

<b>DISTRICT COURT, ADAMS COUNTY COLORADO</b> 1100 Judicial Center Dr. Brighton, CO 80601 (303) 659-1161	<div style="text-align: center;">▲ COURT USE ONLY ▲</div>  Case Number:   Div:
<b>Plaintiffs:</b> CENTER FOR BIOLOGICAL DIVERSITY and NORTH RANGE CONCERNED CITIZENS,  v.  <b>Defendant:</b> COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, AIR POLLUTION CONTROL DIVISION	
Robert Ukeiley, # 26747 CENTER FOR BIOLOGICAL DIVERSITY 1536 Wynkoop St., Ste. 421 Denver, CO 80202 Telephone: (720) 496-8568 E-mail: <a href="mailto:rukeiley@biologicaldiversity.org">rukeiley@biologicaldiversity.org</a>  Counsel for Plaintiffs	
<b>COMPLAINT</b>	

PLAINTIFFS, through counsel, submit the following Complaint:

### **INTRODUCTION**

1. Plaintiffs Center for Biological Diversity and North Range Concerned Citizens [collectively “Public Interest Groups”] bring this suit to overturn Defendant’s, the Colorado Department of Public Health and Environment, Air Pollution Control Division (“Division”), granting of air pollution Construction Permit 20AD0890 Issuance: 1 to the Polar Service Centers at 4850 E. 74<sup>th</sup> Avenue, Commerce City, Colorado (“the Permit”), contrary to the Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101 *et seq.*, and applicable regulations.

2. The Permit authorizes Polar Service Centers (“Polar”) to construct and operate a flare which burns petroleum product vapors and emits a variety of air pollutants. It is located in the Denver Metro / North Front Range area, which for 16 years has violated the national health and welfare-based standards for the air pollutant ozone. This violation is currently rated as “severe” by the United States Environmental Protection Agency.

3. Ground level ozone, which people commonly refer to as smog, can kill people. Ozone also causes a variety of other health impacts, like asthma attacks, decreases agricultural crop yields, damages native trees and flowers, such as aspens and ponderosa pines, and injures wildlife. Ozone is not the only pollutant of concern covered by the Permit. Rather, the permit covers a whole host of air pollutants, including cancer-causing benzene and nitrogen oxides.

4. Polar is located in an area with numerous other sources of air pollution, including the Suncor refinery, the Cherokee power plant, and the Metro sewer plant, along with numerous major roadways.

5. The applicable law and regulations prohibits the Division from issuing a permit if the permittee can cause or contribute to violations of science-based national ambient air quality standards set by the U.S. Environmental Protection Agency.

6. The Division's issuance of the Permit was arbitrary and capricious and contrary to law because the Division had no evidence to establish that Polar will not cause or contribute to violations of any national ambient air quality standards. Rather, all the Division used to make the decision was one employee spending 10 minutes to come to the conclusion that he did not "feel" like there would be any national ambient air quality standard violations.

## **PARTIES**

7. Plaintiff **CENTER FOR BIOLOGICAL DIVERSITY** is a non-profit conservation organization with an office in Denver, Colorado.

8. The Center for Biological Diversity's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through science, policy, and environmental law. 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. Plaintiff **NORTH RANGE CONCERNED CITIZENS** is a coalition of Commerce City neighborhoods and neighbors formed to inform residents and protect their health, safety, and welfare and the environment and wildlife from harmful impacts of industrial activity. They oppose industrial activity in residential areas.

10. The Center for Biological Diversity and North Range Concerned Citizens submitted comments on the Division's draft version of the Permit during the public comment period. Thus, as participants in the public comment process, they have standing for purposes of seeking review of the Division's final Permit. C.R.S. § 25-7-114.5(11).

11. The Public Interest Groups' members live, work, recreate, conduct education and research, and other activities, which are legally protected interests, in areas where pollution from Polar harms these activities. The Public Interest Groups' members have concrete plans to continue living in these areas and engaging in these activities. The Defendant's issuance of the Permit causes the Public Interest Groups and their members continuing concern about exposure to harmful pollution. The Public Interest Groups and their members' interests have been, are being, and will continue to be irreparably harmed by the Defendant's issuance of the Permit.

12. The violations alleged in this Complaint have injured and continue to injure the legally protected interests of the Public Interest Groups and their members.

13. Defendant **COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT** ("CDPHE") is the Colorado regulatory department with jurisdiction and authority to implement the Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101, *et. seq.* CDPHE's mission is to protect and preserve the health and environment of the people of Colorado. CDPHE includes the Air Pollution Control Division, which administers the State's air quality programs. The Division has the authority and duty to grant or deny applications for air pollution permits.

### **JURISDICTION AND VENUE**

14. This Court has jurisdiction under C.R.S. § 24-4-106 (State Administrative Procedure Act), C.R.S. § 25-7-120 (judicial review provision of the Colorado Air Pollution Prevention and Control Act), and as a Court of general jurisdiction under the Colorado Constitution.

15. Venue is proper pursuant to C.R.S. § 25-7-120(3), because the air pollution source covered by the Defendant's final permit action is located in this district.

### **LEGAL BACKGROUND**

16. Colorado's statutory and regulatory requirements regarding the permitting of sources of air pollution derive, in part, from the federal Clean Air Act.

17. 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 Clean Air Act requires States to have a permitting program to authorize the construction of sources of air pollution.

18. The Division is only allowed to issue a Construction Permit if the source or activity will meet any applicable ambient air quality standard. C.R.S. § 25-7-114.5(7)(a)(III); 5 CCR §§ 1001-5:3b:III.D.1, F.1; 42 U.S.C. § 7410(a)(2)(C). More specifically, the Clean Air Act's central purpose is to protect public health and welfare. 42 U.S.C. § 7401(b)(1). A key driver for achieving the Act's public health and welfare goals is the requirement that all areas in the country comply with primary (health-based) and secondary (public welfare-based) national

ambient air quality standards (“NAAQS”), which reflect the maximum permissible levels of common pollutants in the ambient air. *Id.* §§ 7401, 7409.

19. The ambient air quality standard for nitrogen oxides (“NO<sub>x</sub>”), for example, has become increasingly stringent over time as scientific understanding of its health impacts has increased. Evidence has mounted linking short bursts of NO<sub>x</sub> pollution with severe health impacts. In January 2010, EPA established an additional one-hour primary standard for NO<sub>x</sub> at 100 ppb after many studies established connections between short-term exposure to NO<sub>x</sub> and adverse respiratory effects, increased visits to emergency departments, and hospital admissions for respiratory issues, especially asthma.<sup>1</sup>

20. Compliance with the NAAQS is at the core of the Clean Air Act’s preconstruction permitting program for both major and minor sources of air pollution. Section 110(a)(2)(C) provides that state minor source programs must “include ... regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved.” Thus, EPA cannot approve a state’s minor source program if that program “would interfere with any applicable requirement concerning attainment” of NAAQS.

21. EPA’s minor source permitting regulations, set forth in 40 C.F.R. sections 51.160 through 51.164, require that the state minor source program must enable the permitting agency to reject any permit application if it will interfere with attainment:

Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in...

...

(2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

[and]

(b) Such procedures must include means by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction or modification if—

...

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<sup>1</sup> US EPA, *Primary National Ambient Air Quality Standards (NAAQS) for Nitrogen Dioxide*, <https://www.epa.gov/no2-pollution/primary-national-ambient-air-quality-standards-naaqs-nitrogen-dioxide> (last visited Feb. 28, 2018).

(2) It will interfere with the attainment or maintenance of a national standard.

40 C.F.R. § 51.160(a)-(b) (emphasis added).

22. The Colorado Air Pollution Prevention and Control Act states that the Division shall grant a permit application if, among other requirements, “[f]or construction permits, the source or activity will meet any applicable ambient air quality standards and all applicable regulations.” C.R.S. § 25-7-114.5(7)(a)(III). The Colorado regulations further provide that the Division shall grant the permit if, among other requirements,

c. The proposed source or activity will not cause an exceedance of any National Ambient Air Quality Standards;

d. The source or activity will meet any applicable ambient air quality standards and all applicable regulations;

5 CCR § 1001-5:3b:III.D.1. Additionally, if the source cannot comply with these provisions, the Division shall deny the permit:

If the Division determines that a source cannot comply with the provisions of Part B, Section III.D., of this regulation, the Division shall issue its written denial of the permit application stating the reasons for such denial.

5 CCR § 1001-5:3b:III.F.1.

## **FACTS**

23. Construction Permit 20AD0890 Issuance 1 which the Division issued to Polar on October 4, 2022, authorizes Polar to blow petroleum product vapors out of tanker trailers and burn the vapors in an enclosed combustion device. An enclosed combustion device is commonly referred as a flare.

24. The Permit allows for an unlimited amount of nitrogen oxide and sulfur dioxide emissions from the flare.

25. There are numerous other significant sources of nitrogen oxide and sulfur dioxide emissions near Polar, including, but not limited to, the Suncor refinery, the Cherokee power plant, and the Metro sewer plant.

26. The Division did not conduct computer modeling to determine if Polar will cause or contribute to violations of any national ambient air quality standard. Polar did not submit to the Division any computer modeling to determine if Polar will cause or contribute to violations of any national ambient air quality standard.

27. The Division did not conduct any other type of quantitative analysis to determine if Polar will cause or contribute to violations of any national ambient air quality standard. Polar did not submit to the Division any other type of quantitative analysis to determine if Polar will cause or contribute to violations of any national ambient air quality standard.

28. Emmett Malone, who was the Supervisor for the Division's Modeling and Emissions Inventory Unit, stated that his unit spent 10 minutes considering whether Polar will cause or contribute to violations of any national ambient air quality standard. Mr. Malone stated that his unit "does not feel that the source will threaten the NAAQS".

### **CLAIMS FOR RELIEF**

#### **CLAIM ONE**

(Issuing a permit for sources which can cause or contribute to a violation of a national ambient air quality standard)

29. Plaintiffs reallege the previous paragraphs and incorporate them by reference as if fully set forth herein.

30. The Division cannot issue a permit which will allow the construction of a source which can cause or contribute to a violation of a national ambient air quality standard.

31. The Division's determination that Polar will not cause or contribute to a violation of a national ambient air quality standard was arbitrary and capricious and contrary to law.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Vacate the Permit;
- B. Remand the matter to the Division with instructions to ensure with objective, replicable evidence that Polar cannot cause or contribute to a violation of any national ambient air quality standard before issuing another permit to Polar for the flare; and
- C. Grant such other relief as the Court deems just and proper

Respectfully submitted,

/s/ Robert Ukeiley  
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Dated: November 4, 2022

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