

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

WILDEARTH GUARDIANS,)
)
Plaintiff,)
)
v.)
)
MICHAEL REGAN, in his official capacity as)
Administrator, United States)
Environmental Protection Agency)
)
Defendant.)
_____)

No. 1:23-cv-379

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief, with costs and fees, under the Clean Air Act (hereafter “Act”), 42 U.S.C. §§ 7401, *et seq.*, and the declaratory judgment statute, 28 U.S.C. § 2201. Plaintiff WildEarth Guardians (“Guardians”) seeks an order declaring that the Defendant Administrator of the U.S. Environmental Protection Agency (“Administrator” or “EPA”) violated the Clean Air Act by failing to issue or deny air pollution operating permits in accordance with the nondiscretionary deadline set forth in the Act, and an order compelling timely compliance.

2. On November 16, 2022, in response to Guardians’ petitions to EPA, EPA formally objected to the Clean Air Act Title V Operating Permits (“Title V Permits” or “Permits”) issued by the New Mexico Environment Department for the Frac Cat and Big Lizard Compressor Stations operated by Lucid Energy Delaware, LLC in Lea County, New Mexico.

3. EPA objected to these two Permits because they failed to comply with the Clean Air Act. Specifically, EPA issued a finding that the New Mexico Environment Department’s Air Quality Bureau failed to demonstrate that the operation of the Frac Cat and Big Lizard compressor stations would protect National Ambient Air Quality Standards for ozone and failed to provide for adequate monitoring of emissions venting. *In the Matter of Lucid Energy Delaware, LLC Frac Cat Compressor*

Station, Lucid Energy Delaware, LLC Big Lizard Compressor Station, Petitions VI-2022-5 and VI-2022-11 (Nov. 16, 2022) (“Lucid Ruling”).¹

4. The Clean Air Act expressly requires that where a State fails to respond to an EPA objection within 90 days, the Administrator must issue or deny the Title V Permit in question. 42 U.S.C. § 7661d(c). It has been more than 160 days since EPA issued the objection to the Permits for the Frac Cat and Big Lizard compressor stations, yet as of the date of this Complaint, the New Mexico Environment Department has not responded to the objections and EPA has not issued or denied the Title V Permits for the compressor stations. EPA is therefore in violation of its nondiscretionary duty under the Clean Air Act.

JURISDICTION, VENUE, AND NOTICE

5. This Court has subject matter jurisdiction over the claim in this Complaint pursuant to the citizen suit provision of the Clean Air Act, because the Administrator has failed to perform a non-discretionary act or duty under the Clean Air Act. 42 U.S.C. § 7604(a)(2) (citizen suit provision).

6. This Court has federal question jurisdiction, because Guardians claims a violation of the Clean Air Act, a federal statute. 28 U.S.C. § 1331 (federal question jurisdiction).

7. The requested relief is authorized by statute. 28 U.S.C. § 2201 (declaratory judgment); 28 U.S.C. § 2202 (injunctive relief); and 42 U.S.C. § 7604(d) (costs and attorney fees).

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events and omissions giving rise to Guardians’ claim occurred in the District of New Mexico. Additionally, Guardians’ main office is located in Santa Fe, New Mexico.

9. Guardians properly gave the Administrator more than 60-days written notice of the specific violation alleged in this Complaint and of Guardians’ intent to bring suit to remedy that

¹ Available at https://www.epa.gov/system/files/documents/2022-11/Lucid%20Energy%20Delaware%20Order_11-16-22.pdf (last accessed April 21, 2023).

violation. 42 U.S.C. § 7604(b)(2) and 40 C.F.R. §§ 54.2 and 54.3. Guardians provided notice to the Administrator on February 23, 2023 via certified mail. The Administrator is deemed to have received that notice on February 23, 2023. 40 CFR 54.2(d). More than 60 days have passed since the Administrator received Guardians' notice letter.

10. The Administrator has not remedied the violations alleged in Guardians' notice letter and this Complaint.

PARTIES

11. Plaintiff WILDEARTH GUARDIANS is a non-profit conservation organization with headquarters in Santa Fe, New Mexico. Guardians is dedicated to protecting and restoring wildlife, wild rivers, wild places, and health in the American West, and to safeguarding the Earth's climate and air quality. Guardians and its members work to reduce harmful air pollution to safeguard public health, welfare, and the environment. Guardians has approximately 6,814 members, many of whom live, work, and recreate in areas affected by pollution from the Frac Cat and Big Lizard compressor stations in Lea County.

12. Guardians is a "person" within the meaning of 42 U.S.C. § 7602(e). As such, Guardians may commence a civil action under 42 U.S.C. § 7604(a).

13. Guardians' members live, work, and recreate around the Frac Cat and Big Lizard compressor stations. These members breathe, use, and enjoy the ambient air around the area of the Lucid compressor stations and their interrelated wells. They are adversely affected by the emissions of pollutants which harm or threaten to harm their health, and because they are reasonably concerned about their health and their use of the air, which is impaired by the pollution from the facility. Guardians' members are directly harmed by the Administrator's delay in issuing or denying a final Title V Permit because such permit or permit denial would result in fewer air pollution emissions than currently emitted from the compressor stations.

14. Additionally, Guardians and its members would further participate in the public processes provided for by Congress in the Clean Air Act if the Administrator would timely issue or deny a Title V Permit for the two compressor stations. Guardians and its members have the right to petition for review of Permit terms and to enforce Permits terms once issued. The Administrator's failure to timely grant or deny a Title V for the Frac Cat and Big Lizard compressor stations negatively affects Guardians' procedural rights under the Clean Air Act.

15. Defendant MICHAEL REGAN is the Administrator of the EPA. The Administrator is responsible for ensuring EPA's compliance with the Clean Air Act, including the requirement that EPA issue or deny a Title V Permit when the State of New Mexico fails to timely respond to EPA's permit objection. Mr. Regan is sued in his official capacity. If ordered by a Court, the Administrator of the EPA has the authority and the ability to remedy the harm alleged in this Complaint by providing the requested relief.

REQUIREMENTS OF THE CLEAN AIR ACT

16. 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. 42 U.S.C. §§ 7661–7661f.

17. A primary purpose of the Title V permitting program is to reduce violations of the Clean Air Act and improve enforcement by recording in a single document all of the air pollution control requirements that apply to a major source of air pollution. *Sierra Club v. Leavitt*, 368 F.3d 1300, 1302 (11th Cir. 2004) ("Title V imposes no new requirements on sources. Rather, it consolidates existing air pollution requirements into a single document, the Title V permit, to facilitate compliance monitoring.").

18. Major sources of air pollution cannot legally discharge pollutants into the air unless

they have a valid Title V Permit. 42 U.S.C. § 7661a(a).

19. The Clean Air Act provides that the EPA Administrator may approve state programs to administer the Title V permitting program with respect to sources within their borders. 42 U.S.C. § 7661a(d). The Administrator has approved New Mexico's administration of its Title V permitting program. 60 Fed. Reg. 60,032 (Nov. 26, 1996). The Air Quality Bureau of the New Mexico Environment Department ("NMED") is responsible for issuing Title V permits in New Mexico.

20. Before a state with an approved Title V permit program can issue a Title V permit, the state must forward the proposed permit to EPA. 42 U.S.C. § 7661d(a)(1)(B).

21. EPA then has 45 days from the state's submission to review the proposed permit. 42 U.S.C. § 7661d(b)(1). EPA has a non-discretionary duty to object to the issuance of the permit if it finds that it does not comply with all applicable provisions of the Clean Air Act. *Id.*

22. After EPA's 45-day review period expires, "any person may petition the Administrator within 60 days" to object to the proposed permit. 42 U.S.C. § 7661d(b)(2). Once EPA receives such a petition, the Clean Air Act requires that "[t]he Administrator shall grant or deny such petition within 60 days after the petition is filed." *Id.*

23. If a petition is granted, meaning EPA issues an objection on one or more grounds, the state must submit a revised permit to EPA which corrects the objection. If the state fails to submit a revised permit resolving the objection within 90 days, EPA must "issue or deny the permit[.]" 42 U.S.C. § 7661d(c). Specifically, if the state fails to "terminate, modify, or revoke and reissue the permit" and resolve the objection within 90 days, EPA must "terminate, modify, or revoke and reissue the permit" in accordance with 40 C.F.R. § 71.7(g). *See also* 40 C.F.R. § 71.4(e).

24. Under 40 C.F.R. § 71.4(l)(2), if EPA issues or denies a permit, the state may thereafter issue a Title V Permit in accordance with 40 C.F.R. § 70 regulations for state operating permit programs. However, such a state-issued Title V permit is only valid upon expiration of any

EPA-issued Title V permit, and only if EPA determines that such a state-issued permit has resolved the Administrator's objection.

25. Under the Clean Air Act, citizens may file suit against the EPA Administrator where there is "alleged a failure of the Administrator to perform any act or duty under [the Clean Air Act] which is not discretionary with the Administrator[.]" 42 U.S.C. § 7604(a)(2). This suit may be commenced only "60 days after" notice has been given to the Administrator. 42 U.S.C. § 7604(b)(2).

FACTUAL ALLEGATIONS

26. The Frac Cat and Big Lizard compressor stations are each major stationary sources of air pollution located in Lea County, New Mexico. These facilities dehydrate, compress, and route natural gas for pipeline transmission.

27. According to the Statement of Basis for the Title V Operating Permit for the Frac Cat compressor station, the facility is permitted to annually release: 118.92 tons of nitrogen oxides ("NO_x"), 114.29 tons of carbon monoxide ("CO"), 62.25 tons of volatile organic compounds ("VOCs"); 15.30 tons of sulfur dioxide ("SO₂"); 8.07 tons of particulate matter less than 10 microns in diameter ("PM₁₀"); 8.07 tons of particulate matter less than 2.5 microns in diameter ("PM_{2.5}"); and 25.85 tons of hazardous air pollutants ("HAPs"), including benzene, toluene, ethylbenzene, xylene, hexane, and other toxic substances.

28. According to the Statement of Basis for the Title V Operating Permit for the Big Lizard compressor station, the facility is permitted to annually release: 101.75 tons of NO_x; 116.85 tons of CO; 217.66 tons of VOCs; 11.67 tons of SO₂; 11.03 tons of PM₁₀; 11.00 tons of PM_{2.5}; and 22.2 tons of HAPs, including benzene, toluene, ethylbenzene, xylene, hexane, and other toxic substances.

29. On April 28, 2022, Guardians submitted detailed comments to NMED on the draft Operating Permit for Big Lizard compressor station. On January 28, 2022, Guardians submitted

detailed comments to NMED on the draft Operating Permit for the Frac Cat compressor station. In both comment letters, Guardians raised a number of concerns over the failure of the Permits to ensure compliance with the Clean Air Act.

30. NMED ultimately rejected Guardians' comments and submitted the proposed Permits to EPA – in March of 2022 for Frac Cat, and on June 10, 2022 for Big Lizard – without any changes to the initial draft Permits.

31. EPA's 45-day review period for the Frac Cat compressor station permit ended on June 14, 2022. EPA's 45-day review period for the Big Lizard compressor station permit ended on July 25, 2022.

32. On June 15, 2022, Guardians filed a petition requesting that the Administrator object to the issuance of the Permit for the Frac Cat compressor station on the basis that the Title V permit: 1) failed to ensure compliance with Clean Air Act Title V permitting requirements for renewal obligations; 2) failed to ensure compliance with the New Mexico State Implementation Plan and related requirements to protect ambient air quality standards by causing or contributing to exceedances of the National Ambient Air Quality Standard for ozone; and 3) failed to require sufficient VOC monitoring to ensure compliance with emission limits, and also that the monitoring requirements which the Permit did contain were unenforceable as a practical matter.

33. On September 26, 2022, Guardians filed a petition requesting that the Administrator object to the issuance of the Big Lizard compressor station Permit on the same three grounds as the Frac Cat compressor station Permit.

34. On November 16, 2022, in a single response, the Administrator granted in part both of Guardians' petitions and issued objections to the Title V Permits on two of the three grounds for petition, finding that NMED failed to demonstrate that operation of the compressor stations would protect national ambient air quality standards for ozone and failed to provide for adequate

monitoring of vented emissions.²

35. Despite the Administrator's Lucid Ruling granting in part both of Guardians' petitions for objection to the Permits, NMED did not address the objections or otherwise submit to EPA revised Permits that resolved the Administrator's objections. It has now been more than 160 days since the Administrator objected to the Permits, and NMED still has not responded to the objections for either facility.

36. In accordance with the Clean Air Act, the Administrator had a non-discretionary duty to issue or deny the Title V Permits upon NMED's failure to respond to the objections within 90 days. Thus, by February 14, 2023, the Administrator was required to "terminate, modify, or revoke and reissue" the permits. As of the date of this Complaint, the Administrator has not taken such action with regards to the Lucid Title V Permits.

37. On February 23, 2023, Guardians provided notice to the Administrator of his failure to perform a nondiscretionary duty under the Clean Air Act related to his obligation to issue or deny the Permits for the Frac Cat and Big Lizard compressor stations after NMED failed to revise the permits to respond to EPA's objection within 90 days.

CLAIM FOR RELIEF

Failure to Perform a Nondiscretionary Duty Under the Clean Air Act to Issue or Deny the Frac Cat and Big Lizard Operating Permits

38. Every allegation set forth in this Complaint is incorporated herein by reference.

39. The Administrator was required to issue or deny the Title V Permits for the Frac Cat and Big Lizard compressor stations if NMED failed to submit Permits revised to meet the Administrator's November 16, 2022 objection within 90 days.

² See Lucid Ruling, *available at* https://www.epa.gov/system/files/documents/2022-11/Lucid%20Energy%20Delaware%20Order_11-16-22.pdf. (last visited April 24, 2023)

40. Given that NMED has not yet submitted permits revised to meet the Administrator's objection to the State-issued Title V Permits for the Frac Cat and Big Lizard compressor stations, the Administrator has a nondiscretionary duty to issue or deny the Title V Permits for the facilities. 42 U.S.C. § 7661d(c).

41. This Clean Air Act violation constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act's citizen suit provision. 42 U.S.C. § 7604(a)(2).

42. EPA's violation is ongoing, and will continue unless remedied by this Court.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff WildEarth Guardians requests that this Court enter judgment providing the following relief:

A. A declaration that EPA has violated and is in violation of its mandatory duty under the Clean Air Act to issue or deny the Title V Permits for the Frac Cat and Big Lizard compressor stations;

B. An injunction compelling EPA to issue or deny the Title V Permits for the Frac Cat and Big Lizard compressor stations in accordance with an expeditious schedule prescribed by the Court;

C. An order retaining jurisdiction over this matter until such time as EPA has complied with its non-discretionary duties under the Clean Air Act to ensure compliance with the Court's injunction;

D. An order awarding Guardians its costs of litigation, including reasonable attorneys' fees; and

E. Such other and further relief as the Court deems just and proper.

Respectfully submitted this 3rd day of May, 2023.

/s/ Katherine Merlin

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