

<p>DISTRICT COURT, ADAMS COUNTY, COLORADO  1100 Judicial Center Dr.,  Brighton, CO 80601  Phone: (303) 659-1161</p>	
<p>Plaintiffs: CENTER FOR BIOLOGICAL DIVERSITY and  WILDEARTH GUARDIANS</p> <p>v.</p> <p>Defendants: COLORADO DEPARTMENT OF PUBLIC  HEALTH AND ENVIRONMENT, AIR POLLUTION  CONTROL DIVISION</p>	
<p><i>Attorneys for Plaintiff:</i></p> <p>Kevin J. Lynch, no. 39873  Wyatt G. Sassman, no. 51890  Amy E. Volz, no. 56058  Amelia Marsh (Student Attorney)  Marcus Gould (Student Attorney)  Nicole Pla (Student Attorney)  Mohammed Aliraani (Student Attorney)  Environmental Law Clinic  University of Denver  Sturm College of Law  2255 E. Evans Avenue  Denver, CO 80208  Phone: (303) 871-6140  klynch@law.du.edu  wsassman@law.du.edu  avolz@law.du.edu  amarsh24@law.du.edu  mgould24@law.du.edu  npla24@law.du.edu  maliraani24@law.du.edu</p>	<p>(COURT USE ONLY)</p> <p>Case Number:</p> <p>Division:</p> <p>Courtroom:</p>
<p><b>COMPLAINT</b></p>	

## **INTRODUCTION**

1. This complaint is brought to compel the Air Pollution Control Division of the Colorado Department of Public Health and Environment to approve or deny the initial Title V permit applications for Dupont Terminal and the Totem NG Transmission and Storage Facility.
2. Air pollution operating permits are required by Title V of the federal Clean Air Act. The United States Environmental Protection Agency authorized Colorado's Air Pollution Control Division to issue Title V operating permits in accordance with the Colorado Air Pollution Prevention and Control Act.
3. The Colorado Air Pollution Prevention and Control Act requires the Air Pollution Control Division approve or deny permit applications within 18 months of a facility submitting its complete application.
4. The Air Pollution Control Division has exceeded the 18-month statutory deadline in acting on permit applications for the Dupont Terminal and Totem NG Transmission and Storage Facility. The Division has failed to approve or deny the initial operating permit application for the Dupont Terminal for 1.8 years and has failed to approve or deny the initial permit for the Totem NG Transmission and Storage Facility for 1.8 years.
5. Defendants must take timely action on these operating permit applications to ensure adequate protection of air quality and public health and to provide for public participation in and scrutiny of the regulation of air pollution from these facilities. Plaintiffs request that this Court require the Division to take final action on the permit applications by a date certain.

## **PARTIES**

6. Plaintiff WildEarth Guardians is a non-profit conservation organization with an office in Wheat Ridge, Colorado. Guardians is dedicated to protecting and restoring wildlife, wild rivers, wild places, and health 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.
7. Plaintiff the Center for Biological Diversity is a non-profit conservation organization with an office in Denver, Colorado. The Center has over 89,000 members throughout the United States and the world and 3,292 members in Colorado. The Center brings this action on its own behalf and on behalf of its adversely affected members.

8. Based on the understanding that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked, the Center for Biological Diversity is working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us.
9. Plaintiffs' members live, work, recreate, travel, and engage in other activities throughout Adams County and the Denver Metro / North Front Range Nonattainment Area where the Dupont Terminal and Totem NG Transmission and Storage Facility are located and will continue to do so on a regular basis. Pollution in the affected areas threatens and damages, and will continue to threaten and damage, the health and welfare of Plaintiffs' members, as well as their ability to engage in and enjoy activities.
10. Pollution from these facilities negatively impacts Plaintiffs' members' ability to engage in outdoor activities in Adams County and the Denver Metro/North Front Range Nonattainment Area. Plaintiffs' members enjoy outdoor recreational activities such as walking, biking, hiking, and playing with their children in these affected areas. Plaintiffs' members conduct research, educational activities, and advocacy programs in these affected areas.
11. Defendants' failures also harm Plaintiffs' members' welfare interest in using and enjoying the natural environment. Ground level ozone damages plant and animal life and natural ecosystems, thus harming Plaintiffs' members' recreational and aesthetic interests in the areas at issue in this complaint.
12. Air pollution from the Dupont Terminal and Totem NG Transmission and Storage Facility, including Carbon Monoxide, Sulfur Dioxide, and Volatile Organic Compounds, directly contributes to the Plaintiffs' members' injuries.
13. The Air Pollution Control Division's ongoing failure to act causes the Plaintiffs and their members continuing concern about exposure to harmful air pollution.
14. The Air Pollution Control Division's ongoing failure to act deprives Plaintiffs of the administrative safeguards and information they are entitled to under the Colorado Air Pollution Prevention and Control Act.
15. Plaintiffs' members' injuries are traceable to the Defendants' failure to act. Failure to act is considered a final agency act under the Colorado Air Pollution Prevention and Control Act. Granting the requested relief would redress Plaintiffs' members' injuries by compelling the Defendants to act as required by the Colorado Air Pollution Prevention and Control Act.

16. Defendant Colorado Department of Public Health and Environment is a state agency charged with the implementation of Colorado Air Pollution Prevention and Control Act, § 25-7-101, et. seq. The Department's stated mission is to advance Colorado's health and protect the places where Coloradans live, work, and play.
17. Defendant Air Pollution Control Division is the state agency within CDPHE who must issue or deny Title V operating permit applications under the Colorado Air Pollution Prevention and Control Act, § 25-7-114.4(2). The Division's stated mission is to protect the health and well-being of Coloradans by enforcing the state's air pollution laws and improving the quality of the air they breathe.

### **JURISDICTION AND VENUE**

18. The Court has jurisdiction under C.R.S. § 24-4-106 (the State Administrative Procedure Act), C.R.S. § 25-7-120 (the judicial review provision of the Colorado Air Pollution Prevention and Control Act), and C.R.S. § 25-7-114.5(7)(b) (providing for judicial review for failure to act on permit applications).
19. 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.
20. This Complaint is timely filed because state Title V permit programs ensure 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." 40 C.F.R. § 70.4(b)(3)(xii).
21. Under Colorado's Title V permit program, Defendants' failure to approve or deny permit applications is a final agency action for the purpose of obtaining judicial review to require that Defendants take action on the applications "without additional delay." C.R.S. § 25-7-114.5(7)(b).

### **LEGAL BACKGROUND**

22. The federal Clean Air Act aims "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1).
23. Air pollution emitted by major sources of pollution threatens the Nation's air quality.
24. In the 1990 amendments of the Clean Air Act, Congress developed the Title V permit program. 42 U.S.C. §§ 7661-7661(f).

25. The Title V program's goal is increased accountability and better enforcement by consolidating all air pollution control standards for a major source of pollution into a single document. *Operating Permit Program*, 57 Fed. Reg. 32251, 32251 (July 21, 1992).
26. When promulgating the Title V program, EPA stated its expectation the program would promote "pollution prevention" by "leadi[ing] air pollution sources and regulatory agencies to evaluate their air pollution control strategies" and "present[ing] an opportunity to pursue strategies that avoid pollution, rather than control it, and that eliminate pollution, rather than shift it from one medium to the other." *Operating Permit Program*, 57 Fed. Reg. 32251, 32251-52 (July 21, 1992).
27. Under the program, all major sources of pollution must obtain a Title V permit to continue or begin operation. Major sources cannot discharge pollutants until they have a valid Title V operating permit. 42 U.S.C. §§ 7661a(a), 7661c(c).
28. Title V operating permits are legally enforceable documents and are granted to facility owners or operators by permitting agencies. *Id.*
29. The terms of the operating permits must contain all air quality legal requirements as well as a schedule of compliance that ensures the facility continues to meet emissions limits. 42 U.S.C. § 7661c(a). In their applications, the owners or operators of a major source must demonstrate an adequate plan for inspection, monitoring, and reporting on a facility's air pollution. 42 U.S.C § 7661c(c).
30. A permitting authority may only issue a permit for up to five years. *Operating Permit Program*, 57 Fed. Reg. at 32,257; 42 U.S.C. § 7661a(b)(5)(B).
31. Once an owner has submitted a timely permit application, 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); C.R.S. § 25-7-114.5(4).
32. The federal Clean Air Act provides that the Administrator of the EPA may approve state Title V permit programs. 42 U.S.C. § 7661a(d).
33. The Administrator of EPA granted full approval for Colorado to administer its Title V operating permit program in 2000. *Clean Air Act Full Approval of Operating Permit Program; Approval of Expansion of State Program Under Section 112(l); State of Colorado*, 65 Fed. Reg. 49,919 (August 16, 2000). Therefore, Defendant is responsible for issuing Title V permits in Colorado.
34. Colorado incorporated the requirements of the Clean Air Act and its implementing regulations into the Colorado Air Pollution Prevention and Control Act. C.R.S. § 25-7-114, et seq.; 5 CCR § 1001-5, Regulation No. 3, Part C.

35. The federal Clean Air Act requires that the state permitting authority must approve or deny permit applications within 18 months of receiving a completed application. 42 U.S.C. § 7661b; 40 CFR Part 70.7(a)(2).
36. Accordingly, the Colorado Air Pollution Prevention and Control Act requires the Air Pollution Control Division to grant or deny applications for operating permits within 18 months after receipt of the completed permit application. C.R.S. § 25-7-114.5(4).
37. Under the federal Clean Air Act, state Title V permit programs must provide for judicial review in state court when permitting authorities fail to act on a permit application after 18 months. 42 U.S.C. § 7661a(b)(7); C.R.S. § 25-7-120.

### **FACTUAL BACKGROUND**

#### **A. Dupont Terminal**

38. The Dupont Terminal, identified by Operating Permit No. 21OPAD444, is a bulk fuel terminal. The terminal is located in Adams County at 8160 Krameria St. Dupont, CO 80022.
39. The Dupont Terminal is a major source of numerous harmful air pollutants in the State of Colorado. As a major source of air pollution, it is subject to the operating permit requirements of the Colorado Air Pollution Prevention and Control Act, as well as the federal Clean Air Act.
40. The permitted emissions units are eighteen (18) storage tanks and one (1) liquid loadout.
41. Of those nineteen (19) units, only one (1) has a pollution control device.
42. The Dupont Terminal emits the following air pollutants:
  - a. Volatile Organic Compounds;
  - b. Nitrogen Oxide;
  - c. Carbon Monoxide; and
  - d. Hazardous Air Pollutants (HAPs):
    - i. Benzene;
    - ii. Hexane;
    - iii. Toluene;
    - iv. Xylene; and
    - v. 2,2,4 Trimethyl pentane.
43. The Division received an initial Title V permit application for this from Magellan Pipeline Company, LP on January 26, 2021.

44. This facility has been in operation since submitting its initial Title V permit application and continues to operate.
45. The Division was required to grant or deny this initial application by July 26, 2022.
46. To date, the Division has not granted or denied the Dupont Terminal's initial permit application submitted on January 26, 2021.

**B. Totem NG Transmission and Storage Facility**

47. The Totem NG Transmission and Storage Facility, identified by Operating Permit No. 21OPAD443, is a natural gas storage and transmission facility. The facility is located at 54200 E. 104th Ave, in Bennett, Colorado.
48. The Totem NG facility is a major source of numerous harmful air pollutants in the State of Colorado. As a major source of air pollution, it is subject to the operating permit requirements of the Colorado Air Pollution Prevention and Control Act, as well as the federal Clean Air Act.
49. The permitted emissions units are four (4) RICE engines, one (1) natural gas fired heater, one (1) EG dehydrator, fugitive equipment leaks, and one (1) process flare.
50. The Totem NG Transmission and Storage Facility emits the following air pollutants:
  - a. Particulate Matter 10;
  - b. Sulfur Dioxide;
  - c. Nitrogen Dioxides;
  - d. Volatile Organic Compounds;
  - e. Carbon Monoxide; and
  - f. Hazardous Air Pollutants (HAPs):
    - i. Formaldehyde;
    - ii. Acetaldehyde;
    - iii. Acrolein;
    - iv. Benzene;
    - v. Toluene;
    - vi. Ethylbenzene;
    - vii. Xylene;
    - viii. n-Hexane;
    - ix. Methanol; and
    - x. 2,2,4-Trimethylpentane.
51. The Division received an initial Title V permit application for this source from Colorado Interstate Gas Company LLC on January 26, 2021.

52. This facility has been in operation since submitting its initial Title V permit application continues to operate.
53. The Division was required to grant or deny this initial application by July 26, 2022.
54. To date, the Division has not granted or denied the Totem NG Transmission and Storage Facility initial permit application submitted on January 26, 2021.

**C. Negative Health Effects of Pollutants**

55. Many of the pollutants emitted by the listed sources are defined under the Clean Air Act as “criteria pollutants” which can endanger public health and welfare. Criteria pollutants are subject to regulation and federal air quality standards that limit the amount of the pollutant that is legally allowed in the air. Relevant criteria pollutants are 1) ground-level ozone, 2) carbon monoxide, 3) sulfur dioxide, and 4) particulate matter.
56. Ground-level ozone, commonly referred to as smog, is a “criteria pollutant” under the federal Clean Air Act. Nitrogen oxides, volatile organic compounds, and carbon monoxide are precursor emissions that contribute to the formation of ground-level ozone.
57. Increased ozone exposure causes various respiratory illnesses, aggravates lung disease, increases the frequency and severity of asthma attacks, and can cause premature death. Ozone exposure causes more than one million premature deaths globally each year.
58. Carbon monoxide a criteria pollutant. High levels of CO can cause dizziness, confusion, unconsciousness, and death. It can also exacerbate some types of heart disease.
59. Sulfur dioxide is a criteria pollutant. It is known to harm the respiratory system and people with asthma, especially children, are particularly vulnerable.
60. Particulate matter is also a criteria pollutant. Two sizes of particulate matter, PM<sub>10</sub> and PM<sub>2.5</sub>, are especially harmful to human health and welfare. Exposure to these fine particles can affect both the lungs and heart, causing nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, increased respiratory problems, and premature death.
61. The listed sources also emit Hazardous Air Pollutants. Hazardous Air Pollutants are toxic air pollutants known or suspected to cause cancer or other serious health effects, and are regulated separately from criteria pollutants under the federal Clean Air Act.
62. Hydrogen sulfide is regulated under the Clean Air Act’s Prevention of Significant Deterioration program. Hydrogen sulfide exposure can cause eye irritation and



headaches, and has the potential to cause more serious effects such as unconsciousness and death.

**FIRST CLAIM**

(Failure to Approve or Deny Title V Operating Permit Application for the Dupont Terminal within Legal Deadline)

63. C.R.S. § 25-7-114.5(4) requires that the Division grant or deny a Title V operating permit application within 18 months of the complete application's submission.
64. Magellan Pipeline Company, LP submitted its initial Title V operating permit application for the Dupont Terminal on January 26, 2021.
65. The Division was required under law to approve or deny this initial operating permit application by July 26, 2022.
66. As of the date of filing this complaint, the Division has neither approved nor denied the Dupont Terminal permit application.
67. Defendants are therefore in violation of C.R.S. § 25-7-114.5(4).

**SECOND CLAIM**

(Failure to Approve or Deny Title V Operating Permit Application for the Totem NG Transmission and Storage Facility within Legal Deadline)

68. C.R.S. § 25-7-114.5(4) requires that the Division grant or deny a Title V operating permit application within 18 months of the complete application's submission.
69. Colorado Interstate Gas Company, LLC submitted its initial Title V operating permit application for the Totem NG Transmission and Storage Facility on January 26, 2021.
70. The Division was required under law to approve or deny this initial Title V operating permit application by July 26, 2022.
71. As of the date of filing this complaint, the Division has neither approved nor denied the Totem NG Transmission and Storage Facility permit application.
72. Defendants are therefore in violation of C.R.S. § 25-7-114.5(4).

**REQUEST FOR RELIEF**

Plaintiffs respectfully request that this Court:

1. Declare that Defendants violated the Colorado Air Pollution and Prevention Act by failing to act on the initial Title V operating permit applications for the Dupont Terminal and the Totem NG Transmission and Storage Facility within 18 months after receiving each application;
2. Order the Division to take final action on these two initial Title V operating permit applications by a date certain;
3. Retain jurisdiction over this matter to ensure compliance with the Court's order; and
4. Award such other relief as the court deems just and proper.

Respectfully submitted this 6<sup>th</sup> day of December, 2022.

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