

⁹ While EPA typically does not issue objections to Title V permits, it is certainly possible that EPA could issue objections to any Title V permit, and EPA did recently issue objections to one of the permits that is the subject of Guardians' litigation against the Division in the Adams County District Court (the Suncor Plant 2 Permit). *See* EPA Region 8, EPA Objection to Suncor Energy, Inc. Plant 2 Title V Operating Permit (March 25, 2022), *available at* <https://www.epa.gov/system/files/documents/2022-03/epa-suncor-plant-2-title-v-objection-letter-2022-03-25.pdf>.

The Division therefore requests that the Court enter an order directing the Division to take final action no later than April 1, 2023, so that the Division is able to comply with both its statutory and regulatory obligations governing the procedural steps required for issuing Title V permits and this Court's order. While it is possible the Division will be able to take final action before April 1, 2023, particularly if no EPA objections are issued on the Subject Permit Application, any order directing the Division to take final action before April 1, 2023, could cause conflict between the Division's statutory and regulatory obligations and this Court's order.

C. Awarding Attorney's Fees Is Not Appropriate Nor Authorized by Law.

Guardians' request for attorney's fees has no basis in law or fact. Colorado law is settled: "a trial court may not award attorney's fees in the absence of statute, rule, or contract." *Avco Fin. Servs. of Colo., Inc. v. Gonzales*, 653 P.2d 751, 751 (Colo. App. 1982) (citing *Agee v. Tr. of Pension Bd.*, 33 Colo. App. 268, 518 P.2d 301 (1974)). Guardians cite no authority that legally entitles it to an award of attorney's fees. The Adams County District Court recently found that in a similar lawsuit brought by Guardians, this request had no merit. *See* Exhibit B, Adams County District Court's January 10, 2022 Order on Liability, issued in Case No. 2021CV30213 on Jan. 10, 2022.

Guardians' claim that Agency Defendants have mounted "frivolous defenses" is untrue, and it is unclear to what Guardians is even referring. Mot. Summ. J. at 8. If Guardians is referring to Agency Defendants' reservation of its right to respond to Guardians' Motion for Summary Judgment, it is perfectly reasonable for Agency Defendants to raise issues about the scope of the relief Guardians is requesting in this Response. If Guardians is referring to Agency Defendants' Answer that contains a "Defenses and Affirmative Defenses" section, the Tenth

Circuit has recognized that “counsel often plead vast numbers of affirmative defenses without being sure whether the facts will ultimately support the defenses, such pleading is done precisely so that the defenses will be preserved should discovery or further proceedings reveal factual support.” *Wanamaker v. Albrecht*, 99 F.3d 1151, 1996 WL 582738 (10th Cir. 1996).

Furthermore, in this Response, Agency Defendants have mounted *no defenses* to liability.

Guardians’ contention that Agency Defendants are “frivolously and vexatiously requiring” Plaintiff to sue them on a permit-by-permit basis is also untrue. Mot. Summ. J. at 9. There is no “requirement” for Guardians to file this lawsuit. There is no affirmative action by Agency Defendants that led to this lawsuit. This lawsuit arose out of the Agency Defendants’ inability to take timely final action on the Subject Permit Application.

Further, Agency Defendants have continuously expressed interest in finding an out-of-court remedy to the Division’s Title V permit backlog. *See, e.g.*, Exhibit C, Agency Defendants’ Unopposed Motion to Stay Proceedings for Settlement Negotiations in the Suncor Title V Litigation, filed in Case No. 2021CV30213 on Apr. 30, 2021. Even if Agency Defendants and Guardians are not able to reach a mutually agreeable settlement arrangement to resolve the Division’s Title V backlog issue, that fact would not entitle Guardians to an award of attorney’s fees.

Agency Defendants’ Title V backlog is due, in part, to the Division’s historical struggle to adequately staff its Title V permit program. *See* Exhibit D, McMillan Decl. from Suncor Title V Litigation, filed in Case No. 2021CV30213 on Oct. 28, 2021, ¶¶ 5-6. Plaintiffs contend that they have “repeatedly conferred with Defendants, on this and multiple other cases, and requested that Defendants develop a comprehensive schedule for addressing the current backlog of more

than 60 overdue and more than 80 currently pending Title V Major Source Operating permits.” Mot. Summ. J. at 9. The Division *is* working towards developing a comprehensive plan that is both realistically accomplishable and aggressive to address the Division’s Title V permitting backlog. *See* Decl. of Deborah Nelson, filed concurrently herewith, ¶ 5. The Division has also made successful efforts during this year’s legislative session to get more resources to address the Division’s Title V operating permit backlog.¹⁰ In addition, the Division is planning to hire additional permit engineers to increase the available resources for the Division’s Title V Operating Permit unit, so that the Division’s Title V permitting backlog can be resolved. *See* Decl. of Deborah Nelson, ¶ 6. Guardians’ request for attorneys’ fees is without reasonable basis in law or in fact, and should be denied.

D. Other Relief Is Not Appropriate Nor Authorized by Law.

Plaintiff’s prayer for other relief exceeds the scope of relief authorized by § 25-7-114.5(4) or § 24-4-106(7)(b), C.R.S.

V. CONCLUSION

In conclusion, Agency Defendants do not contest that the Division has not yet taken final action on the Subject Permit Application. However, Agency Defendants do contest portions of the relief that Guardians requested. Agency Defendants request that this Court enter an order directing the Division to take final action on the Subject Permit Application no later than April 1, 2023, so that the Division is able to comply with both its regulatory obligations in issuing a

¹⁰ *See* Colorado Budget Appropriation of the 2022 Legislative Session, HB22-1329, *available at* https://leg.colorado.gov/sites/default/files/documents/2022A/bills/2022a_1329_act.pdf; Joint Budget Committee, Staff Figure Setting, FY 2022-23, Department of Public Health and Environment, 18-20, 70-87, *available at* https://leg.colorado.gov/sites/default/files/fy2022-23_pubheafig.pdf.

legally sufficient Title V permit and this Court's order. Agency Defendants also request that this Court deny Guardians' request for attorney's fees and other relief.

Submitted this 19th day of May, 2022.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (with Exhibits A, B, C, and D and Declarations of Blue Parish and Deborah Nelson)** upon all parties below electronically via the Colorado Courts E-File system this 19th day of May 2022:

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