IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

WILDEARTH GUARDIANS,

Plaintiff,

v.

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

Defendants.

WILDEARTH GUARDIANS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff WildEarth Guardians ("Guardians") brings this suit against Defendants (collectively, Colorado Springs Utilities or "CSU") for violations of the Clean Air Act's continuous opacity monitoring requirement at the Martin Drake Power Plant ("Drake") in Colorado Springs, Colorado. In its Motion for Summary Judgment, CSU attempts to belittle the strength of Guardians' case by flippantly dismissing the importance of opacity monitoring on the grounds that opacity is not a pollutant and that Drake complies with the continuous opacity monitoring requirement most of the time. Yet CSU overlooks the fact that the U.S. Environmental Protection Agency ("EPA") relies on opacity monitoring as a surrogate to assess mass emissions of pollutants which it considers quite dangerous to public health, even in short duration exposures. When electric utilities burn coal, they release particulate matter and sulfur dioxide. EPA recently determined that exposures to these air pollutants may significantly impact

human health. Through this action, Guardians seeks to ensure that CSU meets the rigorous opacity monitoring requirements at Drake which are designed to protect public health. Over the past five years, Drake has accumulated 18,930 minutes of unexcused monitoring downtime, during which excess emissions of dangerous pollutants may have occurred.

CSU has moved for summary judgment dismissing this case for lack of standing. CSU claims that: Guardians' members cannot incur an injury from violations of the Clean Air Act's requirement that Drake continuously monitor opacity, any cognizable injuries cannot be traced to periods of monitor downtime, and Guardians' injuries are not redressable by a decision in its favor. CSU's Motion should be denied. Guardians has demonstrated, through the standing declarations of its members, that CSU's actions harms Guardians and that a favorable outcome will redress these injuries. CSU's violations of the continuous opacity monitoring requirement at Drake not only threaten public health, by also impact Guardians' members' recreational and aesthetic interests. Guardians also has a protectable interest in obtaining monitoring data from Drake.

RESPONSE TO CSU'S STATEMENT OF UNDISPUTED FACTS

Section I: The Parties and Procedural Background (pp. 4-5)

Guardians does not dispute the statements in this section of CSU's Motion.

Section II: The Plant and Opacity Monitoring (pp. 5-6)

Guardians does not dispute the statements in this section of CSU's Motion.

Section III: Facts Regarding Plaintiff's Standing[1]

Paragraph 1 (pp. 6-7): Guardians does not dispute any of the statements in this paragraph.

Paragraph 2 (p. 7): Guardians does not dispute the first three sentences in this paragraph. For Sentence 4, Guardians does not dispute that its members express concerns about Drake's emissions during periods of opacity monitor downtime. To the extent that Sentence 4 implies that members did not articulate specific "concerns" or purports to represent all of Guardians' bases for standing, Guardians denies this representation. Weise Decl. ¶¶ 3-9[2] (Apx.151-55); Rosa Decl. ¶¶ 3-4, 7-9, 11 (Apx.129-30); Ostrom Decl. ¶¶ 7-9 (Apx.139); Robinson Decl. ¶¶ 3-4, 7-9 (Apx.156-58) (all discussing specific concerns related to Drake's pollution and failure to comply with monitoring requirements). For Sentence 5, Guardians does not dispute the **first half** of the sentence referring to its members' statements that their concerns with exposure to Drake's air pollution would be eased if CSU complied with the continuous opacity monitoring requirement. The **second half** of sentence 5 is unclear as to what is meant by "any distinction", therefore Guardians denies the second half of Sentence 5. Guardians denies Sentence 6 because it is not a statement of fact but rather an argument as to Guardians' standing.

[1] Because CSU did not number the factual allegations in its Motion, Guardians refers to the two paragraphs in this section as Paragraph 1 and Paragraph 2 and addresses each sentence in turn.

[2] CSU included Guardians' declarations in the Appendix ("Apx.") to its Motion at Dkt. 33-1. All references to the declarations in this brief include the corresponding Apx. page number in parentheses after the declaration paragraph number.

ARGUMENT IN RESPONSE—GUARDIANS HAS STANDING TO ENFORCE OPACITY MONITORING VIOLATIONS

To establish standing to bring this action, Guardians must satisfy the Constitution's Article III case or controversy requirement. An environmental organization has standing to bring a suit in its own name "when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000). Standing has three elements. First, the plaintiff must have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the injury must be fairly traceable to the challenged action of the defendant. *Lujan*, 504 U.S. at 560. Third, the requested relief must redress the injury. *Id*. at 561.

I. Guardians is Injured by CSU's Opacity Monitoring Violations at Drake

A plaintiff "adequately allege[s] injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw,* 528 U.S. at 183 (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)). A plaintiff's injury may be based on either the defendant's environmental pollution or its failure to comply with a permit term or condition. *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1112 (4th Cir. 1988), overruled on other grounds.

CSU's violations of the continuous opacity monitoring requirement at Drake result in three concrete and imminent injuries to Guardians' members: (1) justifiable fear of health risks; (2) diminishment of aesthetic interests; and (3) diminished recreational

enjoyment. Guardians' members experience these injuries because they live, work, and recreate in Drake's immediate vicinity and in the wider area affected by Drake's emissions. Nicole Rosa and Jacquie Ostrom both live about three miles from Drake and can see its pollution plumes from their houses. Rosa Decl. ¶ 3 (Apx.129); Ostrom Decl. ¶ 3 (Apx.137). Leslie Weise sees the pollution from Drake's stacks when she drives by the facility to take her son to his school, which is located 2.5 miles from Drake. Weise Decl. ¶ 3 (Apx.151). Mark Robinson sees the pollution plumes from Drake when driving by the facility every day on his way to work. Robinson Decl. ¶ 3 (Apx.156).

A. CSU's Violations of the Opacity Monitoring Requirement Harms Guardians' Health, Recreational, and Aesthetic Interests.

CSU argues that Guardians has not demonstrated injury to its members from the monitoring violations alleged in the complaint because "there cannot be any cognizable physical or recreational injuries" from the failure to monitor opacity. CSU MSJ at 11. CSU provides no support for this argument, instead stating its opinion that only "actual exceedances of emission limits" form the basis of a cognizable injury. *Id*. Using this erroneously narrow concept of injury and ignoring relevant case law, CSU attempts to dismiss Guardians' members' "concerns" about health risks stemming from Drake's pollution as "vague speculation" insufficient for injury. CSU MSJ at 10. However, Guardians has clearly demonstrated that its members suffered cognizable injuries to their health, recreational, and aesthetic interests from CSU's failure to comply with the opacity monitoring requirement.

EPA considers opacity a reliable and effective surrogate to determine if pollutant emissions may be excessive or whether pollution control equipment is functioning adequately. *See Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1350 n.4 (11th Cir.

2006); *Sierra Club v. TVA*, 592 F. Supp. 2d 1357, 1362 (N.D. Ala. 2009); *WildEarth Guardians v. Public Serv. Co. of Colo.*, 2010 WL 1568574, *1 n.2 (D. Colo. April 15, 2010). Accordingly, it is well settled that citizens may sue for monitoring violations. In a case nearly identical to the one at bar, this Court held that Guardians had standing to sue for opacity monitoring violations. In *WildEarth Guardians v. Public Service Co.*, 2010 WL 1568574 at *1, Guardians alleged that the Defendant operator of the Cherokee Power Station violated the continuous opacity monitoring requirement by incurring 2,194 hours of unexcused monitoring downtime over a five-year period. The Defendant there made the same argument as CSU makes here—that a failure to monitor opacity could not be the basis of a cognizable injury. *Id*. at *2. The Court disagreed:

> Under the [Clean Air] Act, opacity monitoring has been authorized to quantitatively measure the air quality. Violation of this monitoring is illegal and punishable by law. Thus, under the CAA, violation of opacity monitoring is necessarily an injury in fact attributable to the monitoring violator.
>
> Plaintiff here has adequately alleged that Defendant violated its opacity monitoring requirements under the Permit. Additionally, Plaintiff has adequately alleged that some of its members live within a reasonable zone of influence around Cherokee, and these members' "recreational, aesthetic, and economic interests" are affected by Cherokee's excessive pollution. Therefore, Plaintiff has met its burden that it has standing to bring this lawsuit.

Id. (internal citations and quotation marks omitted). *See also Sierra Club v. Tri-State Generation and Transmission Ass'n*, 173 F.R.D. 275, 278-81 (D. Colo. 1997) (finding injury from failure to continuously monitor emissions where Plaintiff's members lived, worked, and recreated in the Yampa Valley where the facility was located).

Guardians' members' articulated bases for their concerns about exposure to Drake's air pollution and CSU's failure to comply with continuous monitoring

requirements are anything but vague.[3] All of the member declarants attest to being exposed to air pollution from Drake; knowing the types of air pollutants Drake emits on a daily basis, and the health impacts associated with exposure to these pollutants; and that Drake has exceeded safe levels of some air pollutants that opacity monitoring is meant to capture. Weise Decl. ¶¶ 3-9 (Apx.151-55); Rosa Decl. ¶¶ 3-10 (Apx.129-32); Ostrom Decl. ¶¶ 7-9 (Apx.139); Robinson Decl. ¶¶ 3-4, 7-10 (Apx.156-59). Member declarants are also aware that Drake is required to continuously monitor opacity; that opacity monitoring measures pollution coming out of Drake's smoke stacks; and that during monitor downtimes levels of harmful air pollutants are not known, potentially resulting in excess emissions. Weise Decl. ¶¶ 8-9 (Apx.154-55); Rosa Decl. ¶¶ 8-9 (Apx.131), 11; Ostrom Decl. ¶ 9 (Apx.139); Robinson Decl. ¶¶ 8-9 (Apx.158). Moreover, member declarants often curtail recreational activities to avoid exposure to Drake's air pollution. Rosa Decl. ¶¶ 3-4; Ostrom Decl. ¶ 6. Rather than being vague or speculative, Guardians' members' have stated with specificity concerns about health effects from their repeated exposure to Drake's air pollution given the type of pollutants emitted from the facility and their knowledge that CSU has not ensured continuous monitoring to track pollution levels. These are sufficient bases for injury-in-fact.

CSU briefly raises two additional arguments relating to the "speculative nature" of Guardians' injuries. First, CSU erroneously interprets ¶ 8 of Leslie Weise's declaration

[3] CSU takes Guardians' members' statements in their declarations regarding health concerns out of context, parsing declarants' explanations into generic "concerns" and then attacking these concerns as "vague speculation." *See*, *e.g.*, CSU MSJ at 10 (stating that declarants "have only expressed 'concerns' about if the Plant does not continuously monitor opacity."). Considering the declarants' articulated concerns in their proper context shows that they have an interest impaired by CSU's Clean Air Act violations, which is sufficient for injury-in-fact.

as stating that she did not become aware of CSU's monitoring violations until after the lawsuit was filed, and therefore did not suffer an injury until after Guardians commenced this case. CSU MSJ at 12. To the contrary, Ms. Weise became aware of CSU's monitoring violations from conversations with Guardians' staff and subsequently reading the 60-day "notice letter" prior to Guardians filing suit. Weise Decl. ¶ 8 (Apx.154-55). Second, CSU implies that because two of the declarants did not become Guardians members until 2016, any injuries they suffered from CSU's unlawful action prior to joining Guardians cannot be considered. CSU MSJ at 12. CSU has not provided, nor is Guardians aware of, any case law supporting CSU's implication. It is a "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed." *Lujan*, 504 U.S. at 569 n.4; *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263 (10th Cir. 2004) (recognizing that "[s]tanding doctrine addresses whether, at the inception of the litigation, the plaintiff had suffered a concrete injury that could be redressed by action of the court."). Here, all of the declarants were members of Guardians and were injured by Drake's pollution and CSU's actions before Guardians filed suit. CSU's argument is wrong as a matter of law.

Guardians' members have also suffered injury to their recreational and aesthetic interests in the areas affected by Drake's pollution. CSU chose to focus only on the adequacy of averments related to health-based interests for injury; however, the Court can find sufficient injury on any one (or all) of these grounds. Guardians' members either recreate less or enjoy their recreation less due to both the aesthetically displeasing nature of Drake's air pollution and concerns over the health risks from exposure to this pollution. Concern over Drake's air pollution deters Nicole Rosa from

using the bike path next to the Plant on her daily commute, opting to ride in the road which is less safe due to motor vehicle traffic. Rosa Decl. ¶ 3 (Apx.129-30). Ms. Rosa has the same concerns with breathing Drake's pollution when she runs in two of the Parks close to the Plant (also stating that on some days her eyes burn and she can smell a chemical odor when running near the Plant), and when hiking in Manitou Springs. *Id*. at ¶¶ 4,10 (Apx.130,132). Jacqui Ostrom regularly bikes on trails that pass Drake, but states that she avoids the section of the trial that passes close to Drake because of concerns about being exposed to the Plant's pollution. Ostrom Decl. ¶ 6 (Apx.138-39). Regarding aesthetic injury, Guardians' members have averred with particularity that the pollution emitted from Drake is aesthetically displeasing and negatively impacts their enjoyment of the view from their homes and while recreating outdoors. Weise Decl. ¶ 3 (Apx.151-52); Rosa Decl. ¶ 10 (Apx.132); Ostrom Decl. ¶ 3 (Apx.137-38); Robinson Decl. ¶ 10 (Apx.158-59).

CSU ignores the well-established case law recognizing that a plaintiff's "reasonable concerns" about the potential effects from exposure to a facility's pollution is sufficient to establish injury-in-fact. *Laidlaw*, 528 U.S. at 183-84. *Laidlaw* found injury-in-fact where the plaintiffs curtailed their recreational use of a river because they were "concerned" about the harmful effects they might suffer if they came into contact with pollutants in the river discharged by the defendant.[4] *Id*. at 182. As a result of *Laidlaw*, citizen plaintiffs have been able to demonstrate injury-in-fact by making specific allegations that include (1) repeated use of an area affected by the alleged unlawful

[4] Because the Clean Air Act and Clean Water Act have similar operative mechanisms, including enforcement provisions, courts routinely rely on cases decided under one statute when interpreting the other statute. *See*, *e.g.*, *Gwaltney v. Smithfield Ltd. v. Chesapeake Bat Found.*, 484 U.S. 49, 60 (1987).

conduct, (2) concern that the plaintiff might experience an increased risk of harm from the challenged conduct's potential impacts, and (3) either diminishing enjoyment from using the affected area or avoidance of the affected area from concerns about the challenged conduct. *See, e.g.*, *Communities for a Better Envt. v. Cenco Refining Co., 180 F. Supp. 2d 1062, 1074-75 (C. D. Cal. 2001); Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 670–71 (E.D. La. 2010). To meet the injury prong for standing, Guardians does not have to demonstrate that Drake exceeds a particular permit requirement, nor must it demonstrate adverse health impacts from exposure to Drake's pollution. *See, e.g.*, *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002); *Concerned Citizens*, 686 F. Supp. 2d at 670–71. Guardians' members have made all of the necessary allegations that courts have found sufficient to demonstrate injury from a defendant's failure to comply with permit conditions.

In contrast, CSU cites cases that are not relevant to allegations adequate to establish injury in a Clean Air Act citizen suit. In *Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086, 1089 (D. Kan. 2015), the court found plaintiff's injury from the challenged legislation—fear of future gun violence—insufficiently concrete and imminent given that "the likelihood of being injured in a shooting is remote" and plaintiff's "feared injuries . . . are entirely dependent on the decisions of some indeterminate third party" to buy a gun covered by the challenged Act and use it to harm the plaintiff's members. *Id*. at 1093-94. This attenuated chain of the events rendered plaintiff's injury speculative rather than imminent. *Id*. In *Grider v. City and County of Denver*, 958 F. Supp. 2d 1262, 1265-68 (D. Colo. 2013), the court held that plaintiffs who used pit bulls as service animals were not likely to be imminently

injured by a pit bull ban when it was modified to exclude pit bulls used as service dogs, nor had plaintiffs been injured prior to modification of the ban because the defendants had not enforced the pit bull ban against the plaintiffs. Finally, in *Engl v. Nat. Grocers by Vitamin Cottage*, 2016 WL 8578252, *6 (D. Colo. Sept. 21, 2016), the court found insufficient plaintiff's fear of future injury from identity theft because the plaintiff failed to allege sufficient facts regarding imminent identity theft using only the plaintiff's name. The facts of these cases are clearly distinguishable from the case at bar.

B. CSU's Violation of the Clean Air Act's Opacity Monitoring Requirement Harms Members' Informational Interests.

Courts have recognized an informational injury to plaintiffs from a failure to comply with monitoring requirements. An informational injury constitutes injury-in-fact when "the lack of information caused an injury beyond the 'common concern for obedience to law.'" *Am. Canoe Ass'n v. Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004) (quoting *L. Singer & Sons v. Union Pac. R.R. Co.,* 311 U.S. 295, 303 (1940)). *American Canoe* held that the plaintiffs had standing to sue for monitoring and reporting violations under the Clean Water Act because those violations "deprived [organizational members] of the ability to make choices about whether it was safe to fish, paddle, and recreate in the waterway." *Id*.

Likewise, CSU's failure to continuously monitor opacity also deprives Guardians and its members of information that would allow members to make informed decisions regarding the potential health risks associated with living and recreating near Drake. Drake's Operating Permit requires it to continuously monitor opacity. Such information allows the public and government authorities to accurately assess Drake's impact on the environment and their interests. *See*, *e.g.*, *Sierra Club v. Public Service Co. of*

Colo., 894 F.Supp. 1455, 1459 (D. Colo. 1995) (recognizing that accurate monitoring and reporting "aid citizen enforcement" of the Clean Air Act). Guardians' members have expressed concerns related to breathing the air around Drake because of the uncertainty associated with pollution levels during periods of unexcused monitor downtime. Weise Decl. ¶¶ 5, 8-9 (Apx.152-55); Rosa Decl. ¶¶ 8-9 (Apx.131); Ostrom Decl. ¶¶ 9-10 (Apx.139-40); Robinson Decl. ¶¶ 8-9 (Apx.158). Thus, Guardians' members experience uncertainty and fear with regard to the possibility that excess emissions during times of monitoring downtime could cause public health concerns.

Moreover, Congress has recognized that such concern is not speculative: "If [COMS] data . . . is not available for an affected unit during any period of a calendar year . . . and the owner or operator cannot provide information, satisfactory to [EPA], on emissions during that period, [EPA] shall deem the unit to be operating in an uncontrolled manner during the entire period for which the data was not available." 42 U.S.C. § 7651k(d). Certainly, if Congress has reason to believe that excess emissions should be assumed during monitoring downtime, Guardians and its members have reasonable concerns regarding impacts to their health during such periods. Only with continuous, accurate, and reliable monitoring data can Guardians fully evaluate Drake's compliance with the Clean Air Act, the impact violations may have on public health, and make determinations with their members regarding recreation in the area.

II. Guardians' Injuries are Fairly Traceable to CSU's Violations

CSU's uncontrolled operation of Drake causes injuries to Guardians and its members. To satisfy the second prong of Article III standing, the injury suffered must be fairly traceable to the defendant rather than to a third-party not before the court. *Lujan*,

504 at 560. It is a well-established principal in pollution cases that the causation requirement for standing is not one of scientific certainty that defendant's emissions caused plaintiff's harm, but that the defendant discharges a pollutant that causes or contributes to the kind of injuries alleged in a specific geographic area of concern. *See*, *e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000); *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000); *Sierra Club v. Cedar Point Oil Co.*, Inc., 73 F.3d 546, 558 (5th Cir. 1996); *Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3rd Cir. 1990). Moreover, a plaintiff's injury may result from either the defendant's environmental pollution or its failure to comply with a permit term or condition. *Simkins*, 847 F.2d at 1112; *Am. Canoe Ass'n*, 389 F.3d at 542; *WildEarth Guardians v. Public Service Co.*, 2010 WL 1568574 at *2.

There can be little doubt that Drake caused Guardians' injuries. Members have unequivocally stated that exposure to Drake's pollution concerns them, that they use or live in the area around Drake, that Drake has lessened the recreational and aesthetic value of the area, and that they plan to use the area around Drake in the future but may curtail some of their regular activities due to concerns for their health and diminished enjoyment of those activities. Further, CSU's failure to continuously monitor opacity necessarily caused Guardians' informational injury. Therefore, Guardians has satisfied the traceability requirement for standing.

CSU argues that Guardians has not established causation because (1) a monitoring violation can never result in an injury and (2) members must be able to show that they have experienced their injuries during the periods of unexcused monitor

downtimes at Drake. CSU MSJ at 11, 13. CSU's first argument improperly conflates injury with causation, and the nature of Guardians' injury here has already been addressed above. Courts have repeatedly rejected CSU's second argument. Plaintiffs "need not pinpoint the exact times of violations and link its members' injuries to permit violations at those times." *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc*, 686 F. Supp. 2d 663, 671 (E.D. La. 2010). Indeed, "no relevant case law supports [Defendant's] argument that [Plaintiff] must connect the exact time of their injuries with the exact time of an alleged violation." *Texans United for a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp,* 207 F.3d 789, 793 (5th Cir. 2000). The key is that failure to comply with a permit requirement at Drake contributed to Guardians' members' injuries.

There is a well-established body of case law regarding the standard for meeting standing's causation prong in pollution cases, as cited above. Yet, CSU ignores this case law and cites to only a single case for the principle that causation requires a showing of "proof of a substantial likelihood that the defendant's conduct" caused Guardians' injuries, rather than "speculative inferences" connecting its injuries to CSU's actions. CSU MSJ at 13. In *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1221-22 (10th Cir. 2008), a civil rights case wherein the plaintiff challenged his removal from a town board by a recall election, the Court determined that the plaintiff had not adequately established that the defendant town caused his injury because the four steps in the chain of events leading to plaintiff's loss of his seat on the town board included "an indispensible act by a third party not before the court: the votes cast by the voters of Estes Park." *Id*. at 1225. The Court could not make the "inferential leap" tying

the motivations of individual voters to the defendant town's actions. *Id*. There is no similar multi-part causal chain here involving uncertain events or actions by third parties. Drake emits a number of dangerous air pollutants. Opacity monitoring is required to track Drake's emissions of these pollutants. CSU has not ensured that opacity is continuously monitored at Drake as required by the Clean Air Act. Guardians' members who are exposed to Drake's air pollution, and have a legally-protected interest in knowing whether Drake's emissions are within legal limits, are injured by CSU's failure to ensure continuous opacity monitoring.

III. Requiring CSU to Operate Drake in Compliance with the Continuous Opacity Monitoring Requirement Will Redress Guardians' Injuries

Injunctive relief and civil penalties will redress the injuries CSU has caused Guardians and its members from repeated instances of unexcused monitor downtime. To satisfy Article III standing, the plaintiff must demonstrate that a favorable judicial decision will likely prevent or redress the injury. *Laidlaw*, 528 U.S. at 181. The plaintiff does not need to show that the relief will relieve his injury entirely, just that a favorable decision will progress towards ameliorating the problem. *See Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). Here, requiring CSU to continuously monitor opacity will necessarily redress injuries to Guardians and its members. Moreover, the Supreme Court has recognized that civil penalties will deter future violations of the Act, including monitoring requirements. *Laidlaw*, 528 U.S. at 185. Therefore, a decision in Guardians' favor will sufficiently redress Guardians' injuries for standing purposes.

CSU argues that Guardians has not met the redressability prong of standing because an order requiring CSU to ensure compliance with the continuous opacity monitoring requirement will not redress all of Guardians' members' injuries. CSU MSJ at

14-15. CSU asserts that even if Guardians suffered an injury from monitoring violations, because reducing or eliminating instances of unexcused monitor downtime would only redress injuries to Guardians' members' health concerns and not remedy all of Guardians' injuries, redress is not possible. *Id*. at 15. This argument lacks merits for two reasons. First, a plaintiff can still meet the redressability requirement even where its injuries will not be *entirely* ameliorated by a favorable outcome. Redressability requires only the likelihood that the plaintiff would receive "some" benefit from the requested relief. *Massachusetts*, 549 U.S. at 526 (holding redressability satisfied where the risk of global warming "would be reduced to some extent if petitioners received the relief [sought]"). Second, because instances of unexcused monitor downtime typically last longer than periods of excused monitor downtime for planned equipment maintenance and repair, Guardians MSJ at 14-15 (Dkt. 34), the former has a greater potential for the release of excess harmful emissions that form the basis of Guardians' health concerns. It follows that reducing or eliminating *unexcused* monitor downtime will redress (even if only partially) Guardians' injuries.

Guardians is also seeking relief in the form of civil penalties. The Supreme Court has recognized that civil penalties have a deterrent effect because such penalties "limit[] the defendant's economic incentive to delay its attainment of permit limits; [and] they also deter future violations." *Laidlaw*, 528 U.S. at 185. CSU does not acknowledge that Guardians also requested relief in the form of civil penalties, only briefly mentioning that relief having a "deterrent effect on the defendant" is not sufficient for standing. CSU MSJ at 14. CSU cites *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998), for this proposition but neglects to mention that the Supreme Court's

subsequent decision in *Laidlaw* found the deterrent effect of civil penalties suitable redress for permit violations because this remedy "abates" unlawful conduct and "prevents its recurrence" in the future. *Laidlaw*, 528 U.S. at 185-86. Accordingly, imposition of civil penalties on CSU will redress Guardians' injuries.

IV. The Closure of Drake Unit 5 Does Not Divest Guardians of Standing

CSU asks the Court to dismiss Guardians' "claim as it relates to Unit 5" because the closure of Unit 5 at Drake divests Guardians of standing to challenge violations of the opacity monitoring requirement at that unit. CSU MSJ at 12-13. CSU believes that Guardians lacks standing to challenge unexcused monitor downtimes at Unit 5 because "there is no continuing injury and no possibility of any future instances of unexcused monitor downtime from Unit 5" and the Court cannot grant any meaningful relief with respect to Unit 5. *Id*. at 12, 15. CSU is wrong on both counts.

First, the Clean Air Act authorizes suits for *past* or continuing violations:

> any person may commence a civil action on his own behalf . . . against any person . . . who is *alleged to have violated* (if there is evidence that the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation under this chapter . . . .

42 U.S.C. § 7604(a)(1) (emphasis added). For wholly past violations, the plain language of this provision requires repeated violations, as opposed to a single occurrence. *See Paper, Allied Indus., Chem. & Energy Workers Intern. Union v. Continental Carbon Co.*, 2005 WL 1389431, *15 (W.D. Okla. 2005) (recognizing that "[t]he plain language of the Clean Air Act therefore permits citizen suits for continuing violations and wholly past violations, so long as the past violations were repeated."); *Fried v. SunGard Recovery Servs., Inc.*, 916 F. Supp. 465, 467 (E.D. Pa. 1996) (accord); *Adair v. Troy State Univ. of Montgomery*, 892 F. Supp. 1401, 1409 (M.D. Ala. 1995) (accord). Here, Guardians'

amended complaint asserted 29 individual monitor downtime violations at Unit 5 totaling approximately 4,220 minutes occurring between April 2011 and December 2015. Dkt 15-1 (spreadsheet of downtime violations). Clearly, there were repeated unexcused episodes of monitor downtime at Unit 5, which is all that is required when filing suit over past violations under the Clean Air Act. Even if CSU had demonstrated, as opposed to merely asserting, that Unit 5 could not reasonably be expected to resume operation in the future, these violations are actionable and Guardians has suffered injury from them as described above.[5]

Second, CSU's argument that the Court cannot provide Guardians with any meaningful relief as to monitoring violations at Unit 5 ignores the well-established precedent that claims for civil penalties can survive even where cessation of the challenged conduct has mooted injunctive relief. *Laidlaw*, 528 U.S. at 196; *see also S.F. BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1160 (9th Cir. 2002) (recognizing that because civil penalties attach at the time violations occurred, not at the time of final judgment, cessation of the challenged conduct during the course of the litigation does not moot a request for civil penalties). Injunctive relief and civil penalties are two different types of remedies that, practically speaking, serve different purposes.

[5] CSU does not cite to any of the relevant Clean Air Act case law on this issue. Instead, CSU cites to *Hale v. Ashcroft*, 683 F. Supp. 2d 1189, 1199 (D Colo. 2009), for the general proposition that a plaintiff lacks standing for declaratory relief when the challenged conduct causing the injury has ceased. However, *Hale* is not helpful on the issue of Guardians' standing to challenge Clean Air Act violations that may not be likely to continue. In *Hale*, the plaintiff challenged as unconstitutional certain prison restrictions placed on him. *Id*. at 1192-93. During the course of the litigation, the prison removed the challenged restrictions and imposed different restrictions on him. *Id*. at 1193. The government moved to dismiss the case in part on standing grounds. The court ruled that the removal of the challenged restrictions left the plaintiff with "no remaining concrete or imminent injury" which the court could redress if it found the originally restrictions unconstitutional. *Id*. at 1199.

Injunctive relief is imposed to stop the defendant's unlawful conduct (e.g., violation of a permit condition) that gave rise to the citizen suit. Civil penalties have a deterrent effect on *future* violations. As the Supreme Court recognized in *Laidlaw*, "a defendant once hit in its pocketbook will surely think twice before polluting again." *Id.* at 186. To the extent that Unit 5 may no longer be operational, CSU continues to operate Units 6 and 7 at Drake, and both units have repeated instances of unexcused monitor downtime. Dkt. 15-1. Therefore, assessing civil penalties against CSU for its monitoring violations at Unit 5 could have a deterrent effect on future monitoring violations at Units 6 and 7 thereby redressing Guardians' injuries.

Finally, to the extent that CSU is trying to weave a mootness defense against monitoring violations at Unit 5 into its argument that Guardians lacks standing, CSU has not met its burden to demonstrate mootness here. *Laidlaw* articulated a mootness standard where "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189. The party arguing mootness bears "[t]he 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again . . . ." *Id*. (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)); *see also Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 792 (10th Cir. 2010) (accord). CSU's mootness implication in its MSJ rests on a single sentence that "Unit 5 was permanently shut down in December 2016" and references documents in the Appendix to its MSJ that say the same thing, without any further evidence demonstrating that the unit cannot reasonably be expected to start operating again in the future. CSU MSJ at 12. In *Laidlaw*, the Supreme Court declined to find mootness even where the facility

was "closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased," because the effects of the facility closure on potential future violations was "a disputed factual matter" given that Laidlaw retained its permit and could have rebuilt the facility. *Laidlaw*, 528 U.S. 179, 193. Here, Drake remains an operational facility as CSU continues to operate Units 6 and 7, and CSU has provided nothing beyond unsupported statements to indicate that operation of Unit 5 "could not reasonably be expected to recur." *Id*. at 189. This is insufficient for demonstrating that the portion of Guardians' claim relating to monitoring violations at Unit 5 is moot.

CONCLUSION

Fore the foregoing reasons, Guardians respectfully requests that the Court deny CSU's Motion for Summary Judgment in its entirety.

Respectfully submitted on this 17th day of October 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2017, I filed this document through the District of Colorado's CM/EDF e-filing system, which provides a copy of the filing via e-mail link to counsel of record for all parties.

/s/ Samantha Ruscavage-Barz
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