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	
WILDEARTH GUARDIANS, Plaintiff, v. **GOVERNOR JARED POLIS,** in his official capacity, **COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**; **COLORADO AIR QUALITY CONTROL COMMISSION, COLORADO AIR POLLUTION CONTROL DIVISION**, Defendants. And **ENVIRONMENTAL DEFENSE FUND**, Plaintiff v. **COLORADO AIR QUALITY CONTROL COMMISSION AND COLORADO AIR POLLUTION CONTROL DIVISION**, Defendants	**▲ COURT USE ONLY ▲**
***Attorneys for Defendant Governor Jared Polis*:** PHILIP J. WEISER, Attorney General LEEANN MORRILL, Reg. No. 38742* First Assistant Attorney General 1300 Broadway, 6th Floor Denver, CO 80203 Phone: (720) 508-6159 E-mail: leeann.morrill@coag.gov **Counsel of Record*	Case No.: 2020CV032320 with consolidated case 2020CV32688 Division: 414
THE GOVERNOR'S MOTION TO DISMISS WILDEARTH GUARDIANS' CLAIM	

Defendant Jared Polis, in his official capacity as Governor of the State of Colorado ("Governor"), by and through the Colorado Attorney General's Office and undersigned counsel, moves to be dismissed as a party to this action under C.R.C.P. ("Rule") 12(b)(5).

***Certificate of Compliance with Rule 121 § 1-15*:** Undersigned counsel certifies that she conferred with counsel for Plaintiff WildEarth Guardians ("WEG") about the relief requested by this motion and represents that WEG opposes the same.

I. INTRODUCTION

In this consolidated action for judicial review under the Colorado Administrative Procedure Act, § 24-4-101, *et seq*., C.R.S. (2020) ("APA"), Plaintiffs, two non-profit environmental protection organizations, complain that the Colorado Air Quality Control Commission ("Commission" or "AQCC") failed to notice and undertake a rulemaking by July 1, 2020 as required by § 25-7-140(2)(a)(III), C.R.S. (2020) ("Section 140"). Both Plaintiffs ask this Court to order the Commission, as well as the Colorado Department of Public Health and Environment's ("CDPHE") Air Pollution Control Division ("Division"), which allegedly must support the Commission in the development of rules, to comply with Section 140's rulemaking mandate. But only WEG seeks this same relief against the Governor, upon whom Section 140 imposes *no* duty to act and who as a matter of law *cannot* direct the Commission to act. Thus, even if all well-pled facts alleged in the Complaint are accepted as true, WEG's claim against the Governor fails as a matter of law and the Governor must be dismissed as a party to this action.

II. WEG'S COMPLAINT

The Commission "is a nine-member citizen board tasked with promulgating rules and

regulations . . . related to statewide greenhouse gas pollution abatement." *WEG Compl.*, ¶ 19 (citing § 25-7-105(1)(e)(II), C.R.S. (incorrectly cited as § 25-7-105(e)(II)). The Division "is tasked with administering and enforcing air quality control programs adopted by the Commission," and "[a]mong other duties," must "support[] the Commission in the development of rules." *Id.*, at ¶ 20 (citing §§ 25-7-111(1)-(2)). Both the Commission and Division "are part of CDPHE," which "is an administrative agency of the State of Colorado created under C.R.S. § 25-1-102." *Id.*, at ¶ 18 (citing §§ 25-7-104(1) & -111(1)).

In 2019, the Colorado General Assembly passed two bills intended to reduce statewide greenhouse gas emissions—namely, House Bill 19-1261 ("HB 1261") and Senate Bill 19-096 ("SB 96"). *WEG Compl.*, ¶ 2. Through HB 1261, which is now codified in relevant part at sections 25-7-102(2) and -105(1)(e), the General Assembly provided that "Colorado shall strive to increase renewable energy generation and eliminate statewide greenhouse has pollution by the middle of the twenty-first century and have goals of achieving, at a minimum," reductions in statewide greenhouse gas pollution levels of 26% by 2025, 50% by 2030, and 90% by 2050, as measured relative to 2005 levels. *Id.* ¶ 4 (quoting § 25-7-102(2)(g)). It also directed the Commission to, "consistent with section 102(2)(g), [] timely promulgate implementing rules and regulations." § 25-7-105(1)(e)(II), C.R.S.

Through SB 96, which is now codified at section 25-7-140, the General Assembly provided, among other things, that "[t]he *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." § 25-7-140(2)(a)(III), C.R.S. (emphasis added); *see also WEG Compl.*, ¶ 3 (quoting part of § 25-7-140(2)(a)(III)). It

also provided that "[all] rules promulgated pursuant to [Section 140] are subject to all applicable requirements, including applicable requirements specific to greenhouse gas abatement, provided in this article 7." § 25-7-140(2)(b), C.R.S. This necessarily includes rules aimed at achieving the reduction goals for greenhouse gas pollution levels set by HB 1261 and codified at section 25-7-105(1)(e)(II). *WEG Compl.*, ¶ 32.

The Governor signed both bills into law on May 30, 2019. *See WEG Compl.*, ¶ 5. In doing so, he issued a signing statement acknowledging that SB 96 "directs the AQCC to propose rules to implement measures that would cost-effectively allow the state to meet its greenhouse gas emission reduction goals." Exhibit A; *see WEG Compl.*, ¶ 30. The signing statement also noted that "AQCC plans to move forward with two major greenhouse gas reductions rulemakings over the next year that will likely satisfy the rulemaking requirements set forth in SB 19-096[.]" *Id.* Although WEG's complaint characterized the Governor's signing statement as acknowledging "that SB 096 directed *Defendants* to propose rules to implement the state's greenhouse gas emission goals," the face of the signing statement reflects that the legislative direction was issued to *only* the Commission. *Compare WEG Compl.*, ¶ 30 (emphasis added), *with* Exhibit A.

Between May 30, 2019 and July 1, 2020, the Commission "promulgated three sets of rules addressing greenhouse gas emissions from three source categories[.]" *WEG Compl.*, ¶ 31. In WEG's opinion, these rules are insufficient "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." *Id.*, at ¶ 32. It complains that, "[t]o 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 tons greenhouse gas reduction gap." *Id.*, at ¶ 32. WEG asks this Court to declare "Defendants' failure to meet the mandatory deadline" in Section 140 "arbitrary and capricious under the APA and compel agency action unlawfully withheld." *Id.*, at ¶ 43 (citing § 24-4-106(7)(b)).

III. ARGUMENT

A. Standard of review.

To survive a Rule 12(b)(5) motion to dismiss, a complaint must state a plausible claim for relief. *See Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (supplanting the "no set of facts" standard). When addressing such a motion, the court must accept properly pled factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). However, the court is "not required to accept as true legal conclusions that are couched as factual allegations." *Id.* Under Rule 12(b)(5), a "complaint may be dismissed if the substantive law does not support the claims asserted." *Western Innovations v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008); *see accord Peña v. Am. Family Mut. Ins. Co.*, 463 P.3d 879, 881 (Colo. App. 2018).

In *Warne*, the Colorado Supreme Court explicitly adopted the plausibility standard articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Warne*, 373 P.3d at 588. Under the *Twombly/Iqbal* standard, a complaint must contain factual allegations sufficient to raise a right to relief "'above the speculative level'" and "'state a claim for relief that is plausible on its face.'" *Id.* at 591 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The tenet that a court must accept as true all of the

allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

When considering a motion to dismiss for failure to state a claim, the court consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice. *Denver Post Corp.*, 255 P.3d at 1088.

B. WEG fails to state a plausible claim for relief against the Governor as a matter of law.

1. Naming the Governor a defendant as the embodiment of the State of Colorado is only proper in limited circumstances.

"When a party sues to enjoin or mandate enforcement of a statute, regulation, ordinance, or policy, it is not only customary, but entirely appropriate for the plaintiff to name the body ultimately responsible for enforcing that law." *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004) (challenging the Governor's executive order directing the state personal director to implement a policy eliminating employee payroll deductions for union dues). And the Governor, in whom "[t]he supreme executive power of the state [is] vested" and "who shall take care that the laws be faithfully executed," COLO. CONST. art. IV, § 2, may be a proper defendant in a variety of cases. *See id.* (collecting cases illustrating the "widespread and well-established . . . practice" of also naming "the Governor, in his official capacity," as a defendant because "[f]or litigation purposes, [he] is the embodiment of the state," but noting that in one "[t]he propriety . . . was not challenged even though there was neither an executive order involved nor any other specific action on the part of the Governor."). Indeed, WEG expressly relies on the holding in *Ainscough* as support for its assertion that the Governor is a proper party to this action. *See WEG Compl.*, ¶ 17 (citing *Ainscough*, 90 P.3d at 858).

But where a "plaintiff has not demonstrated how the specific duties . . . of the governor . . . would be affected by any judicial declaration" and those of other government officials would be, the dismissal of "any state law claim alleged against the governor" is proper. *Lucchesi v. State,* 807 P.2d 1185, 1194 (Colo. App. 1990) (*cert denied* April 8, 1991) (upholding dismissal of Governor as defendant in lawsuit challenging the constitutionality of real property assessment statute administered by county officials); *see accord Jackson v. State*, 966 P.2d 1046, 1053 (Colo. 1998) (citing *Lucchesi* with approval and holding that state officials and employees were "sufficiently involved in the implementation and enforcement of the [challenged statute] to be proper defendants in this action"); *Beauprez v. Avalos*, 42 P.3d 642, 647-48 (Colo. 2002) (citing *Lucchesi* with approval and holding that the Secretary of State was a proper defendant because she "is required to implement a court-ordered redistricting plan"); *see also* C.R.C.P. 57(j) ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration[.]"); C.R.C.P. 19 (defining necessary and indispensable parties).

Based on highly similar reasoning to that relied on in *Lucchesi*, the Supreme Court announced a departure from adherence to the long-standing "practice" of naming the Governor as a defendant without regard to the specific facts and claims asserted by the plaintiff in *Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008). Notably, *Developmental Pathways* was decided four years after *Ainscough* and expressly discussed the holding in the earlier case. *Id.*, at 529-30. But immediately after doing so, the Supreme Court announced that "[t]he evaluation of whether a person or entity is a proper party in a lawsuit *must be determined*

in light of the relevant facts and circumstances." *Id.*, at 530 (emphasis added). In doing so, it articulated a new test for determining whether the Governor is a proper defendant to a lawsuit.

The "relevant facts and circumstances" in *Developmental Pathways* were that plaintiffs, "a combination of individuals and entities covered under [Amendment 41, entitled "Ethics in Government"]," challenged its gift ban provisions "as being overbroad and vague, and thus violating their First Amendment rights to free speech, free association, and petition." 178 P.3d at 526. They named the Governor as the sole defendant because "[a]t the time the current case was filed in February 2007, the members of the [Independent Ethics] Commission had not yet been appointed. Although the Commission existed on paper, it had not yet come into being, and it had taken no action. There was no alternative entity for Plaintiffs to sue in order to challenge Amendment 41." *Id.*, at 530. Based on these specific facts, the Supreme Court concluded that "[t]he only appropriate state agent for litigation purposes was the Governor. As a personification of the state, the Governor was the proper party defendant *in this suit at the time of its filing*." *Id.* (emphasis added). And in its very next breath, the Supreme Court cautioned limits on the scope of its holding, stating: "Had the Commission been in existence at the time this lawsuit was filed, we may have reached a different conclusion with regard to this issue." *Id.*

As a result, post-*Developmental Pathways*, it is no longer proper to name the Governor as a defendant solely because he is "the embodiment of the state" when, at the time a suit is filed, there is another government official, body, or agency that exists and is specifically charged with administering, enforcing, or complying with a particular state law. 178 P.3d at 530. Indeed, two trial courts have applied the *Developmental Pathways* test in dismissing high-level state officials and employees as defendants from lawsuits that instead were properly maintained against other

government officials. *See* Exhibit B – January 11, 2019 Order in Denver District Court Case No. 18CV33600, *Franzoy v. State of Colorado*, (Gerdes, J., presiding) (granting motion to dismiss the Governor and other high-level state officials and employees as improper parties to action challenging constitutionality of a criminal prosecution threatened by the District Attorney for the 21st Judicial District); Exhibit C – February 18, 2014 Order in Jefferson County District Court Case No. 12CV2550, *In re the Lower North Fork Fire Litigation*, (Hall, J., presiding) (granting motion to dismiss the Governor and Attorney General as improper parties because, "[i]n the present litigation, there *are* parties available to defend the constitutionality of the tort [damages] cap: namely, the governmental agencies which are seeking to use the cap to limit the homeowners' recovery." (emphasis in original)). This Court must join these other trial courts in applying the *Development Pathways* test to the "relevant facts and circumstances" presented here. 178 P.3d at 530.

Finally, for well over a century, other Colorado courts have issued similar holdings in a variety of cases decided pre-*Developmental Pathways* based on the uncontroversial conclusion that a proper defendant is one who has a particular interest, right, or duty at stake in the outcome of the litigation. *See, e.g., Greenwood Cemetery Land Co. v. Routt,* 28 P. 1125 (Colo. 1892) (mandamus action may be brought against the Governor when "the law specially enjoins upon the governor, as a duty, the performance of some particular act, under circumstances in which he has no discretion, and he refuses to perform the act"); *Vessa v. Johnson*, 310 P.2d, 564, 566-67 (Colo. 1957) (dismissing complaint against the Civil Service Commission and stating that "plaintiffs, if they have a cause of action, have instituted same against the wrong party" because "[i]t is obvious that the department of health makes the determination as to what is needed" and

is statutorily vested with "[w]ide discretion . . . as to the manner in which it accomplishes and performs its duty"); *Game and Fish Commission v. Feast*, 402 P.2d 169, (Colo. 1965) (denying motion to dismiss for failure to join the State of Colorado as an indispensable party because "it ignores the fact that two agencies of the state government [whose powers and duties would be affected by a judicial declaration] are parties defendant in this action"); *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1080 (Colo. App. 2005) (considering Rule 19(a) motion to dismiss for failure to join the Director of the Division of Workers' Compensation and holding that "[t]he director must be named as an indispensable party only when the appeal involves a statutory duty of the director that concerns a mandatory exercise of discretion").

This Court should arrive at the same uncontroversial conclusion here. To do otherwise is tantamount to concluding that the Governor is a necessary and proper party to *every* lawsuit in which a government official, agency, or employee is alleged to have violated a plaintiff's state statutory or constitutional rights. That, in turn, will saddle the Governor with a host of attendant litigation obligations—including but not limited to document hold and preservation, initial and supplemental disclosures, written and oral discovery, summary judgment motions practice, trial preparation and defense, and appellate briefing and argument—that divert his time and attention away from his official duties and drain limited state resources. Such a result is unworkable and must be avoided by this Court.

2. *The relevant facts and circumstances here establish that the Governor is not a proper defendant to WEG's claim.*

The only facts alleged about the Governor's conduct are that he signed HB 1261 and SB 96 into law on May 30, 2019, and that same day issued a signing statement about SB 96, neither of which is an action challenged by WEG. *See WEG Compl.*, ¶¶ 5, 30. Although the Complaint

also asserted that the Governor has a constitutional duty "to ensure that all laws of the state are faithfully executed" and "that SB 096 directed Defendants to propose rules to implement the state's greenhouse gas emission goals," those are legal conclusions that this Court may not accept as true for purposes of this motion. *See Denver Post Corp.*, 255 P.3d at 1088. Rather, "the existence of a legal duty is a question of law" for the trial court's determination. *Laughman v. Girtakovskis*, 374 P.3d 504, 509 (Colo. App. 2015). And this Court need look only to the plain language of Section 140 to determine which named defendant has the legal duty to propose rules to implement the state's greenhouse gas emission goals: "The *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." § 25-7-140(2)(a)(III), C.R.S. (emphasis added). WEG's characterization of this legal duty as one borne by all Defendants, generally, including the Governor, specifically, is without legal merit and must be rejected. *See WEG Compl.*, ¶ 30. Thus, the allegations that the Governor signed both bills into law and issued a signing statement about one, by themselves, fail to state a plausible claim against the Governor for the Commission's alleged failure to comply with Section 140 because "substantive law does not support the claim[] asserted." *Western Innovations*, 187 P.3d at 1158.

Indeed, substantive Colorado law is fatal to WEG's claim against the Governor. The Commission is housed within CDPHE by virtue of a "type 1" transfer, which means that it "exercise[s] its prescribed powers, duties, and functions, including…the rendering of findings, orders, and adjudications, independently of the head of the principal department." §§ 24-1-119(7)(a), 24-1-105(1), and 25-7-125, C.R.S. In *State Highway Comm'n of Colo. v. Haase*, 537

P.2d 300, 301 (Colo. 1975), the Colorado Supreme Court considered an inter-governmental dispute involving another highly similar commission. The State Highway Commission ("SHC") was housed in the State Department of Highways ("SDH") by virtue of a "type 1" transfer and given express statutory authority over certain functions of the Chief Engineer of the Division of Highways within SDH. *Id.* at 303 (citing §§ 24-1-126(2) and 43-1-105(1)(c), (e), C.R.S. (1973)). A dispute arose when SHC "issued a directive and an order to the Chief Engineer to prepare and submit the schedule [for the expenditure of funds for the construction of I-470] and assurance [that I-470 will be built in accordance with the schedule to the federal] Secretary [of Transportation]," and "that same day, [the Governor] countermanded the [SHC] directive by letter to [the] Executive Director of [SDH with] a direct order that no schedules nor assurances be submitted to the Secretary." *Id.* at 301. After the Chief Engineer refused to execute SHC's directives and orders, it filed a mandamus action against the Chief Engineer and the Supreme Court invited the Governor to intervene. *Id.* at 301-302.

The Supreme Court ultimately directed the Chief Engineer to carry out SHC's orders and directives. *Haase*, 537 P.2d at 305. Pointing to the structural demarcation of SHC from SDH due to the "type 1" transfer of the former to the latter, it held that the Governor's "directive *was a nullity*" because SHC "*by law* exercises its prescribed statutory powers independently of the [Executive Director of SDH] to whom the Governor's order was sent." *Id.* at 302-03 (emphasis added). The same conclusion applies here because the Commission is likewise housed in CDPHE by virtue of a "type 1" transfer. §§ 24-1-119(7)(a), 24-1-105(1), and 25-7-125, C.R.S. Thus, even accepting as true WEG's allegation that the Commission failed to comply with Section 140, that allegation fails to state claim against the Governor because the Commission

exercises its powers independently of CDPHE, and by extension the Governor, as a matter of law. *Haase*, 537 P.2d at 302; *see accord Adarand Constructors v. Owens*, 2000 WL 490690, *4 (D. Colo. Apr. 24, 2000) (dismissing the Governor as a defendant to lawsuit challenging a "type 1" commission's authority to implement a new program because it was "an independent agency that is not within the direct control of the Governor's Office" and holding that "[t]o the extent any previous governor ever attempted to direct the commission's policy [through executive orders asking it to re-examine its goals], *any such attempt would have no legal effect* under the Colorado Supreme Court's decision in *Haase*." (emphasis added)).

Section 140 does not require the Governor to propose rules to implement the state's greenhouse gas emission goals, *see* § 25-7-140(2)(a)(III), C.R.S., and the Governor cannot direct the Commission to act because it is an independent type-1 agency. *See Haase*, 537 P.2d at 305; *Adarand*, 2000 WL 490690 at *4. Accordingly, none of the Governor's "specific duties" or powers "would be affected by a judicial declaration" concerning the Commission's alleged wrongdoing. *Lucchesi,* 807 P.2d at 1194. If WEG has a viable cause of action, it lies against the Commission, not the Governor. *See Developmental Pathways*, 178 P.3d at 530; *Vessa*, 310 P.2d at 566-67. And it is one that is capable of full resolution by this Court without the Governor's participation as a defendant. *See* C.R.C.P. 19 (the Governor is not a necessary or indispensable party because: (1) in his absence complete relief may still be accorded among those already parties; and (2) he does not claim an interest relating to the subject of this action such that disposition in his absence would impair his ability to protect that interest or in any way prejudice those already parties); *Cruz-Cesario*, 122 P.3d at 1080.

IV. CONCLUSION

For the above reasons and based on the above authorities, the Governor respectfully requests that the Court dismiss him as a party to this action.

DATED: September 10, 2020.

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CERTIFICATE OF SERVICE

This is to certify that on September 10, 2020, I duly served the foregoing **THE GOVERNOR'S MOTION TO DISMISS WILDEARTH GUARDIANS' CLAIM** upon all counsel of record for the parties listed below electronically via the Colorado Courts E-Filing system:

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