

<p>17th JUDICIAL DISTRICT COURT ADAMS COUNTY, COLORADO 1100 Judicial Center Drive Brighton, CO 80601</p> <hr/> <p>PLAINTIFF: WILDEARTH GUARDIANS v. DEFENDANTS: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIROMENT, and the AIR POLLUTION CONTROL DIVISION</p>	<p>DATE FILED: January 10, 2022 12:15 PM CASE NUMBER: 2021CV30213</p> <hr/> <p>COURT USE ONLY</p> <hr/> <p>Case No. 2021CV30213 Division: C</p>
<p>ORDER RE: PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT</p>	

This matter comes before the Court on Plaintiff’s Motion for Summary Judgment filed on September 24, 2021. Defendants filed a Response on October 28, 2021. Plaintiff filed a Reply on November 26, 2021. The Court having reviewed the Motion and Response, the file and otherwise being informed in the premises, hereby makes the following findings and orders:

Background

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

At issue in this case are two distinct Title V permits for a single entity, the Suncor refinery. The renewal applications for these two permits were filed in October of 2010 and September of 2016, respectively. Defendants admit that the time to make a final decision on the renewal applications has “come and gone.”

Agency Defendants do not dispute Plaintiff’s standing to bring this action against them.

Undisputed Facts

The Court finds that following pertinent facts to be undisputed:

1. Suncor Energy (U.S.A.), Inc. (“Suncor”) owns and operates the Suncor Refinery, which is located in Adams County, Colorado.

2. The Suncor Refinery is a major source of air pollution under the Colorado Air Pollution Prevention and Control Act. It is a “major source” of Volatile Organic Compounds (“VOCs”) and Oxides of Nitrogen (“NOx”) in the Nonattainment New Source Review Area because it emits more than 50 tons per year of each. It is a Prevention of Significant Deterioration major stationary source because it has the Potential to Emit more than 100 tons/year each of Particulate Matter (“PM”), PM10, SO2, NOx and CO.
3. Pursuant to the Clean Air Act, EPA has delegated the responsibility to issue Title V permits for major sources located in Colorado to the Division. The Division issues Title V permits to major sources of air pollution located within the State of Colorado.
4. The Suncor Refinery consists of: (1) the West Plant, a petroleum refinery (herein referred to as “Plant 1”); (2) the East Plant, a petroleum refinery (herein referred to as “Plant 2”); and (3) an asphalt unit (herein referred to as “Plant 3”).
5. The Division issued Title V permit number 96OPAD120 to Suncor for Plants 1 & 3 (“Plants 1 & 3 Title V permit”).
6. The Division issued Title V permit number 95OPAD108 to Suncor for Plant 2 (“Plant 2 Title V Permit”).
7. The Suncor Refinery’s Plants 1 & 3 Title V permit was first issued on August 1, 2004.
8. The Suncor Refinery’s Plants 1 & 3 Title V permit was last renewed by the Division on October 1, 2012.
9. On September 16, 2016, Suncor submitted an application to the Division to renew its Title V permit for Plants 1 & 3.
10. On October 3, 2016, the Division determined that Suncor’s application to renew its Title V permit for Plants 1 & 3 was complete and sent a letter to Suncor to inform them of that determination.
11. The Division has not yet approved or denied Suncor Energy’s Title V permit renewal application for Plants 1 & 3.
12. The Division first issued the Suncor Refinery’s Plant 2 Title V permit on October 1, 2006. The Plant 2 Title V permit has not yet been renewed.
13. On October 1, 2010, Suncor submitted an application to the Division to renew its Title V permit for Plant 2.
14. On November 8, 2010, the Division determined that Suncor’s application to renew its Title V permit for Plant 2 was complete and sent a letter to Suncor to inform them of that determination.

15. The Division has not yet approved or denied Suncor's Title V permit renewal application for Plant 2.
16. In February 2021, Agency Defendants published a draft Title V permit for Plant 2 which incorporated approximately forty (40) modifications. After conducting public hearings, Agency Defendants received approximately 300 pages of comments on the Plant 2 renewal permit as well as oral comments. To date, Agency Defendants have not yet submitted to EPA its response to comments or proposed final determination of the Suncor Refinery Plant 2 Title V permit renewal application.
17. Suncor has submitted approximately twenty-three (23) permit modification requests for Plant 1 and Plant 3 operating permits from May 2017 through the present that are still under evaluation. No preliminary determination or initiated public comment period for Suncor Plant 1 and Plant 3 Title V renewal application has been made by Agency Defendants.

Legal Standard – Summary Judgment

Summary judgment is appropriate when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record and of the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. *Quist v. Specialties Supply Co., Inc.*, 12 P.3d 863, 868 (Colo. App. 2000).

Where the facts are so certain as not be subject to dispute, a court is in a position to determine the issue strictly as a matter of law. *Morland v. Durland Trust Co.*, 252 P.2d 98 (Colo. 1952).

Legal Authority – C.R.S. §25-7-114.5

C.R.S. §25-7-114.5(4) states in pertinent part as follows:

- (4) . . . Applications for renewable operating permits shall be approved or disapproved within eighteen months after the receipt of the completed permit application . . .

C.R.S. §25-7-114.5(7)(b) states as follows:

- (b) Failure of the division or commission, as the case may be, 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.

Analysis

Plaintiff has asserted only two causes of action: (1) Failure to Approve or Deny Title V Renewal Application for Plants 1 & 3; and (2) Failure to Approve or Deny Title V Renewal Application for Plant 2. Both causes of action are brought pursuant to C.R.S. §25-7-114.5(7)(b). Both causes of action seek an order from the Court requiring the Agency Defendants to act on the permit renewal applications for the respective Suncor Plants without further delay and after adhering to a process for robust public involvement and meaningful consideration of public input.

Based on the plain language of C.R.S. §25-7-114.5(7)(b), to prevail on its claims, Plaintiff must provide undisputed evidence that the Agency Defendants failed to grant or deny the permit renewal applications “within the time prescribed.” And upon such showing the Plaintiff is entitled to judicial review seeking a Court order that “action be taken on such application by the commission or division, as appropriate, without additional delay.”

Plaintiff has met its burden here. Agency Defendants agree they have not met the statutory deadlines for taking final action on Suncor’s Title V operating permit renewal applications. Instead, they assert that the Suncor Refinery is the most complex industrial facility in Colorado and as such its operating permits are equally complex. They also assert that they have historically struggled to adequately staff the Title V permit program. Neither of these assertions act to provide a defense to the claims being made in this case. The claims brought are pursuant to C.R.S. §25-7-114.5(7)(b). The claims brought seek an order from the Court that the Agency Defendants take action on the permit renewal applications “without additional delay.” Because it is undisputed that the Agency Defendants have failed to take action on the permit renewal applications in a timely matter, Plaintiff is entitled to the order they seek.

Both sides provide arguments on whether there is sufficient evidence that the failure of the Agency Defendants to take timely action on the renewal permit applications has resulted in serious harm to air quality or public health. But, Plaintiff’s claims in this case simply seek a Court order requiring the Agency Defendants to take action on the permits without further delay. Entitlement to judicial review in this regard does not require any showing of harm to air quality or the public. As a result, the Court finds the parties’ arguments in this regard immaterial to the issues raised by the motion.

In its motion Plaintiff asks this Court to grant partial summary judgment on liability “with a proceeding to determine the remedy to follow.” In its Reply, Plaintiff asks this Court to enter summary judgment on liability, issue an order to compel Defendants to act without further delay and award attorney fees for Defendants’ prior refusal to settle on the issue of liability.

The remedy sought in the Complaint is an order compelling Defendants to take action on the permit renewal applications without further delay. That remedy will be provided. Therefore, there does not appear to be reason to set a further proceeding “to determine a remedy to follow.”

With respect to attorney fees, Plaintiff has provided no authority that would entitle them to an award of attorney fees as the prevailing party on the subject motion.

Conclusion

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **GRANTED** in part. The Agency Defendants are ordered to take action on the permit renewal applications for the Suncor Plants 1, 2 and 3, without further delay.

Plaintiff's request for attorney fees is denied.

SO ORDERED THIS THE 10th day of January, 2022

BY THE COURT:



District Court Judge