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DISTRICT COURT, GARFIELD COUNTY COLORADO 109 8th St., Ste. 104 Glenwood Springs, CO 81601 (970) 928-3065	
Plaintiff: **WILDEARTH GUARDIANS** v. Defendants: **COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, and the AIR POLLUTION CONTROL DIVISION**	⇧ COURT USE ONLY ⇧
Attorney for Plaintiff Katherine Merlin Attorney Reg. No. 45672 WildEarth Guardians 3798 Marshall St. Suite 8 Wheat Ridge, CO 80033 P: (720) 965-0854	Case Number: 2022CV030024 Div: A
MOTION FOR SUMMARY JUDGMENT	

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

CERTIFICATE OF CONFERRAL

Plaintiff has conferred with counsel for the Denfendants, who take no position on this Motion but reserve the right to respond.

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 obtain operating permits from the state, which must then be renewed 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 Defendants have a mandatory deadline of 18 months to take final action on Title V applications (whether initial applications or applications for renewal). The Defendants admit failing to take final action on the permit application for a major source of air pollution located in Garfield County – the Parachute Water Treatment Facility.

Because of the Defendants' failure to act on this application, this major source of air pollution has been operating without a major source operating permit. These permits, while they do not add substantive operating requirements, collect all legally enforceable operating limits and standards into one place in order to assure compliance, and that the operations of these major polluters do not violate state or federal health and safety standards. The Defendants' neglect of their responsibility to stay up-to-date with its Title V program has caused serious harm to Colorado's air quality. However, the legal analysis in this case does not require complex scientific analysis of the emissions generated by this facility or complex questions of potential harm to people or the environment. This is a mandatory, non-discretionary deadline case: it simply requires looking at a calendar.

UNDISPUTED FACTS

1. The Parachute Water Management Facility ("Parachute facility") is located in Garfield County Colorado. The Parachute Facility receives wastewater from oil and gas production facilities and separates residual hydrocarbons and other pollutants. It consists of dozens of tanks for storing, separating, and pre-treating produced water and hydrocarbon condensate, five ponds for storing water in different stages of treatment, a water evaporation system, and other equipment for burning off pollutants, loading/transporting materials, a 17-acre land application site, and other associated infrastructure.

2. The Parachute Facility is a major source of air pollution under the Colorado Air Pollution Prevention and Control Act. It is a "major source" of numerous air pollutants, and therefore subject to major source permitting under Title V of the Clean Air Act.

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 previous owner of the Parachute Facility, Williams Production RMT Company filed a complete Title V application for an initial operating permit on March 12, 2009.

5. The Division has not yet approved or denied the Title V permit initial application for the Parachute Facility.

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 the Parachute Facility's Title V major source operating permit application 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

1. 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 areas impacted by air pollution originating with the Parachute Facility. *See* Exhibit 1 (sworn declaration of Jeremy Nichols). 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 Parachute Facility, the environmental health of the region surrounding the Facility, and the recreational and aesthetic characteristics of the public lands near the Facility, which are 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.

2. **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 the outstanding Title V major source operating permit 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.

3. **The Defendants' Failure to Act on the Title V Operating Permit Application 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[1] 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.* § 766la(a).

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).

[1] A major source has actual or potential emissions at or above the major source threshold for any "air pollutant." The major source threshold for most air pollutants is 100 tons/year (this is the "default value"). 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). Once a source has submitted a complete application for 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). Although Defendants' Answer states that "the facility's actual emissions fluctuate and may fall below major source thresholds" at paragraph 35, this does not negate the facility's requirement to possess nor the Defendants' responsibility to take final action on a major source operating permit. Defendants admit this at paragraph 33 of their Answer.

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 the initial application for a Title V operating permit for the Parachute Facility on March 12, 2009 and have failed to grant or deny the permit renewal application. The deadline for the Defendants to act on the submittal was on or about September 12, 2010 – nearly 12 years ago. This delay is a violation of the Colorado Air Act, and has deprived Plaintiff and the public of the environmental protections to which they are entitled.

4. Plaintiff's Requested Relief is Authorized and Appropriate

Guardians' Complaint requests relief in the form of: (1) declarative relief, requesting a finding from the Court that the Defendants violated the Colorado Air Act by failing to approve or deny the Title V Major Source Operating Permit application for the Parachute Facility within 18 months of receipt, (2) injunctive relief, requesting that the Court order the Defendants to take final action on the permit application within 90 days of the Court's order, (3) award Plaintiff reasonable costs of litigation including attorney's fees, and (4) grant other such relief as the Court deems appropriate or necessary. This Court is empowered to enter a declaratory judgment by the Colorado Uniform Declaratory Judgments Act, C.R.S. § 13-51-101 et seq., and C.R.C.P. Rule 57. However, the request for injunctive relief as well as the request for costs including attorneys fees were challenged by Defendants' Answer. These requests are appropriate and authorized by law.

Injunctive Relief

The Colorado Air Act states that "Failure of the division or commission, as the case may be, to grant or deny the permit 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). In this case, Defendants' duty to take action on the Parachute Facility operating permit application is nearly 12 years unlawfully delayed from a date-certain deadline. Defendants are aware that their failure to take action on the Parachute Facility permit application is not legally defensible, and that action is overdue – yet have not completed the first procedural step toward approval.

The District Courts have broad equitable powers. *See Lewis v. Lewis*, 189 P.3d 1134 (Colo. 1998) (holding that the power to fashion equitable remedies generally lies within the discretion of the trial court); *Ellis v. Colorado Nat. Bank*, 86 Colo. 391, 282 P. 255 (Colo. 1929) (the District Court is a tribunal of general jurisdiction with the broadest equity powers); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (construing "the statute at issue 'in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.') (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). Courts can, and often do, impose equitable remedies requiring agencies to perform outstanding

obligations by a date certain. *See*, *e.g.*, *New Jersey v. Wheeler*, 475 F.Supp.3d 308, 327–29 (S.D.N.Y. 2020) (imposing a date certain deadline for EPA to promulgate a final rule where a date-certain deadline was missed, and holding that EPA had a "heavy burden" to show that the plaintiff's proposed schedule was "impossible" particularly in light of the agency's history of delay); *Sierra Club v. Pruitt*, 280 F.Supp.3d 1 (D.D.C. 2017)

> [T]he parties are only contesting exactly when EPA must respond. 'When an agency has failed to meet the statutory deadline for a nondiscretionary act, the court may exercise its equity powers 'to set enforceable deadlines both of an ultimate and an intermediate nature. . . A court appropriately may decline to impose an immediate deadline . . . and may afford an agency additional time for compliance, 'where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities.'

(quoting *Sierra Club v. Johnson*, 444 F.Supp.2d 46, 52 (D.D.C. 2006)).

Where an agency is required to act by a mandatory, non-discretionary deadline, fails to act until it is sued and the case is seen all the way through to a final order of the court, the ability to then convert that missed date-certain deadline into an undefined timeframe beginning from the date of the order would result in substantial inequity and only encourage additional agency delay. That inequity is only compounded by the sensitivity to timing contained within the Act itself - Title V permits must be renewed no less frequently than every five years to ensure they remain up to date. This Court has the equitable power to require Defendants to take final action on this permit application and should exercise it.

Attorney's Fees

Plaintiff's request for attorney fees is justified by the frivolous defenses raised by the Defendants. Defendants' Answer acknowledges the existence of a complete Title V operating application for the Parachute Facility filed in 2009, their mandatory non-discretionary 18-month deadline for taking final action, and the fact that they have not yet taken final action. There are no legal or factual arguments on which a defense might be mounted, other than an attempt to bar Plaintiff from raising these claims through a Statute of Limitations. However, the Defendants *cannot* raise this objection to Plaintiff's claims.

When each state submits its proposed Title V program to the EPA for approval, its Attorney General must issue a legal opinion stating that the laws of the state provide adequate authority to carry out the program, and include "citations to the specific states, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority." 40 CFR § 70.4(b)(3). When EPA approved Colorado's Title V operating permit program on August 16, 2000, the agency

clearly acknowledged that Colorado certified its Title V program comports with the agency's 40 C.F.R. Part 70 regulations. 65 Fed. Reg. 49,919 (Aug. 16, 2000). In its approval, the EPA explained, "[t]he program submittal included a legal opinion from the Colorado Attorney General stating that the laws of the State provide adequate legal authority to carry out all aspects of the program[.]" 65 Fed. Reg. 49,919, 49,921. This included authority to meet certain federal procedural requirements, including the opportunity for adequate state judicial review of Title V permit actions. § 70.4(b)(3)(xii). Federal regulations required the Colorado Attorney General to state, cite, sign, and demonstrate that "[i]f the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review *may be filed any time before the permitting authority denies the permit or issues the final permit*." *Id.* (emphasis added). Colorado's Attorney General has certified to the U.S. EPA that petition for judicial review of failure to take final action on a Title V permit application "may be filed at any time." A dismissal of this Complaint on a 35-day Statute of Limitations would therefore be contrary to federal requirements for Title V and place the federal approval of the entire state Title V permitting program in legal jeopardy.

The Colorado legislature, provided that "in any civil action of any nature commenced or appealed in any court of record in this state, 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, either in whole or in part, that the court determines lacked substantial justification." C.R.S. § 13-17-102(2) (emphasis added). Plaintiff has 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. With no legal or factual defense Defendants are frivolously and vexatiously requiring that plaintiffs such as WildEarth Guardians sue them on a permit-by-permit basis in District Courts around the state prior to acting on these applications which they acknowledge are overdue as a factual and legal matter.

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 Parachute Facility.

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 this Court should grant Plaintiff the remedy it seeks and declare that Defendants violated the Colorado Air Act by failing to approve or deny the Title V Major Source Operating Permit application for the Parachute Facility, Permit No. 09OPGA330,

within 18 months after receiving the application; and order the Division and/or the Commission to act on the Title V permit initial application for the Parachute Water Management Facility by issuing or denying the permit within 90 days of a final order from the Court finding Defendants violated the Colorado Air Act.

Respectfully submitted on April 29, 2022,

/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 April 29, 2022:

Attorneys for Defendants:
PHILIP J. WEISER,
Attorney General THOMAS A. ROAN, 30867*
First Assistant Attorney General
ALLISON L. KVIEN, 53143* Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
Phone: (720) 508-6000
Email: tom.roan@coag.gov
allison.kvien@coag.gov
*Counsel of Record