

<p>DISTRICT COURT, DENVER COUNTY,          COLORADO          Denver City and County Building          2nd Judicial District          1437 Bannock Street, Room 256          Denver, Colorado 80202          Phone number: (303) 606-2300</p>	<p>DATE FILED: July 9, 2020 12:40 PM          FILING ID: C93124923F9B6          CASE NUMBER: 2020CV32320</p>
<p><b>WILDEARTH GUARDIANS,</b></p> <p>Plaintiff,          v.</p> <p><b>GOVERNOR JARED POLIS, in his official capacity,          COLORADO DEPARTMENT OF PUBLIC          HEALTH AND ENVIRONMENT; COLORADO          AIR QUALITY CONTROL COMMISSION,          COLORADO AIR POLLUTION CONTROL          DIVISION,</b></p> <p>Defendants.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>ATTORNEYS FOR PLAINTIFF:</b></p> <p>Katherine L.T. Merlin (CO Bar No. 45672)          3100 Arapahoe Ave., Ste 410          Boulder, CO 80303          Phone: (720) 965-0854          Fax: (720) 414-3132          Email: <a href="mailto:kate@katemerlinlaw.com">kate@katemerlinlaw.com</a></p> <p>Samantha Ruscavage-Barz (NM Bar No. 23276)          WildEarth Guardians          301 N. Guadalupe St., Ste. 201          Santa Fe, NM 87501          Phone: (505) 401-4180          Email: <a href="mailto:sruscavagebarz@wildearthguardians.org">sruscavagebarz@wildearthguardians.org</a>  <i>Pro hac vice application forthcoming</i></p>	<p>Case No.:</p> <p>Division:</p>
<p style="text-align: center;"><b>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</b></p>	

Plaintiff WildEarth Guardians (“Guardians”), through counsel and on behalf of its affected members, brings this lawsuit against Defendants Governor Jared Polis, Colorado Department of Public Health and Environment, Colorado Air Pollution Control Division, and Colorado Air Quality Control Commission for failure to comply with the mandatory statutory deadline set forth in C.R.S. § 25-7-140(2)(a)(III).

## INTRODUCTION

1. This case is about Defendants’ failure to meet the statutory July 1, 2020 deadline to publish a notice of proposed rulemaking setting forth the measures necessary to meet greenhouse gas reduction goals, as required by C.R.S. § 25-7-140(2)(a)(III). Guardians seeks to compel Defendants’ timely compliance with this deadline.

2. The Colorado Legislature has recognized that the state is already experiencing several harmful climate impacts including increased drought and wildfires, increasingly frequent and severe floods, health impacts from increased ground-level ozone concentrations, and decreased economic activity related to decreased outdoor recreation. C.R.S. § 25-7-102(2)(b). During the 2019 Session, the Legislature made addressing the disproportionate impact of the climate crisis on Colorado, and especially vulnerable Colorado communities and community members, a high priority. The Legislature ultimately passed two climate-related bills, Senate Bill 19-096<sup>1</sup> and House Bill 19-1261<sup>2</sup> (hereinafter SB 096 and HB 1261, respectively).

3. Among other requirements, SB 096 mandates that Defendants “shall . . . by July 1, 2020, publish a notice of proposed rule-making that proposes rules to implement measures that would cost-effectively allow the state to meet its greenhouse gas emission reduction goals.” C.R.S. § 25-7-140(2)(a)(III) (hereinafter “Section 140”).

4. HB 1261 provides the specific greenhouse gas reduction goals referenced in SB 096:

Colorado shall strive to increase renewable energy generation and eliminate statewide greenhouse gas pollution by the middle of the twenty-first century and have goals of achieving, at a minimum, a twenty-six percent reduction in statewide greenhouse gas pollution by 2025, a fifty percent reduction in statewide greenhouse gas pollution by 2030, and a ninety percent reduction in statewide greenhouse gas pollution by 2050. The reductions identified in this subsection (2)(g) are measured relative to 2005 statewide greenhouse gas pollution levels.

C.R.S. § 25-7-102(2)(g).

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<sup>1</sup> The full text of SB 096 is available at:  
[https://leg.colorado.gov/sites/default/files/2019a\\_096\\_signed.pdf](https://leg.colorado.gov/sites/default/files/2019a_096_signed.pdf).

<sup>2</sup> The full text of HB 1261 is available at:  
[https://leg.colorado.gov/sites/default/files/2019a\\_1261\\_signed.pdf](https://leg.colorado.gov/sites/default/files/2019a_1261_signed.pdf).

5. Governor Polis signed both bills into law on May 30, 2019.
6. To date, Defendants have not complied with the discrete, legally-required action by the July 1, 2020 deadline imposed by Section 140.
7. Based on information and belief, Defendants do not have any specific or concrete plans to publish a notice of proposed rulemaking meeting the requirements of Section 140.
8. Defendants' failure to move forward on implementing the state's mandatory climate response by publishing the required notice of proposed rulemaking by the statutory deadline is arbitrary and capricious, and an unlawful withholding of required agency action under the State Administrative Procedure Act ("APA"), §§ 24-4-101 *et seq.*
9. Thus, Guardians seeks an order holding Defendants' failure to comply with Section 140's mandate unlawful, compelling the required agency action, and such other and further relief as the Court deems appropriate.

### **JURISDICTION AND VENUE**

10. This action arises under the Colorado Air Pollution Prevention and Control Act ("CAPPCA"), C.R.S. §§ 25-7-101 *et seq.*, and the APA, C.R.S. §§ 24-4-101 *et seq.*
11. This Court has jurisdiction over this matter pursuant to C.R.S. § 24-4-106(1), which allows judicial review of agency action or inaction for "persons or parties adversely affected and aggrieved by agency actions." This Court has jurisdiction to compel the required agency action and order other relief as appropriate. C.R.S. § 24-4-106(7)(b).
12. Guardians filed this action within 35 days of the expiration of Section 140's July 1, 2020, mandatory deadline for Defendants to publish the required notice of proposed rulemaking. C.R.S. § 24-4-106(4).
13. Venue in this Court is proper pursuant to C.R.C.P. 98(c) and C.R.S. § 24-4-106(4) ("The residence of a state agency for the purpose of this subsection (4) shall be deemed to be the city and county of Denver.").

### **PARTIES**

14. Plaintiff WILDEARTH GUARDIANS ("Guardians") sues on behalf of itself and its members. Guardians is a non-profit membership organization based in Santa Fe, New Mexico, with offices throughout the Western United States, including in Wheat Ridge, Colorado. Guardians' mission is to protect and restore the wildlife, wild places, wild rivers, and health of the American West. To fulfill this mission, Guardians and its members work to confront the harmful impacts of fossil fuel production and consumption and to advance a transition to clean, renewable energy in order to safeguard public health, the environment, and the climate.

Guardians has upwards of 275,000 members and supporters. Many of these members and activists reside in and/or recreate in Colorado.

15. Guardians' members and supporters live, work, and/or recreate in Colorado and regularly use and enjoy the air, water, wildlands, habitat, and healthy ecosystems throughout the State. Guardians' membership includes working families and people who live in rural communities, and includes all age groups ranging from the young to the elderly. These categories of members are specifically listed in HB 1261 as disproportionately impacted by climate harms and in need of a high degree of protection. Guardians' members use these resources for healthy living and working as well as for recreational pursuits such as camping, fishing, hiking, photographing scenery and wildlife, and aesthetic enjoyment.

16. The rapidly worsening climate crisis and Defendants' inaction to address Colorado's contribution to the crisis will harm Guardians' interests in clean air, clean water, wildlife, intact ecosystems, and a livable planet.

17. Defendant JARED S. POLIS is sued in his official capacity as Governor of the State of Colorado. The Colorado Constitution requires Governor Polis to ensure that all laws of the state are faithfully executed. Colo. Const. Art. IV § 2. As the State's chief executive, the Governor is the proper defendant to actions to mandate enforcement of a statute or regulation. *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004).

18. Defendant COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT ("CDPHE") is an administrative agency of the State of Colorado created under C.R.S. § 25-1-102. Both the Air Quality Control Commission and Air Quality Control Division are part of CDPHE. *Id.* at §§ 25-7-104(1), 25-7-111(1).

19. Defendant AIR QUALITY CONTROL COMMISSION ("the Commission") is a nine-member citizen board tasked with promulgating rules and regulations consistent with legislative declarations. C.R.S. §§ 25-7-104 and 105. The Commission is specifically tasked with promulgating rules and regulations related to statewide greenhouse gas pollution abatement. C.R.S. § 25-7-105(e)(II).

20. Defendant AIR QUALITY CONTROL DIVISION ("the Division") is tasked with administering and enforcing air quality control programs adopted by the Commission. C.R.S. § 25-7-111(1). Among other duties, the Division supports the Commission in the development of rules. *Id.* at § 25-7-111(2).

## FACTS AND ALLEGATIONS

21. Climate change is one of the greatest challenges facing humanity. According to Volume II of the Fourth National Climate Assessment,<sup>3</sup> significant impacts from climate change are already occurring across the Southwest and in Colorado. For example:

- The average annual temperature of the Southwest increased 1.6°F between 1901 to 2016, magnifying the impacts of drought and wildfire.<sup>4</sup>
- Hotter temperatures have already contributed to reductions in snowpack, amplifying drought conditions in the Colorado River Basin, the Rio Grande, and other critical watersheds.<sup>5</sup>
- The area burned by wildfire across the western United States between 1984 and 2015 was twice what would have burned had climate change not occurred.<sup>6</sup>
- Native Americans are among the most at risk from climate change, often experiencing the worst effects because of higher exposure, higher sensitivity, and lower adaptive capacity for historical, socioeconomic, and ecological reasons.”<sup>7</sup>

22. Ultimately, if we do not take action, climate change threatens to lead to “to aridification (a potentially permanent change to a drier environment) in much of the Southwest, through increased evapotranspiration, lower soil moisture, reduced snow cover, earlier and slower snowmelt, and changes in the timing and efficiency of snowmelt and runoff.”<sup>8</sup>

23. Colorado citizens are increasingly aware of the impacts of the climate crisis on the state and are motivated to take action.<sup>9</sup> As of February 2020, 59% of Coloradans support action on climate change, up 48% from ten years ago. Additionally, three-quarters of Colorado voters want

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<sup>3</sup> U.S. Global Change Research Program, *Climate Science Special Report, Fourth National Climate Assessment, Volume I* (D.J. Wuebbles et al. eds. 2017), <https://science2017.globalchange.gov/>.

<sup>4</sup> *Id.* at 1108.

<sup>5</sup> *Id.* at 1104, 1111.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1109.

<sup>8</sup> *Id.*

<sup>9</sup> Bruce Finley, *Voters in Colorado and the West Prioritize Environment and Increasingly Demand Climate Act, Poll Finds*, DENVER POST, Feb. 20, 2020, <https://www.denverpost.com/2020/02/20/state-rockies-climate-conservation-west-environment-voters-poll/>.

their officials in Congress and their governor to have a plan for reducing the carbon air pollution that contributes to climate change.

24. Colorado has taken these concerns to heart. In 2019, the Legislature passed, and the Governor signed into law, HB 1261, an act “concerning the reduction of greenhouse gas pollution, and in connection therewith, establishing statewide greenhouse gas pollution reduction goals[.]”

25. In HB 1261, the Legislature acknowledged the disproportionate impacts of the climate crisis on Coloradans, including communities of color, finding that:

(2)(a) Climate change adversely affects Colorado’s economy, air quality and public health, ecosystems, natural resources, and quality of life.

(b) Colorado is already experiencing harmful climate impacts, including declining snowpack, prolonged drought, more extreme heat, elevated wildfire risk and risk to first responders, widespread beetle infestation decimating forests, increased risk of vector-borne diseases, more frequent and severe flooding, more severe ground-level ozone pollution causing respiratory damage and loss of life, decreased economic activity from outdoor recreation and agriculture, and diminished quality of life. Many of these impacts disproportionately affect rural communities, communities of color, youth and the elderly, and working families. Reducing statewide greenhouse gas pollution as outlined in this subsection (2) will protect these frontline communities, first responders, and all Colorado residents from these and other climate impacts.

26. To mitigate these impacts, HB 1261 mandates greenhouse gas reduction goals of “at a minimum, a twenty-six percent reduction in statewide greenhouse gas pollution by 2025, a fifty percent reduction in statewide greenhouse gas pollution by 2030, and a ninety percent reduction in statewide greenhouse gas pollution by 2050.”

27. According to an independent emissions study by M.J. Bradley and Associates, LLC, commissioned by conservation organizations, Colorado must reduce greenhouse gas emissions by 58 million metric tons relative to 2015 levels (120 million metric tons) to meet the 2030 50% reduction goal.<sup>10</sup>

28. Simultaneously in 2019 Colorado enacted SB 096. This Act addresses “the collection of greenhouse gas emissions data to facilitate the implementation of measures that would most cost-effectively allow the state to meet its greenhouse gas emissions reduction goals[.]”

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<sup>10</sup> M.J. Bradley Associates, LLC, *Colorado’s Climate Action Plan Emission Targets: Illustrative Strategies and GHG Abatement Potentials*, Strategic Environmental Consulting Whitepaper, Feb. 28, 2020 at 5, <https://www.mjbradley.com/reports/colorado%E2%80%99s-climate-action-plan-emission-targets-illustrative-strategies-and-ghg-abatement>.

29. SB 096 requires Colorado to collect greenhouse gas data to implement the greenhouse gas reduction goals set forth in HB 1261. The law also imposes a deadline by which Defendants were required to act to implement the law. It states that “[t]he [Air] Commission shall . . . [b]y July 1, 2020, publish a notice of proposed rule-making that proposes rules to implement measures that would cost-effectively allow the state to meet its greenhouse gas emission reduction goals.” C.R.S. § 25-7-140(2)(a)(III).

30. Governor Polis also issued a signing statement for SB 096 on May 30, 2019.<sup>11</sup> The statement acknowledged that SB 096 directed Defendants to propose rules to implement the state’s greenhouse gas emission goals. The statement also noted that the state was already taking some steps to reduce greenhouse gas emissions “that will likely satisfy the rulemaking requirements set forth in SB 19-096.” *Id.*

31. To date, the Commission has promulgated three sets of rules addressing greenhouse gas emissions from three source categories:

- a. On August 16, 2019, the Commission finalized the Zero Emission Vehicle (“ZEV”) rules.<sup>12</sup> The Commission adopted the rules in part to meet the requirements of HB 1261. The Division estimated that the rules would result in a cumulative reduction of greenhouse gas emissions of 3,199,154 metric tons of carbon dioxide equivalent (“CO<sub>2</sub>e”).<sup>13</sup>
- b. On December 19, 2019, the Commission revised portions of the existing oil and gas control measures (the “Reg. 3 and 7 rules”).<sup>14</sup> The Commission adopted the revisions in part to meet the requirements of HB 1261. According estimates from the Division, the proposed rules will reduce statewide greenhouse gas emissions

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<sup>11</sup> Governor Polis’ full signing statement for SB 096 is available at: <https://drive.google.com/file/d/0B7w3bkFgg92dOWdESWhHUko3cjZ3OWhMVDZreEIwcHhqSXAw/view>.

<sup>12</sup> AQCC, Regulation Number 20, Colorado Low Emission Automobile Regulation, 5 CCR 1001-24 (eff. Sept. 30, 2019).

<sup>13</sup> APCD, *ZEV Regulatory Analysis, Proposed Revisions to Colorado Air Quality Control Commission Regulation Number 20 5 CCR 1001-24*, at 14. Available at <https://drive.google.com/file/d/1FYOkHimNLpZLwkAEKdCpwkd0rrO-1Kpu/view>.

<sup>14</sup> AQCC, Regulation Number 3, Stationary Source Permitting and Air Pollutant Emission Notice Requirements, 5 CCR 1001-5 (revisions described at 348–51); AQCC, Regulation Number 7, Control of Ozone via Ozone Precursors and Control of Hydrocarbons via Oil and Gas Emissions, 5 CCR 1001-9 (revisions described at 246–65).

by 125,000 metric tons of CO<sub>2</sub>e per year or a cumulative reduction of 1,375,000 metric tons between now and 2030.<sup>15</sup>

- c. On May 22, 2020, the Commission finalized rules regulating emissions from hydrofluorocarbons (“HFCs”). HFCs are a potent, but less common, greenhouse gas. The Commission adopted the HFC rules in part to meet the requirements of HB 1261. According to the Division, the HFC rules would reduce cumulative greenhouse gas emissions by 1.15 million metric tons of CO<sub>2</sub>e by 2030.<sup>16</sup>

32. The Division therefore estimates that implementation of the ZEV, Reg. 3 and 7, and HFC rules combined could reduce Colorado’s overall greenhouse gas emissions by 5.724 million metric tons. The Commission still must promulgate additional rules to achieve the 52.276 million metric tons of greenhouse gas reductions remaining in order to meet the 2030 50% reduction goals outlined in HB 1261. In an email to a Colorado citizen obtained by Guardians, the Division admitted that “these rulemakings, while meaningful and ambitious, are not sufficient in and of themselves to reach the greenhouse gas emissions reduction milestones set forth in HB19-1261.”

33. The Commission did not issue any additional greenhouse gas reduction rules by July 1, 2020 as mandated in SB 096. Based on information and belief, the Commission does not plan to issue any additional rules reducing greenhouse gas emissions in 2020. To date, Defendants have not issued a notice of proposed rulemaking outlining how they intend to fully meet the mandate of SB 096 and make up the remaining 52 million metric ton greenhouse gas reduction gap.

## **STATUTORY AND REGULATORY FRAMEWORK**

### **I. The Colorado Administrative Procedure Act**

34. The APA provides a right to judicial review for “any person adversely affected or aggrieved by any agency action[.]” C.R.S. § 24-4-106(4). “Aggrieved” means “having suffered actual loss or injury or being exposed to potential loss or injury to legitimate interests including, but not limited to, business, economic, aesthetic, governmental, recreational, or conservational interests.” *Id.* § 24-4-102. “Action” includes “the whole or any part of any agency rule, order, interlocutory order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*” *Id.* § 24-4-102 (emphasis added).

35. Challenged agency action must be final. C.R.S. § 24-4-106(2).

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<sup>15</sup> APCD, *Colorado Air Quality Control Commission’s 2019 Revisions to Regulation Number 7 – Oil and Gas Emissions and Regulation Number 3 –*

*Permitting and APENs Fact Sheet* (January 8, 2020), available at:

<https://drive.google.com/file/d/1b0qXRpFOFayO1r3qF4bdFpG9NPukGJfP/view>.

<sup>16</sup> APCD, Memorandum of Notice, Regulation Number 22, Feb. 20, 2020 at 5.

36. The APA authorizes courts to compel agency action “unlawfully withheld . . . if the court finds that the agency action is arbitrary and capricious[.]” C.R.S. § 24-4-106(7)(b). Put another way, “when an agency is compelled by law to act within a certain time period” the action is nondiscretionary and “a court can compel the agency to act.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004); *Roosevelt Tunnel, LLC v. Norton*, 89 P.3d 427, 429 (Colo. App. 2003) (accord); *National Wildlife Federation v. Cotter Corp.*, 665 P.2d 598, 603 (Colo. 1983) (accord).

## **II. The Colorado Air Pollution Prevention and Control Act**

37. Under CAPPCA, “the Commission shall . . . by July 1, 2020, publish a notice of proposed rule-making that proposes rules to implement measures that would cost effectively allow the state to meet its greenhouse gas emissions reduction goals.” C.R.S. § 25-7-140(2)(a)(III).

38. The referenced greenhouse gas reduction goals require, “at a minimum, a twenty-six percent reduction in statewide greenhouse gas pollution by 2025, a fifty percent reduction in statewide greenhouse gas pollution by 2030, and a ninety percent reduction in statewide greenhouse gas pollution by 2050.” C.R.S. § 25-7-102(2)(g).

### **PLAINTIFF’S CLAIM FOR RELIEF**

*Defendants Acted Arbitrarily, Capriciously, and Otherwise Contrary to Law For Failure to Take Agency Action Required by Colo. Rev. Stat. § 25-7-140(2)(a)(III)*

39. Guardians incorporates the foregoing paragraphs by reference.

40. Defendants had a mandatory duty to notice a proposed rulemaking to create rules to implement measures allowing the state to cost-effectively meet its greenhouse gas emission reduction goals by July 1, 2020. C.R.S. § 25-7-140(2)(a)(III).

41. To date, Defendants have not published a notice proposing rules meeting these requirements.

42. Defendants’ failure to meet this mandatory deadline is arbitrary, capricious, contrary to statute, and not in accordance with CAPPCA or the APA. C.R.S. §§ 25-7-140(2)(a)(III), 24-4-102, 24-4-106(7)(b).

43. As a result, Guardians requests that this Court declare Defendants’ failure to meet the mandatory deadline in C.R.S. § 25-7-140(2)(a)(III) as arbitrary and capricious under the APA and compel agency action unlawfully withheld. C.R.S. § 24-4-106(7)(b).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests the Court to order the following relief:

A. Declare Defendants’ failure to act by the July 1, 2020 deadline as arbitrary and capricious or otherwise contrary to law;

- B. Compel agency action unlawfully withheld;
- C. Grant such other relief as the Court deems just and equitable.

Respectfully submitted on this 9th day of July, 2020.

/s Katherine Merlin  
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