

**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.

**MOTION FOR PARTIAL SUMMARY JUDGMENT**

WildEarth Guardians brought suit against Defendants Colorado Springs Utilities (“CSU”), the Colorado Springs Utilities Board, and the City of Colorado Springs for CSU’s failure to comply with its Clean Air Act operating permit requirement that it continuously monitor opacity “at all times” that the boilers at the Martin Drake Power Plant are in operation. WildEarth Guardians now brings this Motion for Partial Summary Judgment on a subset of CSU’s opacity monitoring violations. Specifically, on 91 occasions CSU failed to monitor opacity for 1,848 separate 6-minute blocks. There is no genuine issue of material fact that these violations occurred, and none of the exceptions to the continuous monitoring requirement apply. Thus, partial summary judgment is appropriate for these events.<sup>1</sup> Resolution of this Motion will significantly narrow the

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<sup>1</sup> The First Amended Complaint alleges an additional 1,307 violations that are not the subject of this motion. Those violations are subject to different legal and factual issues, and are not as susceptible to summary judgment. Nonetheless, because the

scope of remaining issues and provide guidance to the Parties on how to address disputed factual and legal issue at trial.

### **UNDISPUTED MATERIAL FACTS**

1. The Martin Drake Power Plant is operated by Defendant CSU. [Admitted at Doc. 19, ¶ 15.]

2. During the time period covered in the Complaint, the Martin Drake Power Plant had three coal-fired electric generating units: Units 5, 6, and 7. [Admitted at Doc. 19, ¶ 42.]

3. Defendant CSU operates the Martin Drake Power Plant pursuant to Operating Permit #95OPEP102 (“the Permit”) issued by the Colorado Department of Public Health and the Environment (“CDPHE”) on November 1, 2002 and revised on April 13, 2004. [Admitted at Doc. 19, ¶ 45.]

4. The Permit includes emissions limits regarding the maximum allowable opacity during operations. (Movant’s Appx., pp. 11–12, Martin Drake Operating Permit.)

5. The Permit also incorporates the federal opacity monitoring requirements set forth in 30 C.F.R. Part 75. [Admitted at Doc. 19, ¶ 48.]

6. The Permit requires the operator to monitor opacity using continuous opacity monitors. According to the permit, CSU “shall ensure that all continuous . . . opacity monitoring systems required are in operation and monitoring . . . opacity at all times that the boiler combusts any fuel.” (Movant’s Appx., p. 8, Martin Drake Operating Permit.)

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number of violations is large, it would significantly streamline trial and assist the parties and the Court in the presentation of evidence to obtain a partial summary judgment ruling on the violations in this motion.

7. The Permit provides exceptions to the continuous opacity monitoring requirement during “periods of calibration, quality assurance, or preventative maintenance, performed pursuant to [40 C.F.R. Sec. 75.21 and appendix B of [40 C.F.R. Part 75], periods of repair, periods of backups of data from the data acquisition and handling system, or recertification performed pursuant to [40 C.F.R.] Sec. 75.20.” (*Id.*)

8. CSU monitors opacity levels at the Martin Drake Power Plant through the use of Continuous Opacity Monitoring Systems (“COMS”) on each operating unit. (Movant’s Appx., p. 24, Deposition of Chris Welch at 28:2–8.)

9. CSU must monitor and report opacity data in six-minute block averages. (Movant’s Appx., pp. 6–7, Martin Drake Operating Permit.)

10. The Permit provides that “[e]ach violation of a provision of [40 C.F.R. Part 75] by an affected source or affected unit, or by an owner or operator or designated representative of such source or unit, shall be a separate violation of the [Clean Air Act].” (Movant’s Appx., p. 14, Martin Drake Operating Permit.)

11. CSU provides quarterly “excess emissions reports” to the Colorado Department of Public Health and Environment, which includes reporting the date and time of each period of “equipment malfunction.” (Movant’s Appx., p. 11, Martin Drake Operating Permit.)

12. These reports are signed and certified as to their completeness and accuracy by a qualified person who is responsible for the review and integrity of the report. (See Movant’s Appx., p. 82, Sample Excess Emissions Report.)

13. In practice, if an event prevents CSU from continuously monitoring opacity for any part of a 6-minute block, then CSU reports that block as “downtime,” and provides a

short description of the cause of the downtime. (See Movant's Appx., p. 85, Sample Excess Emissions Report.)

### **Details of Violations**

14. Exhibit 3 is a summary listing the events where the First Amended Complaint alleges the COMS for one of the units at the Martin Drake Power Plant was not able to continuously monitor the opacity for that unit. (Movant's Appx., pp. 35–79, Summary of Violations.)

15. The data acquisition and handling system for the COMS retains opacity data as it is collected. (Movant's Appx., p. 23, Deposition of Chris Welch at 23:4–10.)

16. CSU also maintains an electronic LogBook that is based upon contemporaneous notes and observations of CSU employees to document notable events relevant to, *inter alia*, the COMS. (Movant's Appx., pp. 21–22, Deposition of Chris Welch at 15:21–17:1; 18:15–25; 20:1–13.)

17. The information in Exhibit 3 summarizes CSU's description of the events as reported in the excess emissions reports and the LogBook history. (See Movant's Appx., p. 36, Summary of Violations.)

18. The LogBook contains the primary documentary information (along with the COMS data itself) that CSU itself relies upon when it investigates events or incidents. (Movant's Appx., pp. 22, 30, Deposition of Chris Welch at 19:1–19; 62:9–16.)

19. CSU reported each of the events in Exhibit 3 as opacity monitoring "downtime" in its excess emissions reports to CDPHE. (See Movant's Appx. pp. 36–79, Summary of Violations.)

### **Downtime Events that Require Repairs**

20. For certain events listed on Exhibit 3, CSU's records show that CSU performed repairs or maintenance to fix whatever issue caused the downtime event. (See Movant's Appx., pp. 37, 42, 43, 47–53, 55–57, 66, 68, 70–75, Summary of Violations.)

21. After there is a system fault or error detected, the control room at the Martin Drake Power Plant notifies the appropriate personnel at the facility (generally instrument/electrical/control specialists). Those specialists then investigate the problem and, if necessary, fix it. (Movant's Appx. at 22–23, Deposition of Chris Welch at 20:1–13, 24:19–25:6.)

22. When instrument/electrical/control specialists begin working on the COMS, they will flag the data with a "maintenance" flag and record in the LogBook the time that they begin and end their work. (Movant's Appx. at 25–26, Deposition of Chris Welch at 34:3–35:12.)

23. When the LogBook entries state that "routine" maintenance was performed following a fault or alarm, those entries indicate that the steps taken to fix the alarm were routine maintenance steps. (Movant's Appx. at 27, Deposition of Chris Welch at 39:3–19.) They do not mean that the maintenance performed was previously scheduled. (*Id.*)

24. For a number of the downtime events, Table 1, below, lists the beginning of the downtime event and the time maintenance/repair work began. (Movant's Appx., pp. 37, 42, 43, 47–53, 55–57, 66, 68, 70–75, Summary of Violations.) The events in Table 1 are ordered chronologically and given the same event numbers given by Ralph Roberson, Defendants' liability expert.

<b>TABLE 1</b>				
<b>Roberson Event #</b>	<b>Commencement of Downtime Event As Reported in EER</b>	<b>Commencement of Maintenance/Repair Work Based on CSU LogBook History Entries</b>	<b>6-Minute Time Blocks Between Beginning of Downtime Event and Commencement of Maintenance/Repair Work</b>	
5	8/1/2011 19:36	8/2/2011 06:30	109	
23	4/3/2012 16:06	4/4/2012 11:18	192	
27	10/18/2012 23:06	10/19/2012 12:00	129	
43	9/20/2013 05:54	9/20/2013 07:00	11	
46	12/9/2013 02:36	12/9/2013 05:19	27	
49	12/23/2013 15:36	12/23/13 17:10 <sup>2</sup>	15	
51	1/5/2014 08:06	1/05/2014 11:30	29	
52	1/9/2014 08:48	1/09/2014 08:58	2	
53	1/9/2014 14:42	1/09/2014 14:53	2	
55	1/11/2014 01:36	1/11/2014 02:36	10	
56	1/11/2014 07:54	1/11/2014 16:01	82	
57	1/12/2014 00:06	1/12/2014 01:24	13	
58	1/18/2014 07:24	1/18/2014 08:27	11	
64	2/2/2014 04:48	2/2/2014 06:12	14	
67	2/5/2014 20:54	2/5/2014 21:43	8	
70	2/20/2014 11:12	2/20/2014 12:49	17	
71	2/23/2014 11:12	2/23/2014 12:53	18	
109	4/17/2015 14:54	4/17/2015 15:23	5	
116&117	5/5/2015 08:06	5/6/2015 12:00	279	
122, 124–26	5/8/2015 18:20	5/11/2015 07:04	607	
127&128	5/12/2015 16:06	5/12/2015 17:18	12	
132	5/22/2015 16:06	5/22/2015 16:44	6	
133	5/23/2015 17:00	5/23/2015 17:40	7	
134	6/5/2015 09:42	6/5/2015 10:12	5	
135	6/11/2015 18:18	6/11/2015 19:25	12	
137	7/9/2015 19:06	7/10/2015 07:00	119	
138	9/1/2015 16:24	9/1/2015 18:07	18	
		<b>Total 6-minute time blocks with missing data prior to commencement of repairs/maintenance:</b>	<b>1,759</b>	

<sup>2</sup> CSU's LogBook entry for this event, as reproduced in Exhibit 3, states that the maintenance was performed at 18:10, but that is almost certainly a typo.

### Calibration Error Tests

25. Each COMS unit is programmed to automatically run one calibration error test per day that the unit is in operation. (Movant's Appx., p. 28, Deposition of Chris Welch at 53:5–12.)

26. When the calibration error test is running, instead of monitoring the opacity of the actual emissions from the stack, the COMS tests the "zero" and "span" of the system. (Movant's Appx., p. 29, Deposition of Chris Welch at 55: 3–15.)

27. According to CSU's 30(b)(6) witness, Chris Welch, CSU staff also typically (1) run calibration error tests after performing maintenance activities, and (2) conduct regular quarterly calibration error tests. (Movant's Appx., pp. 26, 29, 32, Deposition of Chris Welch at 38:6–16, 55:10–24, 127:11–16.)

28. In addition, the LogBook entries reproduced in Exhibit 3 show that CSU's typical practice after responding to failed calibration error tests included running an additional calibration error test before returning the unit to regular operation. (See, e.g., Movant's Appx. at 70–72, Summary of Violations (showing steps taken after failed calibration error tests during May 8–11, 2015 timeframe).)

29. As outlined in Table 2, however, on 41 occasions during the time period covered by the Complaint, the COMS initiated a calibration error test in error. (Movant's Appx. at 38, 39, 42, 43, 45, 47, 48, 54, 59–67, 77–79, Summary of Violations.) According to CSU's EER reports and LogBook entries, (*id.*), as well as the deposition testimony of Chris Welch, (Movant's Appx., p. 29–31, Deposition of Chris Welch at 55:3–56:20, 62:17–63:24), these tests were not regular daily or quarterly calibration error tests, and were not conducted following maintenance activities.

TABLE 2

<b>Roberson Event #</b>	<b>Commencement of Downtime Event As Reported in EER</b>	<b>End of Downtime Event as Reported in EER</b>	<b>6-Minute Time Blocks Between Beginning and End of Downtime Event</b>
10	10/5/2011 05:48	10/5/2011 05:54	1
11	11/5/2011 06:48	11/5/2011 06:54	1
12	11/6/2011 06:48	11/6/2011 06:54	1
13	12/10/2011 06:36	12/10/2011 06:42	1
15	12/25/2011 06:42	12/25/2011 06:54	1
16	1/20/2012 06:36	1/20/2012 06:42	1
24	7/25/2012 06:12	7/25/2012 06:18	1
25	10/7/2012 09:24	10/7/2012 09:30	1
28	11/28/2012 11:54	11/28/2012 12:00	1
35	5/3/2013 06:12	5/3/2013 06:24	2
37	7/11/2013 06:12	7/11/2013 06:24	2
42	9/16/2013 06:12	9/16/2013 06:24	2
44	10/24/2013 07:42	10/24/2013 07:48	1
45	11/4/2013 06:54	11/4/2013 07:00	1
47	12/11/2013 20:18	12/11/2013 20:30	2
61	1/25/2014 07:12	1/25/2014 07:24	2
82	4/12/2014 23:24	4/12/2014 23:30	1
84	4/15/2014 18:18	4/15/2014 18:30	2
85	4/22/2014 12:00	4/22/2014 12:06	1
88	8/24/2014 05:42	8/24/2014 05:48	1
91	10/7/2014 23:24	10/7/2014 23:30	1
92	10/21/2014 11:18	10/21/2014 11:30	2
96	1/26/2015 17:36	1/26/2015 17:48	2
97	1/27/2015 10:12	1/27/2015 10:18	1
98	1/27/2015 10:42	1/27/2015 10:54	2
101	3/2/2015 21:42	3/2/2015 21:48	1
102	3/9/2015 22:12	3/9/2015 22:18	1
103	3/10/2015 03:24	3/10/2015 03:30	1
104	3/13/2015 19:54	3/13/2015 20:00	1
111	5/1/2015 10:12	5/1/2015 10:18	1
113	5/5/2015 02:42	5/5/2015 02:48	1
114	5/5/2015 08:12	5/5/2015 08:18	1
136	6/25/2015 16:12	6/25/2015 16:18	1
139	9/1/2015 13:42	9/1/2015 13:48	1
141	10/29/2015 09:06	10/29/2015 09:18	2
142	11/27/2015 11:18	11/27/2015 11:30	2

143	12/4/2015 01:42	12/4/2015 01:48	1
144	12/12/2015 06:12	12/12/2015 06:18	1
145	12/12/2015 18:42	12/12/2015 18:48	1
146	12/12/2015 19:48	12/12/2015 20:00	2
147	12/13/2015 18:18	12/13/2015 18:30	2
		<b>Total 6-minute blocks with missing data:</b>	<b>54</b>

**Downtime Events Which Did Not Require Repairs, But Which Nonetheless Prevented the Monitoring of Opacity**

30. For certain downtime events detailed in Table 3, CSU's Excess Emissions Reports and LogBook entries state that the COMS was not collecting valid data or was not functioning properly. (Movant's Appx. at 36, 39–41, 47, 48, 55, 59–62, 64, 66, 70, Summary of Violations.)

31. For the events listed in Table 3, the LogBook entries state that the issues or alarms were subsequently resolved without CSU staff needing to perform any repairs, maintenance, or recalibration. (See *id.*)

32. Those events for which the COMS had a system fault or alarm (and thus for which data was missing), or for which the COMS unit was obstructed, and for which no repairs were performed, are as follows:

<b>TABLE 3</b>				
<b>Roberson Event #</b>	<b>Commencement of Downtime Event As Reported in EER</b>	<b>End of Downtime Event as Reported in EER</b>	<b>6-Minute Time Blocks Between Beginning and End of Downtime Event</b>	
2	4/14/2011 07:18	4/14/2011 07:42	4	
3	4/14/2011 09:42	4/14/2011 09:48	1	
4	4/14/2011 09:54	4/14/2011 10:00	1	
14	12/21/2011 04:18	12/21/2011 04:24	1	
17	1/25/2012 22:24	1/25/2012 22:30	1	
18	2/5/2012 21:48	2/5/2012 21:54	1	

19	2/5/2012	22:54	2/5/2012	23:00	1
20	2/8/2012	03:30	2/8/2012	03:36	1
21	2/8/2012	08:48	2/8/2012	08:54	1
22	2/21/2012	05:54	2/21/2012	06:06	2
41	9/16/2013	05:54	9/16/2013	06:06	2
48	12/16/2013	08:00	12/16/2013	08:06	1
65	2/2/2014	16:18	2/2/2014	16:24	1
79	4/3/2014	04:48	4/3/2014	04:54	1
80	4/3/2014	05:06	4/3/2014	05:24	3
83	4/13/2014	14:48	4/13/2014	15:06	2
89	9/1/2014	02:48	9/1/2014	02:54	1
93	1/3/2015	17:42	1/3/2015	17:48	1
94	1/3/2015	18:00	1/3/2015	18:18	3
95	1/13/2015	15:18	1/13/2015	15:24	1
99	2/21/2015	21:48	2/21/2015	22:00	2
110	4/28/2015	14:06	4/28/2015	14:18	2
121	5/8/2015	06:42	5/8/2015	06:48	1
			<b>Total 6-minute blocks with missing data:</b>		<b>35</b>

## ARGUMENT

Summary judgment is appropriate if the moving party demonstrates that “there is no genuine dispute as to any material fact” and that it “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material if, under the applicable substantive law, it is essential to the proper disposition of the claim.” *Joyce v. N. Metro Task Force*, 2011 WL 2669162, at \*3 (D. Colo. Jul. 7, 2011) (internal quotation marks omitted). “An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.” *Id.* (internal quotation marks omitted).

The moving party must first demonstrate the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). If the movant does not bear the

ultimate burden of persuasion on an issue, then the movant need not disprove the other party's claim; instead, the movant must simply point out a lack of evidence supporting the nonmoving party on an essential issue. *Id.* at 671. If the movant meets its burden, then the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It must do so using "affidavits, deposition transcripts, or specific exhibits." *Adler*, 144 F.3d at 671.

In this Clean Air Act case alleging violations of a permit condition, WildEarth Guardians has the initial burden of proof to prove that violations occurred. However, to the extent CSU seeks the protection of a regulatory exception to the permit condition, then CSU, and not WildEarth Guardians, bears the burden of proving that the exception applies. See, e.g., *N.L.R.B. v. Kentucky River Cmty. Care*, 532 U.S. 706, 711 (2001) ("The burden of proving the applicability of the supervisory exception . . . should thus fall on the party asserting it."); *United States v. Louisiana Generating, LLC*, 2012 WL 4107129, at \*4 (M.D. La., Sept. 19, 2012) ("the burden of showing the exception applies to the work is on [power plant defendant]."); *Sierra Club v. Duke Energy Ind., Inc.*, 2010 WL 1381468, at \*2–3 (S.D. Ind., Mar. 30, 2010) ("Sierra Club obviously has the initial burden to prove that there was a 'modification;' if that is proven, the burden shifts to Defendants to prove that their activities were exempt from CAA compliance.").

Thus, once WildEarth Guardians establishes a prima facie case that CSU did not continuously monitor opacity during the events listed in Tables 1, 2, and 3, the burden is on CSU to come forward with evidence that those events fit within one of the exceptions to the continuous opacity monitoring requirement.

**I. The Clean Air Act Requires CSU to Continuously Monitor Emissions for Opacity During Operations, Subject to Limited Exceptions.**

Under 42 U.S.C. § 7604(1), any person may commence a civil action 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 (A) an emission standard or limitation under this chapter.” An “emission standard or limitation under this chapter” includes, *inter alia*, “any [] standard, limitation, or schedule established under any permit issued pursuant to [Title V of the Clean Air Act] or any applicable State implementation plan approved by the Administrator, [and] any permit term or condition. . . which is in effect [under the Clean Air Act.]” 42 U.S.C. § 7604(f).

Thus, the elements of the claims at issue in this case are as follows: (1) the defendant has violated any permit term or condition; (2) there is evidence that the alleged violation has been repeated; and (3) the permit term or condition is in effect.<sup>3</sup>

In its answer, Defendant CSU has admitted that is the operator and holder of a permit issued pursuant to Title V of the Clean Air Act, and thus the third element is satisfied. As set forth below, the first two elements of the claim are also met, because the undisputed material facts demonstrate that CSU has repeatedly violated a term or condition of its Title V permit—namely, the condition that it continuously monitor opacity at all times.

Permit term 7.2.1, which incorporates 40 C.F.R. § 75.10(d), requires CSU to  
 ensure that all . . . continuous opacity monitoring systems  
 required are in operation and monitoring unit . . . opacity at all  
 times that the boiler combusts any fuel except during those

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<sup>3</sup> The Clean Air Act provides for civil penalties and injunctive relief as remedies for permit violations. 42 U.S.C. § 7413(b)(1). The amount of any civil penalty, and the appropriateness of an injunction, are not the subject of this motion.

periods identified in [40 C.F.R. § 75.11(e)] and during periods of calibration, quality assurance, or preventative maintenance performed pursuant to 40 C.F.R. Part 75 § 75.21 and Appendix B, periods of repair, periods of backups of data from a data acquisition and handling system or recertification performed pursuant to [40 C.F.R. § 75.20].

(Movant's Appx., p. 8, Martin Drake Operating Permit.) Thus, unless an exception applies, CSU must, under its permit, ensure that its COMS are in operation and monitoring opacity "at all times that the boiler combusts any fuel."

As required by the permit, CSU submits quarterly "excess emissions reports" to CDPHE, which includes reporting all periods of "equipment malfunction." (Movant's Appx., p. 11, Martin Drake Operating Permit.) Opacity data must be monitored and recorded in six-minute intervals. (Movant's Appx., p. 6–7, Martin Drake Operating Permit.) The Permit provides that "[e]ach violation of a provision of [40 C.F.R. Part 75] by an affected source or affected unit, or by an owner or operator or designated representative of such source or unit, shall be a separate violation of the [Clean Air] Act." (Movant's Appx., p. 14, Martin Drake Operating Permit.) Thus, each six-minute block of time in which a permit holder fails to monitor opacity is a separate violation.

The only exceptions to the continuous monitoring requirement are: (1) periods identified in 40 C.F.R. § 75.11(e), which covers SO<sub>2</sub> monitoring and is inapplicable here; (2) periods of calibration, quality assurance, or preventative maintenance performed pursuant to 40 C.F.R. § 75.21 or 40 C.F.R. Part 75 App. B; (3) periods of repair; or (4) periods of backups of data or recertification. (See Movant's Appx., p. 8, Martin Drake Operating Permit.)

Based on CSU's records and discovery responses, it has never claimed that any of the downtime violations at issue in this motion was a period of data backup or

recertification. Thus, the only possible applicable exceptions are periods of calibration, quality assurance, preventative maintenance, or repair. As explained below, however, none of the events listed in Tables 1, 2, or 3 falls within one of those exceptions, and summary judgment is appropriate as to those events.

**II. The Time Periods Listed in Table 1, Which Represent Downtime Prior to the Start of Repairs or Maintenance, Are Clean Air Act Violations That Do Not Fall Under Any Exception to the Continuous Monitoring Requirement.**

**A. Pre-Repair Downtime Cannot Be Considered a “Period of Repair.”**

A “period of repair,” at the risk of stating the obvious, begins when repairs actually begin.<sup>4</sup> When COMS units malfunction and stop collecting valid data, operators cannot simply sit back and claim that the unit is in “repair” unless they have actually begun to repair the unit. The “repair” exception cannot apply to instances where CSU has not yet taken action to restore the COMS units to proper functioning. Otherwise, operators could avoid their continuous monitoring duties indefinitely by claiming that broken-down COMS units are in “repair,” while never actually doing the repairs.

The normal practice for CSU staff was to indicate in the LogBook the time that repairs or maintenance began and ended by turning on and off specific flags in the COMS software. (Movant’s Appx. at 25–26, Deposition of Chris Welch at 34:3–35:12.) Thus, CSU’s LogBook entries contain the start and end times for these repairs. For the events listed in Table 1, there was a delay between the system losing functionality and the commencement of repairs or maintenance. For some events, the delay between the

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<sup>4</sup> WildEarth Guardians will argue at trial that the time period during which repairs take place should also not be excused if the downtime was reasonably foreseeable and, thus, avoidable. That issue, however, is not part of this summary judgment motion, because the parties differ as to the underlying factual issues as to which events were foreseeable.

malfunction and the repairs was substantial. On half a dozen occasions, the delay was over ten hours. In two instances, the delay was measured in days. In all, these delays before the commencement of repairs resulted in 1,759 lost six-minute blocks of opacity monitoring. These time periods before any repairs or maintenance began cannot be excused as “periods of repair.”

**B. Quality Assurance Has a Specific Meaning under the Clean Air Act, and Waiting for Repairs to Begin is Not Quality Assurance.**

Defendants have contended in their discovery responses that some of the periods of downtime listed in Table 1 may be excused as “quality assurance.” But “quality assurance” has a specific meaning in the permit and regulations, and waiting for repairs to begin is not incorporated within it.

“Quality assurance” is defined in reference to 40 C.F.R. § 75.21 and 40 C.F.R. Part 75 App. B. (Movant’s Appx., p. 8, Martin Drake Operating Permit.) 40 C.F.R. § 75.21(b) directs operators to comply with the requirements set forth in state implementation plans. Colorado’s applicable regulation, Regulation 1 Parts IV.F and IV.G, sets out general calibration, notification, and recordkeeping requirements. In addition, 40 C.F.R Part 75 App. B sets forth certain preventative maintenance requirements, recordkeeping requirements, and daily and quarterly calibration requirements that must be included within an operator’s QA/QC program. None of these regulations remotely suggest that the waiting period before repairs begin on a malfunctioning COMS unit constitutes “quality assurance.”

The idea that pre-repair downtime is excused as quality assurance is also inconsistent with the plain English meaning of the term “quality assurance.” According to Merriam Webster, “quality assurance” is “a program for the systematic monitoring and

evaluation of the various aspects of a project, service, or facility to ensure that standards of quality are being met.” *Merriam Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/quality%20assurance> (last visited September 19, 2017). Actively monitoring and evaluating the unit to ensure that it is generating quality data is the essence of quality assurance. Passively waiting for repairs to begin is not.

The only logical interpretation of the Permit is that the “quality assurance” exception to the continuous opacity monitoring requirement applies to activities required under 40 C.F.R. § 75.21 and 40 C.F.R. Part 75 App. B. It is not a catch-all exception that encompasses other downtime events, and it is inapplicable to these periods of pre-repair downtime.

**C. Maintenance Must Be Preventative Maintenance to Be Excused Under the Permit.**

In its LogBook entries, CSU has frequently termed these downtime events as “maintenance.” (See, e.g., Movant’s Appx., p. 87, Sample LogBook History.) In its discovery responses, it has also indicated that some of these downtime events are excused under the Permit as “preventative maintenance.” But not all maintenance is excused under the Permit—the maintenance must be “preventative.” (Movant’s Appx., p. 8, Martin Drake Operating Permit.) This language tracks 40 C.F.R. § 75.10(d). For the events in Table 1, the equipment malfunction occurred prior to the maintenance in question. Therefore, by definition, the maintenance cannot be “preventative.” Any other interpretation would effectively read the word “preventative” out of the Permit.

In addition, for much the same reason that these periods cannot be classified as “repair,” any periods of “preventative maintenance” cannot logically begin until the

maintenance actually begins. For the events in Table 1, CSU's records indicate the minute when CSU employees began performing work following the malfunction. It would be illogical to begin counting a period of maintenance prior to maintenance actually beginning.

**II. Calibration Error Tests that Occur, In Error, Outside of the Scheduled Testing Times, Prevent the Continuous Monitoring of Opacity and Are Violations of the Clean Air Act.**

CSU's permit excludes from the continuous monitoring requirement periods of "calibration . . . pursuant to 40 C.F.R. Part 75 § 75.21 and Appendix B." (Movant's Appx., p. 8, Martin Drake Operating Permit.) 40 C.F.R. § 75.21(b) directs operators to calibrate their COMS units in accordance with State Implementation Plans. Colorado's applicable regulation, Regulation 1 Part IV.F, requires operators to "check the zero and span drift of the system at least once per day and at such other times as designated by [CDPHE], according to procedures approved by [CDPHE]."

40 C.F.R. Part 75 Appendix B requires operators to develop QA/QC programs and outlines the frequency with which those programs call for calibration error tests, and to submit those plans for approval to state regulators. 40 C.F.R. Part 75 App. B § 1. In particular, QA/QC programs must contain provisions for "daily" calibration error tests. *Id.* § 2.1.1. In addition, the programs must require operators to run additional calibration error tests "whenever a daily calibration error test is failed; whenever a monitoring system is returned to service following repair or corrective maintenance that could affect the monitor's ability to accurately measure and record emissions data; or after making certain calibration adjustments." *Id.* § 2.1.3(a).

Accordingly, the applicable regulations require CSU to conduct certain calibration error tests in accordance with a QA/QC program approved by CDPHE. When calibration error tests are required under the regulations and QA/QC program, those periods are excluded from the continuous opacity monitoring requirement. The applicable regulations require daily calibration error tests, as well as additional calibration error tests following failed tests, repairs, corrective maintenance, or calibration adjustments.

The calibration error tests listed in Table 2, however, were unplanned events that, according to CSU, occurred because of system malfunctions in the COMS. They did not fall under any of the categories permitted by 40 C.F.R. § 75.21(b) or 40 C.F.R. Part 75 App. B § 2, they were not approved by CDPHE, and they did not occur in accordance with CSU's QA/QC program.

During calibration error tests, the COMS unit cannot monitor actual emissions from the stack. Thus, excessive and unnecessary calibration error tests serve to prevent the collection of useful opacity data. This is why the permit only excludes calibration pursuant to 40 C.F.R. Part 75 § 75.21 and Appendix B, and does not contain a blanket excuse for all calibration activities. Otherwise, a facility could run unlimited calibration error tests and never collect any useful opacity data.

In summary, on 41 occasions as outlined in Table 2, system malfunctions caused calibration error tests to run at random, unplanned times. These tests were excessive and unnecessary, and prevented the collection of realtime opacity data. These calibration error tests were not required by 40 C.F.R. Part 75 Appendix B, CSU's QA/QC program, or any other regulation or directive, and as such, are not excused downtime.

**III. The System Faults and Downtime Events Listed in Table 3 Are Violations of the Continuous Monitoring Requirements.**

The events in Table 3 are instances where CSU's COMS units exhibited alarms that indicated they were not collecting valid data. On these occasions, the faults resolved without repairs or maintenance. Nonetheless, CSU's reports to CDPHE, as well as its internal LogBook notations, indicate that, before these faults cleared, the units were not able to continuously collect valid opacity data. As such, these events constitute violations of the continuous opacity monitoring requirement.

There were no repairs, maintenance, calibration activities, or any other type of activity going on during these events that would fall under one of the exceptions in the permit. Thus, these events are unexcused downtime, and are violations of the Clean Air Act.

**CONCLUSION**

For the foregoing reasons, WildEarth Guardians requests the Court grant summary judgment with respect to the specific COMS downtime events listed in Tables 1, 2, and 3. There is no genuine issue of material fact that the missing 6-minute blocks of data outlined in Tables 1, 2, and 3 are violations of the continuous opacity monitoring requirement. As a result, those events are violations of the Clean Air Act.

Respectfully submitted,

/s/ A. Nathaniel Chakeres  
Coberly & Martinez, LLLP  
1322 Paseo de Peralta  
Santa Fe, NM 87501  
(505) 989-1029  
[nat@coberlymartinez.com](mailto:nat@coberlymartinez.com)

/s/ Samantha Ruscavage-Barz  
WildEarth Guardians  
516 Alto Street  
Santa Fe, NM 87501  
(505) 401-4180  
[sruscavagebarz@wildearthguardians.org](mailto:sruscavagebarz@wildearthguardians.org)

*Attorneys for Plaintiff WildEarth Guardians*

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 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/ A. Nathaniel Chakeres  
A. Nathaniel Chakeres