

DISTRICT COURT, MOFFAT COUNTY, COLORADO Court address: 221 W. Victory Way, Suite 300 Craig, Colorado 81625 Phone Number: 970-824-8254	▲ COURT USE ONLY ▲
Plaintiff: WILDEARTH GUARDIANS v. Defendants: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, AIR POLLUTION CONTROL DIVISION and COLORADO AIR QUALITY CONTROL COMMISSION	
Attorneys for Plaintiff: Ashley D. Wilmes 680 W. Hickory Street Louisville, CO 80027 (859) 312-4162 awilmes@wildearthguardians.org Atty. Reg #: 40798 Stuart Wilcox 1840 Vine St. #5 Denver, CO 80206 (720) 331-0385 swilcox@wildearthguardians.org Atty. Reg. #: 44972	Case Number: Div: Crtm:
COMPLAINT	

PLAINTIFF, through counsel, submits the following Complaint:

INTRODUCTION

1. Plaintiff WildEarth Guardians brings this suit to compel the Defendants, the Colorado Department of Public Health and Environment, Air Pollution Control Division and the Colorado Air Quality Control Commission, to comply with Defendants’ mandatory duty to timely grant or deny two air pollution permit applications submitted by Tri-State Generation and Transmission Association, Inc. (“Tri-State”), as required by the Colorado Air Pollution Prevention and Control Act.

2. On April 28, 2009 and May 20, 2010, Tri-State submitted air pollution permit applications for the operation of the Craig Generating Station, a 1,339-megawatt coal-fired power plant located near Craig, Colorado. Pursuant to the Colorado Air Pollution Prevention and Control Act, Defendants are required to grant or deny such permit applications within eighteen months of receipt. See C.R.S. § 25-7-114.5(4). Although far more than eighteen months have passed since Defendants received these applications from Tri-State, Defendants have not yet taken action to grant or deny these applications.

3. Pursuant to the Colorado Air Pollution Prevention and Control Act, the Defendants' failure to grant or deny a permit application or permit renewal application is final permit action for purposes of obtaining judicial review to require that action be taken on such application "without additional delay." CRS 25-7-114.5(7)(b). Timely action on these operating permit applications is needed 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 the Craig Generating Station.

PARTIES

4. Plaintiff WILDEARTH GUARDIANS ("Guardians") is a non-profit conservation organization, with an office in Denver, Colorado. Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places 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 35,000 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.

5. Guardians' members live, work, bike, recreate, and conduct educational, research, advocacy, and other activities in and around Craig, Colorado in areas where air pollution from the Craig Generating Station harms these activities. Guardians' 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 Guardians and its 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 Pollution Prevention and Control Act. Guardians' and its members' interests have been, are being, and will continue to be irreparably harmed by the Defendants' failure to act.

6. The violations alleged in this Complaint have injured and continue to injure the interests of Guardians and its 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 Pollution Prevention and Control Act.

7. DEFENDANT COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT ("CDPHE") is the Colorado regulatory Department with jurisdiction and authority to implement the Colorado 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 Quality Control Division (“Division”), which 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 Pollution Prevention and Control Act. See C.R.S. § 25-7-114.4(2).

8. DEFENDANT COLORADO AIR QUALITY CONTROL COMMISSION (“Commission”) is a nine member citizen body within CDPHE. See C.R.S. § 25-7-104. The Commission also has the jurisdiction, authority, and duty to grant or deny applications for operating permits under the Air Pollution Prevention and Control Act. See C.R.S. § 25-7-114.5.

JURISDICTION AND VENUE

9. 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), and as a Court of general jurisdiction under the Colorado Constitution.

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

LEGAL BACKGROUND

11. Colorado’s statutory and regulatory requirements regarding the permitting of sources of air pollution derive from the federal Clean Air Act.

12. 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 id. §§ 7661-7661f.

13. Title V operating permits are legally enforceable documents that permitting authorities issue 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. See 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. See id. § 7661a(a).

14. Applications for Title V operating permits must be submitted by major sources within 12 months of becoming subject to such permitting requirements. See 42 U.S.C. § 7661b(c). Title V operating permits must be issued for a term of no more than five years, and must be renewed thereafter. See id. § 7661a(b)(5)(B). Within six months of the expiration date

of an operating permit, a source must submit a “renewal” application. See 40 C.F.R. § 70.5(a)(1)(iii).

15. The Clean Air Act provides that the Administrator of the Environmental Protection Agency (“EPA”) may approve state programs to administer the Title V permitting program with respect to sources within their borders. See 42 U.S.C. § 7661a(d). EPA granted full approval to Colorado’s administration of its Title V operating permit program in 2000. See 65 Fed. Reg. 49,919 (August 16, 2000). Therefore, Defendants are responsible for issuing Title V permits in Colorado. To this end, with regards to Title V permitting, the requirements of the Clean Air Act and its implementing regulations have been incorporated into the Colorado Air Pollution Prevention and Control Act. See C.R.S. § 25-7-114, *et seq.*

16. 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. See 42 U.S.C. § 7661b(c). The Clean Air Act also provides that the state operating permit program must provide judicial review in state court for the failure of a permitting authority to timely act on a permit application or permit renewal. See 42 U.S.C. 7661a(b)(7).

17. Accordingly, the Colorado Air Pollution Prevention and Control Act requires that applications for renewable operating permits, permit renewals, and permit revisions be granted or denied within eighteen months after the receipt of the completed permit application. C.R.S. § 25-7-114.5(4). “Failure 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).

18. The Colorado Air Pollution Prevention and Control Act provides for judicial review of any final order or determination by the Division or the Commission in accordance with the provisions of the Act and the State APA. C.R.S. § 25-7-120(1).

FACTUAL BACKGROUND

19. The Craig Generating Station, which is largely owned and entirely operated by Tri-State, is a coal-fired power plant consisting of three boilers, or units, which have been identified as Units 1, 2, and 3. This facility is located in Moffat County approximately 2.5 miles southwest of the town of Craig, Colorado.

20. The Craig Generating Station is a major source of air pollution subject to the operating permit requirements of the Colorado Air Pollution Prevention and Control Act and the federal Clean Air Act. According to data submitted by Tri-State to the EPA, which is available on the Agency’s Air Markets Program Database, the Craig Generating Station released nearly 4,000 tons of sulfur dioxide and more than 13,000 tons of nitrogen oxides in 2012. According to

the EPA, both sulfur dioxide and nitrogen oxides can be harmful to public health and the environment. See EPA, “Nitrogen Dioxide, Health” website available at <http://www.epa.gov/air/nitrogenoxides/health.html>; EPA, “Sulfur Dioxide, Health” website available at <http://www.epa.gov/air/sulfurdioxide/health.html>. The Craig Generating Station also releases other air pollutants that are known to pose public health and environmental risks, including mercury, selenium, carbon monoxide, and carbon dioxide.

21. Tri-State originally obtained a Title V operating permit from CDPHE for Units 1 and 2 of the Craig Generating Station on May 1, 2005. This permit has been identified as Operating Permit 96OPMF155. This permit does not incorporate Unit 3.

22. On or about April 28, 2009, Tri-State submitted its Title V operating permit renewal application to the Division for Craig Station Units 1 and 2, Operating Permit 96OPMF155. The Division and/or the Commission were therefore required to take final action to grant or deny this permit application on or before October 28, 2010.

23. Tri-State’s permit renewal application for Craig Station Units 1 and 2 is still before the Division and is awaiting final action in accordance with the Colorado Air Pollution Prevention and Control Act. To date, the Defendants have failed to take final action to grant or deny this permit application.

24. On or about May 20, 2010, Tri-State submitted a permit application to the Division to add Craig Unit 3 and associated emission units to Operating Permit 96OPMF155. The Division and/or the Commission were therefore required to take final action to grant or deny this permit application on or before November 21, 2011.

25. Tri-State’s permit application for Craig Station Unit 3 is still before the Division and is awaiting final action in accordance with the Colorado Air Pollution Prevention and Control Act. To date, Defendants have failed to take final action to grant or deny this permit application. Unit 3 is still not regulated under a Title V operating permit.

26. The Division is the entity responsible for taking final action on the permit applications submitted by Tri-State, referenced in Paragraphs 22 and 24.

27. In the alternative, the Commission may take final action on the permit applications submitted by Tri-State, referenced in Paragraphs 22 and 24.

PLAINTIFF’S FIRST CLAIM FOR RELIEF

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

29. On or about April 28, 2009, Tri-State submitted a Title V operating permit renewal application for Craig Station Units 1 and 2, Operating Permit 96OPMF155.

30. The Division and/or the Commission had and continue to have a mandatory duty to take final action to grant or deny this permit application on or before October 28, 2010. See C.R.S. § 25-7-114.5(4).

31. Neither the Division nor the Commission has taken final action to grant or deny this permit application.

32. Defendants' failure to take final action to grant or deny the Title V permit renewal application for the Craig Generating Station Units 1 and 2 submitted on or about April 28, 2009 violates the Colorado Air Pollution Prevention and Control Act. See C.R.S. § 25-7-114.5(4). This violation is ongoing.

33. The Defendants' failure to grant or deny this permit renewal application within the eighteen months prescribed by statute is final permit action subject to this Court's review. C.R.S. § 25-7-114.5(7)(b). This Court must therefore require that the Division and/or the Commission grant or deny this permit renewal application "without additional delay." Id.

34. The Defendants' failure to grant or deny this permit renewal application within the eighteen months prescribed by the Colorado Air Pollution Prevention and Control Act also constitutes agency action that is contrary to law and/or agency action unlawfully withheld, within the meaning of the State APA. See C.R.S. § 24-4-106(7). Pursuant to the State APA, this Court must therefore compel agency action to be taken in accordance with the Colorado Air Pollution Prevention and Control Act, remand the case for further proceedings, and afford other such relief as may be appropriate. Id.

PLAINTIFF'S SECOND CLAIM FOR RELIEF

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

36. On or about May 20, 2010, Tri-State submitted a Title V permit application to add Craig Unit 3 to Operating Permit 96OPMF155.

37. The Division and/or the Commission had and continue to have a mandatory duty to take final action to grant or deny this permit application on or before November 20, 2011. See C.R.S. § 25-7-114.5(4).

38. Neither the Division nor the Commission has taken final action to grant or deny this permit application.

39. Defendants' failure to take final action to grant or deny the Title V permit application for the Craig Generating Station Units 3 submitted on or about May 20, 2010 violates the Colorado Air Pollution Prevention and Control Act. See C.R.S. § 25-7-114.5(4). This violation is ongoing.

40. The Defendants' failure to grant or deny this permit application within the eighteen months prescribed by statute is final permit action subject to this Court's review. C.R.S. § 25-7-114.5(7)(b). This Court must therefore require that the Division and/or the Commission grant or deny this permit renewal application "without additional delay." Id.

41. The Defendants' failure to grant or deny this permit application within the eighteen months prescribed by the Colorado Air Pollution Prevention and Control Act also constitutes agency action that is contrary to law and/or agency action unlawfully withheld, within the meaning of the State APA. See C.R.S. § 24-4-106(7). Pursuant to the State APA, this Court must therefore compel agency action to be taken in accordance with the Colorado Air Pollution Prevention and Control Act, remand the case for further proceedings, and afford other such relief as may be appropriate. Id.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the court:

A. Order the Division and/or the Commission to act on the Title V permit renewal application for Craig Station Units 1 and 2 (Operating Permit No. 96OPMF155), submitted by Tri-State on or about April 28, 2009, by issuing or denying the permit, without further delay;

B. Order the Division and/or the Commission to act on the Title V permit application to add Craig Unit 3 and associated emission units to Operating Permit 96OPMF155, submitted by Tri-State on or about May 20, 2010, by issuing or denying the permit, without further delay;

C. Award Plaintiff its reasonable costs of litigation, including attorneys' fees; and

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

Respectfully submitted,

/s Ashley D. Wilmes
Ashley D. Wilmes
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/s Stuart Wilcox
Stuart Wilcox
Atty. Reg. #: 44972

*Attorneys for Plaintiff
WildEarth Guardians*

Dated: December 16, 2013