

DISTRICT COURT, GUNNISON COUNTY COLORADO 200 E. Virginia Avenue Gunnison, CO 81230 (970) 642-8300	▲ COURT USE ONLY ▲
Plaintiffs: WILDEARTH GUARDIANS, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, HIGH COUNTRY CONSERVATION ADVOCATES, and WILDERNESS WORKSHOP v. Defendants: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, AIR POLLUTION CONTROL DIVISION, and the AIR QUALITY CONTROL COMMISSION	
<i>Attorney for Plaintiffs</i> Katherine Merlin, Atty. Reg. No. 45672 WildEarth Guardians 3798 Marshall St. Suite 8. Wheat Ridge, CO 80033 P: (720) 965-0854 kmerlin@wildearthguardians.org	Case Number: Div: Crtm:
COMPLAINT	

PLAINTIFFS WildEarth Guardians, Center for Biological Diversity, Sierra Club, High Country Conservation Advocates, and Wilderness Workshop, through counsel, submit the following Complaint:

INTRODUCTION

1. Plaintiffs WildEarth Guardians, the Center for Biological Diversity, the Sierra Club, High Country Conservation Advocates, and Wilderness Workshop, bring this suit to compel the Colorado Department of Public Health and Environment and the Air Pollution Control Division (“Division”) to comply with their mandatory duty to timely grant or deny the air pollution operating permit application submitted for the West Elk Coal Mine located in Gunnison County, Colorado, as required by the Colorado Air Pollution Prevention and Control Act (“Colorado Air Act”).

2. Air pollution operating permits are required by the federal Clean Air Act. The U.S. Environmental Protection Agency (“EPA”) delegated authority to the Division to issue these permits under the Colorado Air Act. The purpose of operating permits is to clearly incorporate all legally required air pollution control standards into a single document to ensure compliance with all

applicable state and federal clean air laws and regulations. Owners of sources with operating permits must annually certify that the source is in compliance with its permit, and the Division must renew the permits every five years. The Division must deny a permit if it cannot ensure a source operates in compliance with applicable requirements. Each operating permit that the Division issues is subject to public comment and offers the public an opportunity for a hearing before the Colorado Air Quality Control Commission (“Commission”).

3. On or about March 31, 2020 Mountain Coal Company, LLC (“Mountain Coal”), a subsidiary of Arch Coal, submitted to the Division an initial application for a Title V Major Source Operating Permit for its West Elk Coal Mine, located in Somerset, Colorado in Gunnison County.

4. The West Elk Coal Mine is one of the largest coal mines in Colorado, covering more than 20 square miles of the Gunnison National Forest. It currently produces over 4.67 million tons of bituminous coal per year and has been in operation since 1982.

5. Pursuant to the Colorado Air Act, the Division was required to grant or deny the permit application within eighteen months of receipt of a completed permit application. *See* C.R.S. § 25-7-114.5(4).

6. The Defendants’ deadline to grant or deny the permit application was September 30, 2021, but Defendants have not yet acted to grant or deny the application.

7. The West Elk Coal Mine is a Major Source of both Volatile Organic Compounds (“VOCs”) and Hazardous Air Pollutants (“HAPs”), yet is operating without a valid Title V Major Source Operating Permit.

8. Pursuant to the Colorado Air Act, the Defendants’ failure to grant or deny a permit 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 this operating permit application 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 West Elk Coal Mine.

PARTIES

9. Plaintiff WILDEARTH GUARDIANS (“Guardians”) is a non-profit conservation organization headquartered in Santa Fe, New Mexico with offices across the western U.S., including in Colorado. Guardians is dedicated to protecting and restoring wildlife, wild rivers, wild places, and health of 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.

10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit environmental organization with over 69,500 members, many of whom live and recreate in western Colorado. The

Center is headquartered in Tucson, Arizona, with offices in a number of states and Mexico. The Center uses science, policy, and law to advocate for the conservation and recovery of species on the brink of extinction and the habitats they need to survive. The Center has and continues to actively advocate for increased protections for species and their habitats in Colorado.

11. Plaintiff SIERRA CLUB is America's largest grassroots environmental organization, with more than 750,000 members nationwide, including more than 21,000 members in Colorado. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

12. Plaintiff HIGH COUNTRY CONSERVATION ADVOCATES is a non-profit conservation organization headquartered in Crested Butte, Colorado. Founded in 1977 as High Country Citizens' Alliance to keep Mount Emmons molybdenum mine-free, the group's work now addresses other issues that affect Gunnison County's clean air, clean water, public lands, and healthy wildlife. HCCA has about 900 members who live, recreate, and enjoy the rural and wild character of Gunnison County and its public lands. HCCA is an active participant in public lands management in Gunnison County, including the lands at issue in this case.

13. Plaintiff WILDERNESS WORKSHOP is a non-profit organization engaged in research, education, legal advocacy and grassroots organizing to protect the ecological integrity of local public lands. Wilderness Workshop is based in Carbondale, Colorado and has approximately 800 members. Wilderness Workshop not only defends pristine public lands from new threats, but also strives to restore the functional wildness of landscapes fragmented by human activity. Wilderness Workshop works to protect and preserve existing wilderness areas, advocate for expanding wilderness, defend roadless areas from development that would destroy their wilderness character, and safeguard the ecological integrity of all federal public lands in the vicinity of the White River National Forest, including the lands at issue in this case.

14. Plaintiffs' members live, work, recreate, and conduct educational, research, advocacy, and other activities in and around Gunnison County, Colorado in areas where air pollution from the West Elk Coal Mine harms these activities. These members also hike on public lands above and in the vicinity of the West Elk mine. Plaintiffs' members have concrete plans to continue living in these areas and engaging in these activities. The Defendants' failure to act on the operating permit applications at issue causes Plaintiffs and their members continuing concern about exposure to harmful air pollution and denies them the opportunity to engage in the administrative process set forth in the Colorado Air Act. Plaintiffs' and their members' interests have been, are being, and will continue to be irreparably harmed by the Defendants' failure to act.

15. The violations alleged in this Complaint have injured and continue to injure the interests of Plaintiffs and their members. This injury is traceable to the Defendants' failure to act, which is considered final agency action under the Colorado Air Pollution Prevention and Control Act. Granting the requested relief would redress these injuries by compelling the Defendants to take action as required by the Colorado Air Act.

16. Defendant COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT is the Colorado regulatory Department with jurisdiction and authority to implement the Colorado Air Act, C.R.S. § 25-7-101, *et. seq.* The Department’s mission is to protect and preserve the health and environment of the people of Colorado.

17. Defendant AIR POLLUTION CONTROL DIVISION is an agency within the Department of Public Health and Environment that administers the State air quality programs. The Division has the jurisdiction, authority, and duty to grant or deny applications for operating permits under the Colorado Air Act. *See* C.R.S. § 25-7- 114.4(2).

18. Defendant AIR QUALITY CONTROL COMMISSION is housed within CDPHE by virtue of a “type 1” transfer, which means that it “exercise[s] its prescribed powers, duties, and functions, including...the rendering of findings, orders, and adjudications, independently of the head of the principal department.” §§ 24-1-119(7)(a), 24-1-105(1), and 25-7-125, C.R.S. To the extent that the Commission possesses independent discretion to extend the length of public hearings that are required as part of the process of permit adjudication by the Division, it may be a party in the absence of whom complete relief may not be afforded. C.R.C.P. 19.

JURISDICTION AND VENUE

19. This Court has jurisdiction under C.R.S. § 24-4-106 (State Administrative Procedure Act (“State APA”)), C.R.S. § 25-7-120 (judicial review provision of the Colorado Air Pollution Prevention and Control Act), C.R.S. § 25-7-114.5(7)(b) (providing judicial review for failure to act on permit applications), C.R.C.P. Rule 106(a)(2), and as a Court of general jurisdiction under the Colorado Constitution.

20. Venue is proper pursuant to C.R.S. § 25-7-120(3), because the air pollution source affected by the Defendants’ inaction is located in this district.

21. This Complaint is 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 one-time violation. Additionally, federal authorization of the state implementation of the Title V program is predicated in part on the availability of state judicial review at any time prior to final agency approval or denial of permit applications.

LEGAL BACKGROUND

22. 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.*

23. 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.”).

24. Title V operating permits are legally enforceable permits that permitting authorities grant to air pollution sources after the source has begun to operate. A Title V permit is federally enforceable and includes, in a single document, all Clean Air Act requirements for a source. Title V permits apply to “major sources” of air pollution 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.* § 7661a(a).

25. A “major source” for purposes of Title V is any source that has actual emissions or potential to emit above major source thresholds, which is generally 100 tons per year (tpy) of any criteria air pollutant, including Carbon Monoxide (CO), Volatile Organic Compounds (VOCs), and Oxides of Nitrogen (NO_x), 42 U.S.C. § 7602(j), or 10 tpy of any Hazardous Air Pollutant (HAP), or 25 tpy of any combination of HAPs. 42 U.S.C. § 7412(a)(1).

26. 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).

27. 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.

28. 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). Prior to six months before the expiration date of an operating permit, a source must submit a “renewal” application. 40 C.F.R. § 70.5(a)(1)(iii). Once a source 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).

29. 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 regard 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.

30. 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 CFR 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.”).

31. Accordingly, the Colorado Air Act requires the Division to grant or deny applications to renew operating permits within eighteen months after receipt of the completed permit application. C.R.S. § 25-7-114.5(4). 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).

32. Before final action can be taken on an operating permit application, the Division must at least provide for a 30-day public comment period. 5 C.C.R. § 1001-5, Part C, Section VI.B.8. The Division must also provide the public an opportunity to request a hearing before the Air Quality Control Commission. 5 C.C.R. § 1001-5, Part C, Section VI.B.10. The Division must also provide the EPA a 45-day period to object. 5 C.C.R. § 1001-5, Part C, Section VI.H. If the EPA does not object, the Division may subsequently grant or deny the permit.

33. 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).

FACTUAL BACKGROUND

34. The West Coal Elk Mine is located in Somerset Colorado, just east of the town of Paonia in Gunnison County.

35. The West Elk Coal Mine triggers Title V Major Source Operating Permitting requirements due to emissions of VOCs in excess of the Major Source threshold of 100 tpy as well as Hazardous Air Pollutants in excess of 10 tpy for a single HAP. The West Elk Coal Mine estimates that its actual emissions of VOCs is at least 274 tpy, and its actual emissions of n-hexane (a Hazardous Air Pollutant) is at least 13.6 tpy. The West Elk Coal Mine triggers Title V Major Source Operating Permitting requirements due to emissions of VOCs in excess of the Major Source threshold of 100 tpy as well as Hazardous Air Pollutants in excess of 10 tpy for a single HAP. The West Elk Coal

Mine estimates that its actual emissions of VOCs is at least 274 tpy, and its actual emissions of n-hexane (a Hazardous Air Pollutant) is at least 13.6 tpy.

36. Mountain Coal submitted an application for a Title V Major Source Operating Permit on or about March 31, 2020.

37. Defendant Air Pollution Control Division gave the West Elk Coal Mine a Title V Permit application the ID of 09GU1382.

38. The 18-month deadline for Defendants to take final action on application 09GU1382 was September 30, 2021.

39. The Defendants continued, and continue to this day, to allow the West Elk Coal Mine to emit Major quantities of air pollution and have never taken final action on its application for an operating permit.

40. In the meantime, Colorado's failure to grant or deny the West Elk Coal Mine permit application means the facility is not operating under an up-to-date, legally adequate, and effective Title V permit. Among other requirements, a Title V permit must include emission limitations and standards, monitoring, and reporting to ensure a source of pollution operates in compliance with applicable requirements under the Clean Air Act. *See generally* 40 C.F.R. § 70.6.

FIRST CLAIM FOR RELIEF

Failure to Approve or Deny Title V Application for the West Elk Coal Mine

41. Plaintiff incorporates the allegations in all preceding paragraphs of this Complaint as if set forth in full herein.

42. The Division has not taken final action to issue or deny Title V Major Source Operating Permit application for the West Elk Coal Mine, Permit No. 09GU1382, within 18 months after receiving the application in accordance with C.R.S. § 25-7-114.5(4). Defendants' failure to take final action on the permit application for the West Elk Coal Mine violated the Colorado Air Act.

43. The Division's failure to grant or deny a Title V Operating Permit for the West Elk Mine within the 18 months prescribed by statute is final permit action subject to this Court's review. *See* C.R.S. § 25-7-114.5(7)(b). This Court must therefore require that the Defendants grant or deny this permit renewal application "without additional delay." *Id.*

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Order Defendants to act on the Title V permit initial application for the West Elk Coal Mine by issuing or denying the permit within 90 days;

B. Award Plaintiffs reasonable costs of litigation, including attorneys' fees; and

C. Grant such other relief as the Court deems appropriate or necessary.

Respectfully submitted on July 26, 2022,

/s/ Katherine Merlin _____
Katherine Merlin, Atty. Reg. No. 45672
WildEarth Guardians
3798 Marshall St. Suite 8.
Wheat Ridge, CO 80033
P: (720) 965-0854
kmerlin@wildearthguardians.org
Attorney for Plaintiff Groups