

District Court, Gunnison County, State of Colorado 200 East Virginia Avenue Gunnison, CO 81230 Telephone: (970) 642-8300	DATE FILED: May 2, 2023 10:42 AM CASE NUMBER: 2022CV30033 ▲ 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 and the AIR POLLUTION CONTROL DIVISION	Case No: 22CV30033 Division: 2 Courtroom: 2
ORDER ON PLAINTIFFS MOTION FOR SUMMARY JUDGMENT ON REMEDY	

This is an action in which Plaintiffs hereinafter referred to as the Conservation Groups have sued the Defendants the Colorado Department of Public Health and Environment and the Air Pollution Control Division with respect to permitting for the West Elk Coal Mine in Gunnison Colorado. The Court previously granted summary judgment for Plaintiffs concluding that the Defendants had failed to comply with the 18-month timeline for issuing or denying the permit pursuant to C.R.S. §25-7-114(4). See the December 13, 2022, Partial Summary Judgment Order.

The subsequent briefing related to the question of remedy. The Conservation Groups assert that only a definitive deadline for issuance or denial of the permit is appropriate. Defendants contend that no such hard deadline is feasible given the remaining steps to be completed. That is detailed in a Declaration by the Deputy Director for Stationary Sources within the Division, Sergio Guerra.

STANDARD OF REVIEW

The parties do not dispute the standard of review. That is, the equitable remedy is within the discretion of the trial court absent an abuse of discretion. The charge for the Court is to tailor relief to achieve the statutory objectives.

SUMMARY OF ARGUMENTS

The Conservation Groups contend that it is undisputed that the 18-month deadline contemplated by statute, C.R.S. §25-7-114 (4) expired on September 30, 2021, that Defendants have failed to satisfy their burden to show impossibility of performance, citing *New Jersey v. Wheeler* 475 F.Supp.3d 308 (S.D.N.Y. 2020). Further, that it is incumbent upon the Defendants to show the utmost diligence. They cite *Sierra Club v. Jackson* 2011 WL 181097(D.D.C. January 20, 2011). They argue that without a firm deadline the delays will persist in contravention of the federal and state statutory presumptions for timely determination of these applications for permits.

Defendants submit that the steps remaining to be taken and the limitations based on the complexity of the matter together with the lack of sufficient staffing make any hard deadline impractical, state they have not completed the task of modeling simulated emissions and once that is concluded then, and then only, can they finalize the draft permit. Thereafter it must be published for public comment, a minimum of 30 days. Then the Division must respond to any public comments, which may be an indefinite time. Thereafter the proposed decision must be submitted to the Environmental Protection Agency for a 45-day review process. The Division must address any objections the EPA provides within 90 days. See Guerra Declaration, a copy of which is attached to this Order. See also the authority cited in the Conservation Groups' opening brief at page 7 including 5 CCR 1001-5 Part C VI B.

ANALYSIS

This issue relates to the permitting process for the West Elk Coal Mine, which has been in operation since 1981. Based on the briefing it is reputed to be the largest coal mine in the State of Colorado. It produced more than 3 million tons of coal in 2021. It is undisputed that it does not presently have an operating permit as required by Title V of the Clean Air Act and the Colorado Air Pollution and Control Act which Defendants are charged with enforcing. It also adjoins the Gunnison National Forest, in part.

The Conservation Groups advocate that this Court order a final permit issue by June 1, 2023. They contend that only a definitive date will result in meaningful action by Defendants. In their briefing they cite to an order issued in a similar case arising out of Garfield County. They also contrast that with one of two similar cases in Adams County in which the direction of the Court was simply to proceed “without delay.”

Defendants have not disputed their default, but have articulated, based on the Declaration of Mr. Guerro, mandatory steps which remain, but commit to a firm date for their initial draft of the permit which they propose can be completed not later than June 1, 2023. Those include, and Defendants in their Reply did not dispute, completion of the modeling between now and June 1, 2023, drafting the permit on or before June 1, 2023, publishing notice for public comment, responding to public comments, sending a proposed decision to the Environmental Protection Agency, addressing any EPA objections, and issuing the final permit. See generally 5CCR 1001-5(b)(IIIC)(VI). This is also detailed in the Guerra affidavit.

ORDER

The Court recognizes the obvious, that this permit process has been delayed well beyond the statutory expected deadline. The Court also recognizes that it is unrealistic to

submit a 90-day deadline given the remaining steps to be done and the probability that either the Applicant, members of the public or the Conservation Groups will raise issues.

Accepting the first draft is done by June 1, 2023, and all steps as outlined thereafter are not extended, would be 30 days for public comment, followed by 45 days for EPA review, followed by 90 days to address comments, potential hearings, and other possible delays.

Impracticability rather than impossibility of performance is recognized in Colorado contract cases, see generally *City of Littleton v. Employers Fire Insurance Co.*, 453 P.2d 810 (Colo 1969). However, as noted by the Conservation Groups, several more legally and factually comparable cases characterized the question for the Defendants here as a “heavy burden” to prove statutory deadlines are impossible. They cite *New Jersey v. Wheeler, supra*, among other federal authorities.

Wheeler related to the EPA’s failure to promulgate federal implementation plans for ozone pollution mandated by the Clean Air Act. That Court states at pp. 327-328:

Where, as in this case, the EPA has failed to comply with a nondiscretionary statutory deadline under the Act and the EPA seeks to extend the time to comply with that deadline by invoking the doctrine of impossibility, “[a]n agency ... bears ‘a heavy burden to demonstrate the existence of an impossibility.’” Johnson, 444 F. Supp. 2d at 53 (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979)); see also *Wisconsin*, 938 F.3d at 319. “That burden is especially heavy where ‘the agency has failed to demonstrate any diligence whatever in discharging its statutory duty to promulgate regulations and has in fact ignored that duty for several years.’” Johnson, 444 F. Supp. 2d at 53 (quoting *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987)). Congress has set the statutory deadline and determined that a definite deadline was important despite alleged difficulties in meeting that deadline. Therefore, the EPA must show more than scientific uncertainty or complexity, but rather impossibility. “The genesis of [the impossibility] doctrine is in the maxim that a court will not exercise its equity powers to compel one to do that which is impossible.” *New York v. Gorsuch*, 554 F. Supp. 1060, 1064 (S.D.N.Y. 1983).

That Court rejected an “incremental approach” and set a firm deadline, as advocated by the Conservation Groups here. The Court concludes that the absence of any rebuttal of the steps or timelines in the Declaration demonstrates that a 90-day hard deadline here is not realistic given the likelihood of issues and timelines at each of the identified stages to be completed, either by the Conservation Groups or the Public generally, or by the West Elk Mine. See the related cases currently before this Court, 22CV30061 and 19CV30041.

The Court concludes it would be futile to set a hard and fast 90-day deadline based on the information before the Court. The Court orders as follows:

1. The initial draft permit shall issue by the date represented by the Defendants as feasible, to be completed on or before June 1, 2023.
2. The Defendants shall file a status report no later than July 14, 2023, with respect to the status of public comment and their estimated time for submission of a draft to the Environmental Protection Agency.
3. Plaintiffs will have 14 days to raise any objections. The Court will set a status conference to determine whether the parties wish to brief the matter or have a hearing.
4. Upon receipt of the Response from the EPA, the Defendants shall inform the Court within 14 days of their estimated time for finalizing the permit.
5. Plaintiffs will have 14 days from that submission to interpose any objection if they believe it to be unreasonable. A status conference to set a hearing or briefing schedule will be set if there is objection.
6. Each side shall be responsible for their own attorneys' fees and costs.

Dated this 2nd day of May 2023.

BY THE COURT:



J. Steven Patrick
District Court Judge

cc: e-filed to parties of record with attachment

DATE FILED: March 10, 2023 4:25 PM

DISTRICT COURT, GUNNISON COUNTY
COLORADO

200 E. Virginia Avenue
Gunnison, Colorado 81230
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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 QUALITY
CONTROL COMMISSION; and the AIR
POLLUTION CONTROL DIVISION

▲ COURT USE ONLY ▲

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Case Number: 2022CV030033

Div: 2

**DECLARATION OF SERGIO GUERRA IN SUPPORT OF DEFENDANTS'
RESPONSE TO MOTION FOR SUMMARY JUDGMENT ON REMEDY**

I, Sergio Guerra, hereby submit this Declaration under penalty of perjury, pursuant to Rule 108 of the Colorado Rules of Civil Procedure and section 13-27-104, C.R.S. and state as follows:

1. I am presently employed as the Deputy Director for Stationary Sources within the Air Pollution Control Division (“Division”) of the Colorado Department of Public Health and Environment (“Department”) (collectively, the “Agency Defendants”). I have been with the Department since 2022.
2. I hold an undergraduate, graduate, and doctoral degrees in environmental health and have over 20 years of professional experience in supporting the air quality air permitting.
3. In my role, I have various responsibilities, one of which is ensuring high quality permits are issued by the State, including, among others, operating permits for a variety of complex sources of air pollution in the State of Colorado.
4. I submit this Declaration in support of the Agency Defendants’ Response to WildEarth Guardians, Center for Biological Diversity, Sierra Club, High Country Conservation Advocates and Wilderness Workshop (“Plaintiffs”) Motion for Summary Judgment on Remedy. This Declaration is based on my personal knowledge, the official records of the Department, and the official records of the Air Quality Control Commission (“Commission”).

Staffing of the Division’s Title V Program

5. The Division has historically struggled to staff the Title V permit program but continues to make progress towards eliminating its operating permit application backlog.

6. The Division currently has seven permit engineers with experience evaluating and writing Title V permits. These employees have the responsibility of evaluating all Colorado Title permit applications, including the West Elk Mine along with several other highly complex industrial facilities.
7. As part of the drafting and finalizing Title V permits, the Division's permitting staff seeks to review and respond to public comments received during the regulatory required public comment period in Colorado.

Summary of the Wek Elk Mine Operating Permit Applications and Timeline

8. The Division received Title V permit application for the West Elk Mine on March 30, 2020.
9. The Division has not yet completed drafting its permitting decision. While most of the permit has been drafted, one of the most complex processes is still underway.
10. The Division is in the process of evaluating the West Elk Coal Mine's ("West Elk") compliance with the National Ambient Air Quality Standards, which involves the task of modeling simulated emissions and their effect on air quality. This process requires months to complete.
11. Before Agency Defendants can take final action on this permit, several interim steps must be completed. The Division must finish evaluating the impact of the pollution emissions associated with this permitting decision. The Division must complete the draft permit. The Division must publish notice of its proposed decision and make the draft permit available for public review. The Division must respond to public comments. The

Division must publish its proposed decision to the EPA. And the Division must address any EPA objections.

12. Historically, public comments, including those offered by Plaintiffs, have included long, complex comments that require a significant amount of the Division's time. For example, while working through the public notice and comment process for Suncor Plant 1 & 3, the Division received over 100 public comments and associated comment documents, comprised of hundreds of pages of comments and supporting documents. These range from general comments requesting that the Division not grant a TV permit to very complex and highly technical comment on the source at issue. As an example of a highly complex comment, a single environmental organization submitted 146 pages of highly technical and legal comment on the application.
13. In response to the single environmental organization's comments outlined above, the Division anticipates nearly 100 pages of analysis.
14. The application in question is not as complex as the Suncor permit applications. However, all Title V permit applications are complex, and few are as controversial as the West Elk Mine. In the probable event the Division receives significant public comment, the Division would be unable to adequately address such comment under the deadline proposed by Plaintiffs.
15. As part of completing draft Title V permits for applications, the Division evaluates all applicable emission sources and requirements at the facility, completes complex schematics and considers input from the source. Much of this information must be

compiled and informed on a facility-by-facility basis and detailed discussion between the Division and the source.

I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

Executed on the 10th day of March, 2023, in Denver, Colorado.

/s/ Sergio Guerra

Sergio Guerra

Deputy Director

Air Pollution Control Division

Colorado Department of Public Health and
Environment