

<p>17th JUDICIAL 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          Sarah Jean Rodger (Student Attorney)          Peyton F. Lindley (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          srodger23@law.du.edu          plindley23@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. Plaintiffs, two non-profit environmental organizations, bring suit to compel Defendants, the Colorado Department of Public Health and Environment’s Air Pollution Control

Division, to approve or deny the air pollution renewal permit applications for the following facilities and sites: the Wattenberg Gas Processing Plant, the Sinclair Denver Products Terminal, the Phillips 66 Denver Terminal, and the East Regional Landfill.

2. Air pollution operating permits are required by Title V of the federal Clean Air Act. The United States Environmental Protection Agency delegated authority to 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 renewal permit applications within 18 months of a facility submitting its complete application.
4. The Division has exceeded the 18-month statutory deadline by over 13 years in failing to approve or deny the renewal permit application for the Wattenberg Gas Processing Plant; over 5 years in failing to approve or deny the renewal permit application for the Sinclair Denver Products Terminal; over 5 years in failing to approve or deny the renewal permit application for the Phillips 66 Denver Terminal; and over 3 months in failing to approve or deny the renewal permit for the East Regional Landfill.
5. 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 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 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 ozone nonattainment area where the Wattenberg Gas Processing Plant, the Sinclair Denver Products Terminal, the Phillips 66 Denver Terminal, and the East Regional Landfill 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 ozone 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. 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 Wattenberg Gas Processing Plant, the Sinclair Denver Products Terminal, the Phillips 66 Denver Terminal, and the East Regional Landfill directly contribute to the Plaintiffs' members' injuries.
13. The Defendants' failures to timely act on the operating permit applications at issue cause the Plaintiffs and their members continuing concern about exposure to harmful air pollution and deprives them of the administrative safeguards and information they are entitled to under the Colorado Air Pollution Prevention and Control Act.
14. Plaintiffs' members' injuries are traceable to the Defendants' failure to act, which is considered a final agency act under the Colorado Air Pollution Prevention and Control Act. Granting the requested relief would redress their injuries by compelling the Defendants to take action as required by the Colorado Air Pollution Prevention and Control Act.
15. 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 mission is to protect and preserve the health and environment of the people of Colorado.

16. Defendant Air Pollution Control Division is the state agency within CDPHE responsible for issuing or denying 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**

17. 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).
18. 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.
19. 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).
20. Under Colorado's Title V permit program, Defendants' failure to approve or deny permit renewal 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).
21. This Complaint is also 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 onetime violation.

### **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. Major sources of pollution, such as oil and gas facilities, threaten 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 goal of the Title V program 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. 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).
27. Title V operating permits are legally enforceable documents and are granted to facility owners by permitting agencies. *Id.*
28. 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 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).
29. 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).
30. Six months before a permit is set to expire, the facility owner must apply for a permit renewal to continue operation of the major source of pollution. 40 C.F.R. § 70.5(a)(1)(iii).
31. Once an owner 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); 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 eighteen months of receiving a completed application. 42 U.S.C. § 7661b(c); 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 eighteen 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 eighteen months. 42 U.S.C. § 7661a(b)(7); C.R.S. § 25-7-120.

## **FACTUAL BACKGROUND**

### **A. Wattenberg Gas Processing Plant**

38. The Wattenberg Gas Processing Plant, identified by Operating Permit No. 95OPAD102, is a natural gas processing plant owned by BP America Production Company. The plant is located at 1909 Powhaton Road, Aurora, Colorado 80019 in Adams County.
39. The plant is a major source of air pollution 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 Wattenberg Plant extracts moisture and natural gas liquids from natural gas before the gas is sent out to sales pipelines. The plant is capable of processing up to 200 million standard cubic feet per day of natural gas.
41. Wattenberg consists of 19 emission units, ranging from a steam boiler to multiple internal combustion engines.
42. Of those 19 units, only 3 have pollution control devices.
43. The Wattenberg Gas Processing Plant emits the following air pollutants:
  - a. Nitrogen Oxides (NO<sub>x</sub>);
  - b. Volatile Organic Compounds (VOCs);
  - c. Carbon Monoxide (CO);
  - d. Sulphur Dioxide (SO<sub>2</sub>);
  - e. Particulate Matter less than 10 microns (PM<sub>10</sub>);
  - f. Hydrogen Sulfide (H<sub>2</sub>S); and
  - g. Hazardous Air Pollutants (HAPs).

44. The Division received Wattenberg's initial operating permit application on December 8, 1995. The Division approved the application and Wattenberg's first permit was issued on September 1, 2003.
45. The initial permit expired on September 1, 2008; however it remains in force due to the Division's failure to take final action on the plant's renewal application.
46. When the initial permit was granted, the area where the plant is located was in attainment with all federal air pollutant limits.
47. In April 2004, the EPA designated the Denver Metro/North Front Range region, where the Wattenberg plant is located, as nonattainment for the 8-hour ozone standard. This means that Wattenberg is located in a region that no longer meets federally mandated pollution limits for ozone.
48. Major sources in nonattainment areas are subject to more protective pollution control measures than facilities in attainment areas.
49. Wattenberg submitted its renewal application on August 3, 2007.
50. The Division was required to grant or deny the renewal application by February 3, 2009.
51. To date, the Division has not granted or denied the Wattenberg Gas Processing Plant's renewal permit application.

**B. Sinclair Denver Products Terminal**

52. The Sinclair Denver Products Terminal, identified by Operating Permit No. 96OPAD172, is a petroleum product storage and distribution facility owned by Sinclair Transportation Company. The facility is located at 8581 East 96th Avenue, Henderson, Colorado 80640 in Adams County.
53. The facility is a major source of air pollution subject to the operating permit requirements of the Colorado Air Pollution Prevention and Control Act, as well as the federal Clean Air Act.
54. The facility consists of 19 emission units, including 14 storage tanks for gasoline, fuel oil # 1, fuel oil # 2, MTBE, and ethanol. It also has a tank truck loading rack and a railcar loading rack.
55. Of those 19 units, only 3 have pollution control devices.
56. The Denver Products Terminal emits the following air pollutants:

- a. Nitrogen Oxides (NO<sub>x</sub>);
  - b. Volatile Organic Compounds (VOCs);
  - c. Carbon Monoxide (CO); and
  - d. Hazardous Air Pollutants (HAPs) including Benzene, MTBE, Toluene, and Xylenes.
57. The Division received the facility's initial operating permit application on February 26, 1996. The Division approved the application and Sinclair's first permit was issued on October 1, 1998.
58. The initial permit expired on October 1, 2003. Sinclair submitted a renewal application on October 1, 2002. The renewal application was approved and a permit was issued on October 1, 2003. Said renewal permit was revised on September 28, 2006, and it expired on October 1, 2008.
59. The Division renewed the permit again on August 1, 2011. This permit expired on August 1, 2016; however it remains in force due to the Division's failure to take final action on the plant's renewal application.
60. Sinclair submitted its most recent renewal application on May 15, 2015.
61. The Division was required to grant or deny the renewal application by November 15, 2016.
62. To date, the Division has not granted or denied the Sinclair Denver Products Terminal renewal permit application.

### **C. Phillips 66 Denver Terminal**

63. The Phillips 66 Denver Terminal, identified by Operating Permit No. 96OPAD160, is a petroleum marketing and storage terminal. The plant is located at 3960 East 56<sup>th</sup> Avenue, Commerce City, Colorado 80022 in Adams County.
64. The plant is a major source of air pollution subject to the operating permit requirements of the Colorado Air Pollution Prevention and Control Act, as well as the federal Clean Air Act.
65. The Phillips 66 Denver Terminal receives gasoline, kerosene turbine fuel, and diesel products from a pipeline, which are stored and distributed to tank trucks. The Pipeline also receives natural gas liquids from tank trucks, then stores and distributes them to a pipeline.

66. The Phillips 66 Denver Terminal consists of 4 emission units, including a loading rack, a vapor combustor unit, and storage tanks for gasoline, kerosene turbine fuel, diesel fuel, and ethanol.
67. The Phillips 66 Denver Terminal emits the following air pollutants:
  - h. Nitrogen Oxides (NO<sub>x</sub>);
  - i. Carbon Monoxide (CO);
  - j. Volatile Organic Compounds (VOCs); and
  - k. Hazardous Air Pollutants (HAPs).
68. The Division first issued Phillips 66 an operating permit for the Denver Terminal on June 1, 1999. The Division approved the application, then approved a renewal permit application on August 1, 2011.
69. On July 1, 2015, Phillips 66 submitted its 3rd renewal application.
70. Phillips 66's 2011 renewal permit expired on August 1, 2016; however it remains in force due to the Division's failure to take final action on the facility's 2015 renewal application.
71. The Division was required to grant or deny the 3rd renewal application by February 1, 2017.
72. To date, the Division has not granted or denied Phillip 66 Pipeline's renewal permit application.

**D. East Regional Landfill**

73. The East Regional Landfill, identified by Operating Permit No. 100PAD353, is a landfill and composting site. The landfill is sometimes referred to as the Five Part Development, LLC East Regional Landfill and sometimes referred to as the Alpine Disposal Inc. East Regional Landfill in state records, however the Operating Permit Number remains consistent. Upon information and belief, these names refer to the same site. The site is located at 8201 Schumaker Road, Bennett, Colorado 80102 in Adams County.
74. The site is a major source of air pollution subject to the operating permit requirements of the Colorado Air Pollution Prevention and Control Act, as well as the federal Clean Air Act.
75. The decomposition of organic materials in landfills creates gases that are expelled into the atmosphere.
76. The East Regional Landfill emits the following air pollutants:
  - e. Volatile Organic Compounds (VOCs);

- f. Particulate Matter less than 10 microns (PM<sub>10</sub>);
- g. Particulate Matter less than 2.5 microns (PM<sub>2.5</sub>); and
- h. Hazardous Air Pollutants (HAPs).

77. The Division received the site's initial operating permit application on September 1, 2010. The Division approved the application and the East Regional Landfill's first permit was issued on August 1, 2016.
78. The initial permit expired on August 1, 2021; however it remains in force due to the Division's failure to take final action on the plant's renewal application.
79. The owner of the East Regional Landfill submitted its most recent renewal application on July 31, 2020.
80. The Division was required to grant or deny the renewal application by January 31, 2022.
81. To date, the Division has not granted or denied the East Regional Landfill's renewal permit application.

**E. Negative Health Effects of Pollutants**

82. Nitrogen oxides, VOCs, and carbon monoxide are precursor emissions that contribute to the formation of ground-level ozone. Ground-level ozone, which is commonly referred to as smog, is considered a "criteria pollutant" under the federal Clean Air Act, meaning it 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.
83. 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.
84. Carbon monoxide is also a criteria pollutant under the federal Clean Air Act. High levels of CO can cause dizziness, confusion, unconsciousness, and death. It can also exacerbate some types of heart disease.
85. Sulfur dioxide is a criteria pollutant as well. It is known to harm the respiratory system, and people with asthma, especially children, are particularly vulnerable.
86. Like the other pollutants emitted by the facilities at issue in this case, particulate matter is also a criteria pollutant regulated under the federal Clean Air Act. 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 even premature death.

87. 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.
88. Hydrogen sulfide is regulated under the Clean Air Act's Prevention of Significant Deterioration program. Hydrogen sulfide exposure can cause minor symptoms such as eye irritation and headaches, and also has the potential to cause more serious effects such as unconsciousness and death.

#### **FIRST CLAIM**

(Failure to Approve or Deny Title V Renewal Application for Wattenberg Gas Processing Plant within Legal Deadline)

89. 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.
90. BP America Production Company submitted its Title V operating permit renewal application for Wattenberg Gas Processing Plant on August 3, 2007.
91. The Division was required under law to approve or deny this permit renewal application by February 3, 2009.
92. As of the date of filing this complaint, the Division has neither approved nor denied the Wattenberg Gas Processing Plant permit renewal application.
93. Defendants are therefore in violation of C.R.S. § 25-7-114.5(4).

#### **SECOND CLAIM**

(Failure to Approve or Deny Title V Renewal Application for Sinclair Denver Products Terminal within Legal Deadline)

94. 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.
95. The Sinclair Transportation Company submitted its Title V operating permit renewal application for Sinclair Denver Products Terminal on May 15, 2015.
96. The Division was required under law to approve or deny this permit renewal application by November 15, 2016.

97. As of the date of filing this complaint, the Division has neither approved nor denied the Sinclair's Denver Products Terminal permit renewal application.

98. Defendants are therefore in violation of C.R.S. § 25-7-114.5(4).

### **THIRD CLAIM**

(Failure to Approve or Deny Title V Renewal Application for Phillips 66 Denver Terminal within Legal Deadline)

99. 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.

100. Phillips 66 submitted its Title V operating permit renewal application for Phillips 66 Denver Terminal on July 1, 2015.

101. The Division was required under law to approve or deny this permit renewal application by February 1, 2017.

102. As of the date of filing this complaint, the Division has neither approved nor denied the Phillips 66 Denver Terminal permit renewal application.

103. Defendants are therefore in violation of C.R.S. § 25-7-114.5(4).

### **FOURTH CLAIM**

(Failure to Approve or Deny Title V Renewal Application for East Regional Landfill within Legal Deadline)

104. 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.

105. The owner submitted its Title V operating permit renewal application for East Regional Landfill on July 1, 2020.

106. The Division was required under law to approve or deny this permit renewal application by January 31, 2022.

107. As of the date of filing this complaint, the Division has neither approved nor denied the East Regional Landfill permit renewal application.

108. Defendants are therefore in violation of C.R.S. § 25-7-114.5(4).

**REQUEST FOR RELIEF**

Plaintiffs respectfully request that this Court enter judgment against Defendants:

1. ordering the Division to take final action on the Wattenberg Park Gas Processing Plant, the Sinclair Denver Products Terminal, the Phillips 66 Denver Terminal, and the East Regional Landfill permit renewal applications by a date certain;
2. retaining jurisdiction over this matter to ensure compliance with the Court's order; and
3. awarding such other relief as the court deems just and proper.

Respectfully submitted this 20<sup>th</sup> day of April, 2022.

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