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OFFICE OF THE EXECUTIVE SECRETARIAT

August 26, 2014

AK-14-001-4414

**BY CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

**Re: Notice of Intent to File Suit, Unreasonable Delay in Responding to Petition to Find that Colorado is Failing to Administer its Title V Permitting Program**

Dear Administrator McCarthy:

WildEarth Guardians hereby notifies you of its intent to file suit under the Clean Air Act against you and the Environmental Protection Agency ("EPA") for your failure to respond to our May 9, 2014 Petition requesting that you find that the State of Colorado is failing to adequately administer its Title V Permitting program under the Clean Air Act. This Petition was submitted pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.* and the Clean Air Act, 42 U.S.C. § 7401, *et seq.* We intend to bring a suit 180 days from the date of this letter, or shortly thereafter, under section 304 of the federal Clean Air Act, as Amended, 42 U.S.C. § 7604(a), against you for your unreasonable delay in responding to our Petition.

On May 9, 2014, Guardians submitted via certified U.S. mail and via e-mail a straightforward rulemaking petition requesting that the EPA find that Colorado, through the Colorado Air Pollution Control Division, is failing to adequately administer its Title V Permitting program. The Petition demonstrated clearly that Colorado is flagrantly violating the Clean Air Act's mandatory requirement that final action be taken on Title V Operating Permits applications within 18 months of their receipt. The Petition provided information demonstrating that Colorado has failed to meet its 18-month deadline for more than 120 permit applications, in violation of 42 U.S.C. § 7661b(c). Among the more egregious failures to meet its 18-month deadline for taking final action on Title V Permit applications:

- Colorado has yet to take action on an initial Title V permit application (permit no. 96OPFR145) submitted by Holcim, Inc. in 1997 for its cement plant in Fremont County. This means this facility has been operating without a Title V permit 24 years after Title V was enacted in 1990;



- Colorado has yet to take action on renewed Title V permit applications for several coal-fired power plants in Colorado, which are some of the largest polluters in the state, including the Craig Generating Station (permit no. 96OPMF155, application submitted in 2009), Nucla Station (permit no. 96OPMO168, application submitted in 2006), Rawhide Energy Station (permit no. 96OPLR142, application submitted in 2010), Drake Power Plant (permit no. 95OPEP107, application submitted in 2006), and CENC Golden facility (permit no. 96OP JE143, application submitted in 2007);
- Colorado has failed to timely issue initial Title V permits for at least 59 sources. These facilities are therefore not subject to any Title V permitting oversight. Thus, there is no assurance that they are operating in compliance;
- Colorado is overdue in taking action on more than 120 applications for initial and renewed Title V permit and many more applications for significant permit modifications. Of these permit applications, more than 40 are overdue by more than five years.

The failure to take action on Title V Permitting applications poses significant public health risks in Colorado. Title V is meant to enhance compliance by ensuring greater transparency, public notice and involvement, monitoring, and accountability to applicable requirements under the Clean Air Act. The lack of up-to-date Title V Permits, or even a Title V Permit, indicates that Colorado is failing to ensure that the public is sufficiently involved in protecting themselves and their communities from air pollution and failing to ensure that the largest and most dangerous sources of air pollution in Colorado are operating in compliance with air quality laws and regulations.

The failure of Colorado to take action on Title V Permitting applications is further troubling in light of the Clean Air Act's explicit requirement that states have "adequate personnel and funding" to administer their Title V program. *See* 42 U.S.C. § 7661a(b)(4); *see also* 40 C.F.R. § 70.4(b)(8). In this case, Colorado is either simply choosing to ignore its duties to administer Title V or lacks the personnel and funding to administer Title V. Either way, Colorado is very clearly not living up to the Clean Air Act.

Whenever a state is failing to adequately administer its Title V Permitting program, the EPA Administrator must make a determination that a state is failing to adequately administer and enforce its Title V Permitting program. *See* 42 U.S.C. § 7661a(i). If a determination is made that a State is not adequately administering and enforcing its Title V permitting program, the Administrator has a nondiscretionary duty to apply sanctions in both attainment and nonattainment areas. *See* 42 U.S.C. § 7661a(i)(2). Additionally, upon making a finding of failure to adequately administer, the EPA may also withdraw full or partial approval of a state Title V program and/or promulgate, administer, or enforce its own federal Title V permitting program within any State. *See* 40 C.F.R. §§ 70.10(b)(2)(ii) and (iii). Upon partially or fully withdrawing approval of a state Title V program, the EPA has the authority to withhold grant funding under Section 105 of the Clean Air Act as authorized by Section 179(a)(4). *See* 40 C.F.R. § 70.10(b)(3).



EPA's failure to act on WildEarth Guardians' Petition is, in effect, condoning the State of Colorado's practice of refusing to take final action on Title V Permits within the statutorily mandated 18-month timeframe and allowing a more significant backlog to develop. It is notable that, even after Guardians submitted its petition, Colorado has not taken action on any backlogged Title V Permitting applications.

In the meantime, the Colorado Air Pollution Control Division continues to issue permits authorizing the construction of extensive oil and gas operations statewide, clearly indicating that the State believes authorizing more air pollution from the oil and gas industry is more important than ensuring current air pollution is appropriately scrutinized under Title V of the Clean Air Act. See Exhibit 1, Current Colorado Air Pollution Control Division Public Notice Website, available at <https://www.colorado.gov/cdphe/air-permit-public-notice> (last accessed Aug. 26, 2014). Indeed, of the 22 current permitting actions out for public comment, 19 are for new oil and gas-related pollutant emitting activities. There are currently no Title V Permits out for public comment.

Colorado's failure to act on its significant backlog of Title V Permits comes even as Clean Air Act violations among Title V sources appear to be widespread. According to the EPA's Environment and Compliance History Online (also referred to as the "ECHO" database, available online at <http://echo.epa.gov/> (last accessed Aug. 26, 2014)), the Colorado Air Pollution Control Division has failed to take action on Title V Permit applications for a number sources considered to be "High Priority Violators" because of ongoing Clean Air Act violations. The table below illustrates just a handful of these and underscore that Colorado's failure to take action on Title V Permits is undermining compliance with the Clean Air Act.

**Examples of High Priority Violators in Colorado for Which Action on Title V Permit Applications is Overdue**

| Source                                   | Title V Permit No. | Quarters as High Priority Violator To Date | Date Title V Permit Application Submitted |
|--|--------------------|--|---|
| Hayden Station Coal-fired Power Plant    | 96OPRO132          | 2  | March 1, 2013                             |
| Coors Brewing                            | 96OPJE140          | 12   | March 28, 2007                            |
| Williams' Willow Creek Gas Plant         | 10OPRB351          | 12   | July 16, 2010                             |
| Encana Hamilton Creek Compressor Station | 07OPSM291          | 12   | January 2, 2007                           |
| Kerr-McGee Ft. Lupton Compressor Station | 95OPWE013          | 12   | October 29, 2002                          |
| Kerr-McGee Hudson Compressor Station     | 95OPWE057          | 12   | July 1, 2010                              |
| Tri-State Nucla Coal-fired Power Plant   | 96OPMO168          | 12   | May 26, 2006                              |
| Duke Energy Ladder Creek Helium Plant    | 99OPCY216          | 9  | September 28, 2004                        |
| Oxy Conn Creek Gas Plant                 | 07OPGA292          | 12   | January 30, 2007                          |



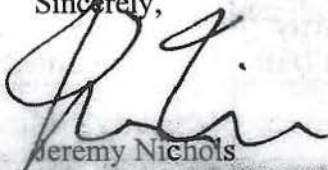
The APA requires EPA to conclude matters raised in petitions within a reasonable time (*see* 5 U.S.C. § 555(b), "within a reasonable time, each agency shall proceed to conclude a matter presented to it") and the Clean Air Act explicitly contemplates that the Administrator will act within a reasonable time (*see* 42 U.S.C. § 7604(a), providing for judicial review of action unreasonably delayed). In our Petition, we requested that the EPA immediately respond given the severity of Colorado's Title V Permit application backlog and given the significant air quality dangers of failing to take action on Title V Permits. EPA's ongoing failure to respond by making a simple finding that is mandatory under the Clean Air Act is not reasonable.

According to green return receipt cards, the Administrator received WildEarth Guardians' Petition on May 13, 2014. Thus, it has been over three months since the Petition was received and WildEarth Guardians still has not received a response to what is a straightforward request that EPA remedy the fact that Colorado refuses to issue Title V Permits within the statutory deadlines imposed by the Clean Air Act. The failure to respond to the Petition constitutes unreasonable delay under the APA and the Clean Air Act.

The Clean Air Act provides that any citizen may file suit to compel action unreasonably delayed by the Administrator. *See* 42 U.S.C. § 7604(a). Pursuant to the Clean Air Act, after 180 days, if we do not receive a response to our May 9, 2014 Petition, we intend to sue you for your unreasonable delay.

In keeping with the requirements of federal regulations, you are hereby notified that the full name and address of the organization giving notice is WildEarth Guardians, 516 Alto St., Santa Fe, NM 87501. If you wish to discuss this matter further, please contact me at the information indicated below. Pursuant to Section 304(a) of the Clean Air Act, notice is also being provided to the State of Colorado.

Sincerely,



Jeremy Nichols  
Climate and Energy Program Director  
WildEarth Guardians  
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cc (by certified mail, return receipt requested):

Larry Wolk, Executive Director, Colorado Department of Public Health and Environment  
Will Allison, Director, Colorado Air Pollution Control Division.