UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-CV-00357-CMA-CBS

WILDEARTH GUARDIANS,

Plaintiffs,

v.

COLORADO SPRINGS UTILITIES, COLORADO SPRINGS UTILITY BOARD, and CITY OF COLORADO SPRINGS

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Defendants Colorado Springs Utilities, Colorado Springs Utility Board and the City of Colorado Springs ("Defendants"), move for summary judgment dismissing the claim filed by Plaintiff Wildearth Guardians ("Plaintiff") for lack of standing.

INTRODUCTION

This case should be dismissed because Plaintiff cannot meet its burden of establishing Article III standing. Plaintiff asserts a single claim for relief alleging that the continuous opacity monitors ("COMS") at the Martin Drake Power Plant (the "Plant") experienced "unexcused" downtime between April 11, 2011 and December 13, 2015, resulting in an alleged violation of the opacity monitoring provisions of the Clean Air Act (the "Act") and its implementing regulations.

It is undisputed that the Martin Drake permit and the operative regulations allow and expect the opacity monitors to go down at certain times. The applicable regulations, 40 CFR

§75.10, specify that the monitors may be down during certain time periods including periods of calibration, quality assurance, preventative maintenance, repair, backups of data, and recertification.

It is also undisputed that opacity is not a pollutant. Rather it refers to the degree to which emissions from a source obscure the view. Significantly, Plaintiff does not allege that the Martin Drake Plant violated any opacity limit; that is, Plaintiff does not allege emissions from the Plant obscured the view.[1] Nor does Plaintiff allege that the Plant was out of compliance with any permit limits for specific pollutants such as particulates, VOCs, CO, SO2, or NOx. This case is not about alleged violation of any pollution limits.

Rather, the central issue in Plaintiff's sole claim is whether the 147 incidents listed on Exhibit A to the First Amended Complaint as monitor downtime fell within one of the regulatory exceptions, or were, as Plaintiff calls them, "unexcused." To put that issue in context, even if the Court accepts as true Plaintiff's allegation that all 147 incidents were unexcused, the Plant still monitored opacity at each of the three Martin Drake generating units well over 99 percent of operating time.[2]

Plaintiff bases its Article III standing on declarations citing the impact of the Plant's emissions on certain of its members' recreational, health, and aesthetic interests. Although Plaintiff strives to paint a picture of emission-induced injuries among its members, a close examination of those allegations demonstrate that Plaintiff's members have only hypothetical

[1] The Martin Drake permit prohibits the Plant from allowing the emission of any pollutant which is in excess of 20 percent opacity, except during certain specified start-up activities when opacity cannot exceed 30 percent. (Permit § 8.1, Appendix, pp. 33-34.)

[2] Even assuming that the monitor downtime cited in the Complaint was "unexcused," Martin Drake Unit 5 COMS still operated 99.77 percent of operating time; Unit 6 COMS still operated 99.95 percent of operating time; and Unit 7 COMS still operated 99.32 percent of operating time. (Expert Report of Ralph Roberson, p. 11, Appendix, p. 96.)

and speculative "concerns" about opacity monitoring at the Plant. Those hypothetical and speculative concerns do not arise to an injury-in-fact and they are not justiciable under Article III of the U.S. Constitution.

Nor can Plaintiff establish the causation element of standing. The only injury that Plaintiff's members have identified that could possibly have been caused by the alleged "unexcused" monitor downtime is hypothetical and speculative "concern" that the Plant might have exceeded opacity limits during the tiny percentage of operating time when the monitors were down and that downtime was "unexcused." But there is no allegation or evidence of any emission exceedance for any pollutant, or even for opacity. Concern about unexcused monitor downtime is not an injury-in-fact and Plaintiff's members' additional allegations regarding aesthetic, health, and recreational issues are simply not traceable to monitor downtime.

The undisputed facts also prove that Plaintiff has not established (and cannot establish) the element of redressability, *i.e.*, the likelihood that the requested relief will redress the alleged injury. Plaintiff raises health, aesthetic, and recreational concerns, but whether or not the Plant's monitor downtime percentage increases a tiny percentage will not redress Plaintiff's asserted concerns. Moreover, Plaintiff's asserted injuries will not be redressed by determining whether the downtime is "unexcused" or "excused." That is, Plaintiffs are concerned about any time the monitors are down, even though it is undisputed that the regulations allow monitor downtime during certain events like periods of repair. Additionally, Unit 5 has been permanently retired. Thus, Plaintiff cannot show any likelihood of future unexcused downtime at Unit 5 and any prospective relief relating to that unit must be denied.

Since Plaintiff cannot establish any of the three required elements of Article III standing, Plaintiff's claim should be dismissed, and summary judgment should enter in favor of Defendants.

UNDISPUTED FACTS[3]

I. THE PARTIES AND PROCEDURAL BACKGROUND

Plaintiff is a nonprofit group with members throughout the United States, including members in Colorado Springs. (Doc. 15 ¶ 8, Appendix, pp. 162-63.) Plaintiff alleges that it works to reduce the adverse impacts of air pollution in the western United States. (Doc. 15 ¶ 8, Appendix, pp. 162-63.) Defendant City of Colorado Springs (the "City") is a home rule municipality incorporated in the State of Colorado. (Doc. 19 ¶ 14, Appendix, p. 182.) Defendant Colorado Springs Utilities ("CSU") is an enterprise of the City and operates the Plant on behalf of the City pursuant to City Charter § 7-90 and Colo. Const. art. X, §20. (Doc. 19 ¶ 14, Appendix, p. 182.) CSU provides electricity to approximately 220,000 customers in and around the Colorado Springs area. (Aff. of Chris Welch ¶ 4, Appendix, p. 1.) Defendant Colorado Springs Utilities Board (the "Board") serves as the Board of Directors pursuant to City Charter § 6-40(A). (Doc. 19 ¶ 16, Appendix, p. 182.)

Plaintiff filed this case on February 9, 2017, and Defendants timely answered in April 2017. (Docs. 1 & 10.) Plaintiff subsequently filed an Amended Complaint, which Defendants answered in May 2017. (Docs. 15 & 19.) Plaintiff's Amended Complaint contains a single claim for relief under Titles IV and V of the Act, the provisions of Colorado's State Implementation

[3] Pursuant to CMA Civ. Practice Standard 7.1E, Defendants state that the facts described below are undisputed for purposes of this Motion unless noted otherwise. Defendants reserve the right to contest these facts at trial. Additional facts are also noted below in the argument section where necessary.

Plan ("SIP"), and the Plant's permits. (Doc. 15 ¶¶ 56 – 62, Appendix, pp. 174-75.) Plaintiff's claim arises solely from instances of "unexcused" downtime of the COMS at the Plant between April 11, 2011 and December 13, 2015. (Doc. 15 ¶ 2, Appendix, p. 160.)

II. THE PLANT AND OPACITY MONITORING

The Plant is located at 700 South Conejos Street, Colorado Springs, Colorado 80903. (Doc. 19 ¶ 6, Appendix, p. 181.) Units 5, 6, and 7 at the Plant were constructed in 1962, 1968, and 1974, respectively. (Doc. 19 ¶ 42, Appendix, p. 187.) Unit 5 was permanently shut down in December 2016, but Units 6 and 7 remain in operation. (Doc. 19 ¶ 42, Appendix, p. 187; Aff. of Chris Welch ¶ 5, Appendix, p. 1.) Since Unit 5 is permanently shut down, there will be no further monitoring of that unit. (Aff. of Chris Welch ¶ 5, Appendix, p. 1.)

The Colorado Department of Public Health and Environment ("CDPHE") issued the Plant's Title V operating permit, #950OPEP107, on November 1, 2002. (Doc. 19 ¶ 45, Appendix, p. 187.) CDPHE issued a revised permit on April 13, 2004. (Doc. 19 ¶ 45, Appendix, p. 187.) Sections 8.1.2 and 8.2.2 of the Permit require CSU to "operate, calibrate, and maintain a continuous in-stack monitoring device for the measurement of opacity." (Permit §§ 8.1.2 & 8.2.2, Appendix pp. 33-34.) The permit for the Plant also incorporates the continuous opacity monitoring requirements contained in 40 C.F.R. Part 75. (Permit §7.4 Appendix pp. 31-32.) Under 40 C.F.R. § 75.10(a)(4), CSU must install, certify, operate, and maintain "a continuous opacity monitoring system." 40 C.F.R. § 75.10(d).

Section 7.2 of the Permit incorporates certain monitoring exceptions that are contained in the applicable regulations. Pursuant to those exceptions, the COMS must be in operation at all times that the boiler combusts fuel, ***except*** during certain excused time periods including periods

of calibration, quality assurance, preventative maintenance, repair, backups of data, and recertification and when alternative monitoring methods are being used. (Permit § 7.2. Appendix pp. 30-31.) Plaintiff does not dispute that pursuant to these regulatory exceptions some COMS downtime is allowed and expected. (Doc. 15 ¶ 36, Appendix, p. 168 (stating that monitors need not operate during "periods of calibration, quality assurance, or preventive maintenance" and "repair, periods of backups of data from the data acquisition and handling system, or recertification") (quoting 40 C.F.R. § 75.10(d)).)

Opacity refers to the degree to which emissions reduce the transmission of light and obscure the view of an object in the background. (Doc. 19 ¶ 33, Appendix, p. 168.) The Plant's COMS determine opacity by passing a beam of light across the gas stream to a light receiver and measuring the light energy that is absorbed or scattered and does not reach the receiver. Plaintiff alleges that the monitoring systems for opacity at the Plant have had instances of "unexcused" downtime causing the Plant to fall out of compliance with the Permit on multiple occasions. Defendants dispute this assertion, but as shown below, this disputed issue is irrelevant to this Motion because Plaintiff lacks standing.

III. FACTS REGARDING PLAINTIFF'S STANDING

Plaintiff contends it has standing on account of injuries suffered by its members. (Plaintiff's Responses to Defendants' First Set of Interrogatories and Requests for Production, Response to Interrogatory No. 3, Appendix pp. 125-26.) Plaintiff identifies five members with information relevant to Plaintiff's standing in its Fed. R. Civ. P. 26(a)(1) disclosures: Nicole Rosa, Leslie Weise, Jacquie Ostrom, Mark Robinson, and Maria Arefieva. But in response to Defendants' discovery request, Plaintiff provided declarations from only four members: Ms.

Rosa, Ms. Weise, Ms. Ostrom, and Mr. Robinson. (Plaintiff's Responses to Defendants' First Set of Interrogatories and Requests for Production, Response to Interrogatory No. 3, Appendix pp. 125-26.)

Certain commonalities emerge in Plaintiff's members' allegations about standing. Most notably, Plaintiff has not set forth any evidence from which it could reasonably be inferred that the Plant has exceeded opacity or emission limits. Moreover, neither Plaintiff nor its members have identified any physical or monetary injury that could be redressed by continuously monitoring opacity. Rather, each of Plaintiff's members' expresses "concerns" about what might happen at the Plant during the alleged instances of "unexcused" opacity monitor downtime. (*See* Ostrom Declaration ¶ 9, Appendix, p. 139; Rosa Declaration ¶ 9, Appendix pp. 131-32; Weise Declaration ¶ 9, Appendix p. 155; Robinson Declaration ¶ 8, Appendix p. 158.) Plaintiff's members also state that their concerns would be "eased" or "lessened" if the Plant did not have "unexcused" monitor downtime, but do not make any distinction between "excused" monitor downtime and "unexcused" monitor downtime. (*See* Ostrom Declaration ¶ 13, Appendix, p. 141; Rosa Declaration ¶ 11, Appendix p. 132; Weise Declaration ¶ 10, Appendix p. 155; Robinson Declaration ¶ 11, Appendix p. 159.) As shown below these concerns are insufficient to confer standing to Plaintiff.

ARGUMENT

I. APPLICABLE LEGAL STANDARD

Under Fed. R. Civ. P. 56, courts shall grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is only "material" when it is necessary to the disposition of the claim under

applicable substantive law. *See Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001). A dispute is only "genuine" if the evidence could lead a reasonable jury to decide the issue in favor of the nonmoving party. *Allen v. Muskogee, Okla.*, 119 F.3d 837, 839 (10th Cir. 1997).

The usual burden of proof does not apply to summary judgment motions challenging a plaintiff's standing. *See Colo. Mfg. Housing Ass'n v. Bd. of Cty. Comm'rs*, 946 F. Supp. 1539, 1543-44 (D. Colo. 1996). Typically, to obtain summary judgment, the moving party must show there are no disputed issues of fact, but the plaintiff ***always*** has the burden of proving standing, "no matter how or when the issue is raised." *Id.* at 1543. Thus, to survive a motion for summary judgment, a plaintiff must demonstrate that standing exists. *See id.* (citing *Glover River Org. v. U.S. Dept. of Interior*, 675 F.2d 251, 254 n. 3 (10th Cir.1982) (when a standing issue has gone beyond the pleadings to summary judgment, "the plaintiff must do more than plead standing; he must prove it"); *see also Lujan v. National Wildlife Federation*, 497 U.S. 871, 884–85 (1990) (Rule 56 does not place the burden on the defendant seeking summary judgment to negate the elements of standing). As shown below, Plaintiff here cannot carry its burden and its claim should be dismissed.[4]

II. PLAINTIFFS MUST PROVE AN INJURY-IN-FACT, CAUSATION, AND REDRESSABILITY

Federal courts only have jurisdiction to hear justiciable "Cases" and "Controversies." U.S. Const. art. III, § 2. "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). If a

[4] Pursuant to CMA Civ. Practice Standard 7.1E(b)(A), Defendants state that Plaintiff has the burden of proof on the issue of standing.

plaintiff lacks standing to sue, the federal court lacks jurisdiction and the case should be dismissed. *Id.*

To establish constitutional standing, a plaintiff must prove three necessary elements: (1) injury-in-fact, (2) causation, and (3) redressability. *Steel Co.*, 523 U.S. at 102. As shown below, an organization like Plaintiff can try to establish standing by presenting a justiciable case on behalf of the organization's members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 168–69 (2000); *see also United States Envt'l Protection Agency v. Port Auth. of N.Y. & N.J.*, 162 F. Supp. 2d 173, 183 (S.D.N.Y. 2001). That is, "the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy." *Id.* Plaintiff here relies on representational standing of four members, but none of the four individuals have standing because they have not met their burden on the three required elements.

A. Plaintiff Cannot Establish an Injury-in-Fact

To show the required injury-in-fact, a plaintiff must show "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Day v. Bond*, 500 F.3d 1127, 1132 (10th Cir. 2007) (quoting *Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663 (1993)). The plaintiff must do more than complain about fears of future risk of harm. *See Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086, 1093 (D. Kan. 2015) (concluding

that plaintiff group lacked standing because fear of increased risk of gun violence was not concrete and particularized); *see also ACLU v. NSA*, 493 F.3d 644, 663 (6th Cir. 2007) (concern over alleged government surveillance program insufficient to confer standing to plaintiff group).

Whether a plaintiff can satisfy the injury element depends "on whether the plaintiff seeks prospective or retrospective relief." *Grider v. City & Cty. of Denver*, 958 F. Supp. 2d 1262, 1266 (D. Colo. 2013). A plaintiff seeking prospective relief must establish "a continuing injury or be under a real and immediate threat of being injured in the future." *Id.* A plaintiff seeking retrospective relief must show it suffered "a past injury that is concrete and particularized." *Id.*

In this case, Plaintiff cannot show a concrete, imminent injury from instances of "unexcused" opacity monitor downtime at the Plant. Plaintiff's members, Ms. Rosa, Ms. Weise, Ms. Ostrom, and Mr. Robinson, have only expressed "concerns" about if the Plant does not continuously monitor opacity. (*See* Ostrom Declaration ¶ 9, Appendix, p. 139; Rosa Declaration ¶ 9, Appendix pp. 131-32; Weise Declaration ¶ 9, Appendix p. 155; Robinson Declaration ¶ 8, Appendix p. 158.) But these concerns are not a concrete or imminent injury. Rather, they are a type of vague speculation that this court and other courts in this circuit have found are insufficient to create standing. *See Brady Campaign*, 110 F. Supp. 3d at 1093 (concern about increased risk of violence not sufficient to create standing); *see also Grider*, 958 F. Supp. 2d at 1268 (plaintiff lacked standing when only injury alleged was "extreme" concern about enforcement of pit-bull ban); *Engl v. Natural Grocers by Vitamin Cottage, Inc.*, 2016 WL 8578252, *6 n.4 (D. Colo. Sept. 21, 2016) (dismissing claim for lack of standing when claim was based on "fear of a future injury"). Thus, even accepting Plaintiff's members' concerns about monitoring as undisputed for purposes of this Motion, Plaintiff cannot establish an injury-in-fact.

In analyzing this element, it is critical to emphasize that this is a case about the ***monitoring*** of opacity, not about events of excess opacity. Plaintiff has not alleged that opacity at the Plant exceeded the 20% or 30% opacity thresholds allowed by the Permit, but rather has only alleged that the Plant experienced some instances of COMS downtime that Plaintiff assert did not fall under one of the regulatory exceptions. As a result, the only injuries that could support standing here are injuries traceable to the alleged instances of ***"unexcused"*** downtime. Thus, the statements from Ms. Rosa, Ms. Weise, Ms. Ostrom, and Mr. Robinson about recreational, aesthetic, or physical injuries are irrelevant because those are not connected to the alleged "unexcused" monitoring, but could only be caused by actual opacity or emission exceedances. Without actual exceedances of emission limits there cannot be any cognizable physical or recreational injuries. And without actual opacity exceedances, there cannot be any cognizable aesthetic injuries. When the irrelevant statements from the declarations of Ms. Rosa, Ms. Weise, Ms. Ostrom, and Mr. Robinson are excluded from the analysis, it becomes clear that Plaintiff cannot show it has suffered a cognizable injury.

The *Brady Campaign* case is persuasive on this point. In that case, a plaintiff gun-control group filed suit seeking a declaration that a Kansas law prohibiting some federal gun control laws was unconstitutional. 110 F. Supp. 3d at 1088-90. In response to the defendants' motion challenging the plaintiff's standing, the plaintiff's members stated they had an increased fear of gun violence if the Kansas law were allowed to stand. *Id.* at 1090-91. The district court, however, dismissed the plaintiff's claim. The court concluded the plaintiff's members purported injury, *i.e.*, a fear of increased violence, was "too abstract and speculative" to survive a standing challenge. *Id.* at 1096.

The same is true here. Plaintiff's members have "concerns" about instances of "unexcused" downtime of the COMS and they speculate about events that might occur during those brief periods of downtime. But there is no evidence or allegation that the Plant has actually exceeded emission or opacity limits during one of the periods of alleged "unexcused" downtime and Plaintiff's members' concerns are not concrete or imminent; they are abstract and speculative. Unlike an excess opacity event, Plaintiff's members could not see, feel, smell, or hear the alleged instances of "unexcused" monitoring downtime. Thus, Plaintiff has not met its burden on the injury of element of standing and Plaintiff's claim should be dismissed.

Additional allegations in the record further demonstrate the speculative nature of Plaintiff's claimed injury. For example, Ms. Weise only learned about the monitoring issues from Plaintiff's employee, Jeremy Nichols, and from reading about the issue ***after*** this lawsuit was filed. (Weise Declaration ¶ 8, Appendix, p. 154-55.) In other words, Ms. Weise's concerns could not have arisen until after this lawsuit was filed. Likewise, Ms. Weise and Mr. Robinson did not join Plaintiff's organization until April 2016 and September 2016, respectively. (Weise Declaration ¶ 2; Robinson Declaration ¶ 2, Appendix, pp. 151 & 156.) Thus, these two declarants were not even members at the time of the alleged "unexcused" downtime.

Moreover, with particular regard to Unit 5, it is undisputed that Unit 5 was permanently shut down in December 2016. (Doc. 19 ¶ 42, Appendix, p. 187; Aff. of Chris Welch ¶ 5, Appendix, p. 1.) Thus, regardless of what happened previously, there is no continuing injury and no possibility of any future instances of unexcused monitor downtime for Unit 5. When, as here, the events giving rise to the alleged injury have ceased and there is no real and immediate likelihood of those events reoccurring in the future, there is no standing. *See Hale v. Ashcroft,*

683 F. Supp. 2d 1189, 1199 (D. Colo. 2009) (plaintiff lacked standing to obtain declaratory relief when measures giving rise to alleged injury had ceased). Plaintiff's claim as it relates to Unit 5 should be dismissed on summary judgment.

B. Plaintiff Cannot Establish Causation or Traceability

To survive this Motion, Plaintiff must also establish the standing element of causation. *Steel Co.*, 523 U.S. at 103. The causation element makes it Plaintiff's burden to show "a fairly traceable connection between the plaintiff's injury and the complained of conduct of the defendant." *Id.* "Although the 'traceability' of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III does 'require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury-in-fact.'" *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1225 (10th Cir. 2008) (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005)). Plaintiffs may not rely on speculative inferences to connect the alleged injury to the defendant's actions. *Id.*

In this case, Plaintiff's members make allegations about supposed aesthetic, health, and recreational impacts of the Plant. While these aesthetic, health, and recreational impacts may be causally related to excess emissions or excess opacity, there is no evidence of excess emissions or excess opacity events; that is not what this case is about. Rather, Plaintiff's aesthetic, health, and recreational issues are not remotely traceable to the alleged instances of unexcused COMS downtime. The complaints about aesthetic, health, and recreational issues with the Plant are, therefore, irrelevant to the lone claim for relief in this case and they cannot support standing.

Plaintiff's sole "injury" that could be considered remotely traceable to Defendants' actions is Plaintiff's members' "concern" about what is happening with the Plant during the

instances of alleged "unexcused" COMS downtime. Yet, as shown above, these concerns over hypothetical events that might occur during instances of opacity monitor downtime are not an actionable injury-in-fact. Accordingly, Plaintiff fails to establish the element of causation or traceability and its claim should be dismissed.

C. Plaintiff Cannot Establish Redressability

Plaintiff also fails to establish the third element of standing, redressability. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. When faced with a challenge to standing under the Act, *Steel Co.* holds that "to survive a motion for summary judgment a plaintiff must come forward with specific facts from which a reasonable fact finder could conclude either that defendant was in fact violating the Act at the time plaintiffs filed their complaint or that future violations of the Act were imminent." *Berry v. Farmland Indus., Inc.*, 114 F. Supp. 2d 1150, 1154 (D. Kan. 2000) (citing *Steel Co.*). The mere gratification of a plaintiff or the deterrent effect on the defendant is not sufficient, without more, to establish standing. *Steel Co.*, 523 U.S. at 106-07.

1. Opacity Monitoring Will Not Redress Plaintiff's Health, Recreational, or Aesthetic Complaints about the Plant

Plaintiff attempts to make this case into something it is not by having its members describe their health, recreational, and aesthetic complaints about the Plant. But none of the health, recreational, and aesthetic issues identified by Ms. Rosa, Ms. Weise, Ms. Ostrom, and Mr. Robinson can be resolved by more monitoring. For example,

- Ms. Ostrom states that she and another family member have developed asthma. (Ostrom Declaration ¶ 8, Appendix, p. 139.) Yet, there is no evidence to suggest

her condition would improve or worsen if opacity were monitored or not monitored during the small percentage of time when the monitors were down.

- The declarants complain about aesthetic effects alleged caused by emissions from the Plant. But again, there are no allegations concerning actual opacity exceedances; this case is about alleged instances of "unexcused" COMS downtime. The alleged aesthetic issues would exist regardless of whether opacity was continuously monitored at the Plant. The plant has a permit to discharge up to 20 percent opacity and this amount would not change even if the Court found the alleged monitor downtime was not covered by one of the regulatory exceptions.

- Plaintiff's members also express concerns about recreation near the Plant. (*See, e.g.*, Ostrom Declaration ¶ 6, Appendix, p. 138-39.) But Plaintiff's members have not alleged their recreation would change if there were no "unexcused" instances of opacity monitor downtime.

The only "injury" that could be redressed by the claim in this case is the members' "concerns" about hypothetical emissions that they think might have occurred or may occur during periods of "unexcused" monitor downtime. But as shown above, these hypothetical concerns are not an actionable injury-in-fact. Thus, the claim here would not solve the problems that Plaintiff complains about. Accordingly, Plaintiff cannot establish this element of standing.

2. Plaintiff Cannot Establish Existing Violations of the Act or an Imminent Threat of Future Violations at Unit 5.

Lastly, Plaintiff alleges the Plant's COMS experienced multiple "unexcused" downtimes between April 11, 2011 and December 13, 2015. (Doc. 15 ¶ 2.) Plaintiff did not, however, file this lawsuit until February 9, 2017 (Doc. 1), and it is undisputed that Unit 5, one of three generating units at the Plant, was permanently retired in December 2016. Plaintiff has set forth no facts from which a finder of fact could conclude that Unit 5 could have caused a continuing violation of the Act at the time Plaintiff filed its complaint. Moreover, even assuming *arguendo* that Unit 5's COMS had instances of "unexcused" downtime between 2011 and 2015, the permanent shut down of this unit removes any threat of future incidents. *Steel Co.*, 523 U.S. at

106-07. Thus, Plaintiff fails to show there is an imminent threat of future unexcused instances of COMS downtime for Unit 5 at the Plant. This defect means that Plaintiff cannot show redressability and that Plaintiff's claim vis-à-vis Unit 5 should be dismissed.

CONCLUSION

For the reasons shown above, Plaintiff cannot put forward facts to create a disputed issue of fact on the necessary elements of standing. Thus, Defendants request the Court enter summary judgment dismissing Plaintiff's claim for lack of jurisdiction.

Respectfully submitted this 26th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF e-filing system, which will send notification of such filing to the following e-mail addresses:

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