

DISTRICT COURT, PUEBLO COUNTY, COLORADO 320 W. 10 <sup>th</sup> Street Pueblo, Colorado 81003	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiffs:</b> CITIZENS FOR CLEAN AIR &amp; WATER IN PUEBLO AND SOUTHERN COLORADO and CLEAN ENERGY ACTION</p> <p><b>vs.</b></p> <p><b>Defendants:</b> AIR POLLUTION CONTROL DIVISION, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT and AIR QUALITY CONTROL COMMISSION, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT</p>	
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<b>COMPLAINT SEEKING JUDICIAL REVIEW OF FINAL AGENCY ACTION</b>	

INTRODUCTION

1) On August 6, 2004 Public Service Company of Colorado d/b/a Xcel Energy Inc. (“Xcel” or “Xcel Energy”) submitted an application for construction permits under Colorado Revised Statutes § 25-7-114.2 for a 750 MW coal-fired boiler (“the proposed Unit 3”) and associated facilities at the existing coal fired electric generating station near Pueblo, Colorado that is referred to as the Comanche Generating Station. The existing Unit 1 in Pueblo has a production capability of 325 MW. The existing Unit 2 has a production capability of 335 MW. Xcel submitted supplemental information related to the construction permit on September 10, 2004.

2) On January 19, 2005 Xcel Energy submitted a revised application addressing issues raised in a Settlement Agreement with various citizen groups.

3) Other new equipment associated with Xcel’s proposal includes a cooling tower, a series of silos, mixers and other equipment needed to handle and process ash and the waste from pollution control equipment, a coal handling and storage system and unloading equipment and conveyors.

4) Pursuant to Colorado Revised Statutes (“C.R.S.”) § 25-7-114.2 Xcel Energy needs to obtain a valid construction permit from Defendant Air Pollution Control Division (“APCD” or “Division”) of the

Colorado Department of Public Health and the Environment (“CDPHE” or “Department”) before commencing construction, alteration or operation of the proposed Unit 3 and associated facilities. Pursuant to C.R.S. § 25-7-104 the Air Quality Control Commission is established for the purposes set forth in C.R.S. §25-7-105 and on June 9, 2005 the AQCC conducted a public hearing in Pueblo, Colorado on Xcel Energy’s proposal for a new Unit 3 in Pueblo.

5) On July 5, 2005 the APCD issued the following 10 permits for Xcel’s existing and proposed operations in Pueblo:

- Permit 04PB1015 Unit 3 Boiler
- Permit 04PB1016 Unit 3 Cooling Tower
- Permit 04PB1017 Coal Handling and Storage
- Permit 04PB1018 Recycle Ash Handling
- Permit 04PB1019 Lime Handling
- Permit 04PB1020 Sorbent Handling
- Permit 04PB1021 Fly Ash and FGD Waste Handling and Storage
- Permit 04PB1022 Haul Roads
- Permit 04PB1439 Unit 1 Boiler
- Permit 11PB859 Unit 2 Boiler

These permits will be collectively referred to as “the permit.” or “construction permit.” Pursuant to CDPHE Regulation 3, Part B, Section II. A. 3., orders or decisions of the APCD are final upon issuance.

6) The issuance of these permits is a violation of Plaintiff’s rights and in violation of the provisions of the Colorado Air Pollution Prevention and Control Act (“the Colorado APPCA”) C.R.S. § 25-7-101 et.seq. and its implementing regulations.

7) Pursuant to C.R.S. § 24-4-106 and C.R.S. § 25-7-120 Plaintiffs Citizens for Clean Air & Water in Pueblo and Southern Colorado (“CCAP”) and Clean Energy Action (“CEA”) (collectively referred to as “Plaintiffs”) by and through their attorney Angelique Layton Anderson, seek judicial review of the APCD and AQCC’s final agency action approving the construction permit for Xcel Energy’s proposed Unit 3 coal fired power plant and associated modifications in Pueblo, Colorado. Plaintiffs also challenge several other violations of law and regulation by the APCD and AQCC.

### JURISDICTION AND VENUE

8) The construction permit issued on July 5, 2005 by the APCD is final in accordance with CDPHE Regulation 3, Part B, Section II. A.3.

9) Subject matter jurisdiction in this court is appropriate pursuant to the Colorado Administrative Procedures Act, C.R.S. § 24-4-106, and the Colorado APPCA C.R.S. § 25-7-120.

10) Venue in this Court is appropriate under C.R.S. § 25-7-120 because Xcel Energy plans to locate the proposed Unit 3 coal fired electric generation station, the air pollution source affected in this matter, within Pueblo County and this Judicial District.

### PARTIES

11) Plaintiff CCAP is a citizens group from Pueblo County and Southern Colorado that was established to advocate for clean air and water in Pueblo County and Southern Colorado. CCAPs

members live, work and recreate in Pueblo County and throughout Colorado and will be harmed by the pollution emitted by the proposed Unit 3.

12) Plaintiff Clean Energy Action is a Colorado based group with members from throughout the state of Colorado as well as other states. Many of its members live and/or recreate in Pueblo County and throughout the areas that will be affected by the proposed Unit 3 coal fired power plant. Clean Energy Action was established to promote the use of clean energy in Colorado and throughout the United States.

13) Plaintiff CCAP participated in the public comment process pertaining to the proposed Unit 3 and therefore has standing to seek judicial review of the APCD and AQCC's final agency action pursuant to C.R.S. § 25-7-114.5 (11).

14) Plaintiff Clean Energy Action participated in the public comment review process pertaining to the proposed Unit 3 and therefore has standing to seek judicial review of the APCD and AQCC's final agency action pursuant to C.R.S. § 25-7-114.5 (11).

15) Defendant APCD is an administrative division within the CDPHE with responsibility for administering and enforcing the air quality control programs adopted by the AQCC under the Colorado APCCA C.R.S. § 25-7-101 et seq.

16) Defendant AQCC is a state administrative agency within the CDPHE, created pursuant to C.R.S. § 25-7-104 with responsibility for promulgating rules and regulations consistent with the legislative declaration set forth in C.R.S. § 25-7-102 and in accordance with C.R.S. § 25-7-105 in order to implement the Colorado APPCA, C.R.S. § 25-7-101 et seq.

## LEGAL BACKGROUND

### I. Purpose of Federal and State Clean Air Laws

17) Colorado enacted the Colorado Air Pollution Prevention and Control Act ("the Colorado APPCA"), C.R.S. § 25-7-101 et seq. pursuant to the mandates of the federal Clean Air Act ("the federal CAA"), 42 U.S.C. § 7401 et seq.

18) At 42 U.S. C. § 7401 (a) (3) the Federal Clean Air Act describes air pollution prevention as "the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source...." (Emphasis added.)

19) At 42 U.S.C. § 7401 (c) the Federal Clean Air Act states that "A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention."

20) Pursuant to C.R.S. § 25-7-102 of the Colorado APPCA, "it is declared to be the policy of this state to achieve the maximum practical degree of air purity in every portion of the state," and "it is the purpose of this article to require the use of all available practical methods which are technologically feasible and economically reasonable so as to reduce, prevent, and control air pollution throughout the state of Colorado;...." (Emphasis added.)

## II. Requirement to Obtain Permit Before Construction or Modification of a Major Source

21) Pursuant to C.R.S. § 25-7-114.2 “No person shall construct or substantially alter any building, facility, structure, or installation, ...or install any machine, equipment, or other device or commence the conduct of any such activity or commence performance of any combinations thereof, or commence operations of any of the same which will or do constitute a new stationary source...without first obtaining or having a valid construction permit therefor from the division or the commission....”

22) Pursuant to C.R.S. § 25-7-103 (8) “‘Construction’ means fabrication, erection, installation, or modification of an air pollution source.”

## III. Requirement for CDPHE to Conduct Investigations

23) Pursuant to C.R.S. § 25-7-115 “If a written and verified complaint is filed with the division alleging that, or if the division itself has cause to believe that, any person is violating or failing to comply with any regulation of the commission issued pursuant to parts 1 to 4 of this article, order issued pursuant to section 25-7-118, requirement of the state implementation plan, provision of parts 1 to 4 of this article, including any term or condition of a permit required pursuant to this article, the division shall cause a prompt investigation to be made;”

## IV. Netting Transactions

24) Pursuant to CDPHE Regulation 3, Part A, Section V. I. 2. the CDPHE is only to allow netting transactions and grant an exemption for construction permit requirements if the emission reduction used in the netting transaction meets the certification requirements in Regulation 3, Part A, Section V. E. The certification requirements specify that “Reductions down to compliance levels may not qualify for emission reduction credit.” (CDPHE Regulation 3, Part A, Section V. E. 7. Note that in the 4/16/2004 version of CDPHE Regulation 3, the provisions of Part A, Section V are in italic type which raises questions about the status of these regulations. According to CDPHE personnel, these regulations are presently in effect and have been in effect for many years.)

25) Pursuant to CDPHE Regulation 3, Part A, Section V. F.2. “No transaction shall be approved if it will result in an increased concentration, at the point of maximum impact, of hazardous air pollutants.”

26) Pursuant to CDPHE Regulation 3, Part A, Section V. F. 13. f. transactions involving sources that are subject of a notice of violation (NOV) require a state implementation plan revision.

## V. Best Available Control Technology (BACT) and Alternatives

27) Under Regulation 3, Part D VI A.1. major stationary sources and major modifications of sources proposed for attainment areas such as Pueblo County, must apply Best Available Control Technology (“BACT”) for each pollutant regulated under either the Colorado APPCA or the federal CAA which the source would have the potential to emit in significant amounts.

28) Pursuant to CDPHE Regulation 3, Part D, Section II.A. 44., significant emissions include 25 tons per year of particulate matter, 40 tons per year of nitrogen oxides, sulfur dioxide, or volatile organic compounds or 100 tons per year of carbon monoxide.

29) Pursuant to CDPHE Regulation 3, Part D, Section II. A. 8. (Revision 4/16/04) BACT is defined as, “An emission limitation (including a visible emissions standard) based on the maximum degree of reduction of each air regulated NSR pollutant subject to regulation under the Federal Act that would be emitted from any proposed major stationary source or major modification that the division or commission, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.” (Note: Type in italics is in the 4/16/2004 CDPHE regulation and is to become effective upon approval by the U.S. Environmental Protection Agency; underlined type is in the 4/16/2004 CDPHE regulation and is to be deleted upon approval by the EPA.)

30) Pursuant to 40 Code of Federal Regulations (“C.F.R.”) § 51.166, all state plans for air pollution control shall have definitions that are “more stringent, or at least as stringent, in all respects as the corresponding definitions” contained in 40 C.F.R. § 51.166 (b).

31) During debate on the 1977 federal CAA, the United States Senate approved an amendment offered by Senator Huddleston adding the phrase “innovative fuel combustion techniques” in order to “leave no doubt” that the definition of BACT included a consideration of coal gasification techniques as well as other production processes (See 123 Cong. Rec. 18472, CAA77 (June 10, 1977)).

## VI. BACT and National Environmental Policy Act (NEPA) Analysis

32) Pursuant to the definition of BACT in CDPHE Regulation 3, Part D, Section II. A. 8., BACT determinations are to be made only after consideration of “energy, environmental, and economic impacts and other costs....”

33) Decisions under the federal CAA were exempted from National Environmental Policy Act (42 U.S.C. § 4321 *et. seq.*, “NEPA”) analysis because analysis conducted under the CAA (and by extension under the Colorado APPCA) was to provide the functional equivalent of NEPA analysis (See *Portland Cement Association v. Ruckelshaus* 486 F2d 375 (1973)).

34) NEPA requires agencies to take a “hard look” at environmental consequences before taking a major action.

35) The United States Supreme Court has recently affirmed that unreasoned air permitting decisions are unlawful and cannot stand. (See *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461 (2004))

## VII. Visibility and Class I Areas

36) Pursuant to CDPHE Regulation Number 3, Part D. Section XIV the purpose of the CDPHE visibility regulations is to assure “reasonable progress towards the national goal of preventing future and remedying existing, visibility impairment in Class I areas where such impairment results from man-made air pollution.”

37) Pursuant to CDPHE Regulation 3, Part D, Section XIV.C. 8, visibility impairment means “any humanly perceptible change in visibility....”

38) Pursuant to CDPHE Regulation 3, Part D, Section XIV. D. 1. either the Federal Land Manager (e.g. the Secretary of the Department with authority over the federal lands—see CDPHE Regulation 3, Part D, Section II. A. 16) or the state APCD may certify that visibility impairment exists in any Class I area.

39) According to CDPHE Regulation 3, Part D, Section VIII. A. Rocky Mountain National Park and the Great Sand Dunes Wilderness Area are designated Class I areas.

40) Pursuant to CDPHE Regulation 3, Part D, Section XIV. E. “Applicants for new major stationary sources and major modifications shall demonstrate that the proposed source will not have an adverse impact on visibility in a Class I area....”

41) Pursuant to CDPHE Regulation 3, Part D, Section XIII. C. if “the division determines that there is an adverse impact on visibility,...the division shall not issue the permit.”

42) Pursuant to CDPHE Regulation 3, Part D, Section XIV.F. the AQCC is to develop, review and revise a long-term strategy for preventing future and remedying existing impairment of visibility in any Class I area.

#### VIII. Construction Permit and Public Comment

43) Pursuant to CDPHE Regulation Number 3, Part B, Section III.C.3., when making determinations of whether a public comment process is warranted, “the division shall take into consideration the duration of the operation, its location, the nature and projected amount of emissions, anticipated public concern, and other relevant factors.”

#### IX. Environmental Justice

44) One of the purposes of environmental justice programs created under Executive Order 12898 is to promote the enforcement of all health and environmental statutes in areas with minority and low income populations. Pueblo is recognized as an environmental justice community by the Environmental Protection Agency.

### FACTS SUPPORTING PLAINTIFFS’ CAUSE OF ACTION

#### I. Failure to Properly Consider Environmental Justice Concerns

45) According to the EPA’s Toxic Release Inventory (TRI) data for 2003 (the last available year) Pueblo County received 82% of the state’s mercury emissions and 72% of the state’s emissions of lead compounds as well as high percentages of other hazardous air emissions. This information is available in the CDPHE record for the proposed Unit 3 at <http://www.cdphe.state.co.us/ap/comanche.html> .

46) The APCD and AQCC failed to adequately consider the disproportionate share of the state’s air pollution already born by Pueblo County before issuing the construction permit for the proposed Unit 3 and associated facilities. The APCD and AQCC also failed to ensure that all health and environmental laws and regulations were complied with before issuing the construction permit to Xcel Energy.

## II. Failure to Investigate the Notice of Violation on the Existing Units 1 and 2 in Pueblo

47) On June 26, 2002 the U. S. EPA issued a Notice of Violation to Xcel Energy for New Source Review Violations at the Comanche Units (i.e. Units 1 and 2) in Pueblo County, Colorado and the Pawnee Units in Morgan County, Colorado. The Notice of Violation included alleged violations of the federal CAA, the Colorado State Implementation Plan and CDPHE Regulations. EPA sent a copy of the NOV to CDPHE and the CDPHE has a copy of the NOV in the files on Xcel's Pueblo plant.

48) Despite the clear mandate in C.R.S. §25-7-115 to conduct an investigation of all verified written complaints of air pollution violations, the CDPHE did not at any time before issuing the construction permit for the proposed Unit 3 and associated modifications conduct an investigation of the NOV issued in June 2002 to Xcel Energy by the EPA. While the decision of whether to take enforcement action under C.R.S. § 25-7-115 is discretionary, the requirement to investigate verified written violations is mandatory.

## III. Failure to Comply With Regulations Governing Netting Transactions

49) When applying for a construction permit, Xcel proposed and the APCD and the AQCC accepted without detailed analysis, a proposal to "net out" of certain Prevention of Deterioration (PSD) requirements for the pollutants sulfur dioxide and nitrogen oxides. (See for example the third sentence from the top on page 8 of the Preliminary Analysis of Xcel Energy's proposal by the APCD dated March 2, 2005 and Revised April 5, 2005 )

50) When issuing the construction permit for Xcel Energy's proposed Unit 3 in Pueblo, Colorado, the APCD and the AQCC failed to comply with regulations governing netting transactions found in CDPHE Regulation 3, Part A, Section V. In failing to conduct an investigation of the June 2002 NOV issued by EPA, CDPHE also failed to conduct the analysis required by CDPHE Regulation 3, Part A, Section V. E. 7. to determine whether the netting process proposed by Xcel Energy was simply using reductions down to or approaching compliance levels. Pursuant to CDPHE Regulation 3, Part A, Section V. E. 7., "Reductions down to compliance levels may not qualify for emission reduction credit."

51) In issuing a construction permit to Xcel Energy for the proposed Unit 3 in Pueblo, the APCD and the AQCC failed to determine whether Xcel Energy's proposed netting transaction would result in an increased concentration of hazardous pollutants at the point of maximum impact. Pursuant to CDPHE Regulation 3, Part A, Section V. F. 2., no transaction will be approved if it will result in an increased concentration of hazardous pollutants at the point of maximum of impact..

52) In issuing a construction permit to Xcel Energy for the proposed Unit 3 in Pueblo, the APCD and the AQCC failed to obtain a state implementation plan revision. Pursuant to CDPHE Regulation 3, Part A, Section V.F.13.f. transactions involving sources that are the subject of a notice of violation require a state implementation plan revision.

## IV. Failure to Conduct a Thorough BACT Analysis

53) The APCD and the AQCC failed to conduct a thorough analysis of all available and practical methods to reduce, prevent and control air pollution before issuing the construction permit for the proposed Unit 3 and associated facilities. It is the clearly stated policy of the Colorado APPCA:

“to require the use of all available practical methods which are technologically feasible and economically reasonable so as to reduce, prevent, and control air pollution throughout the state of Colorado;...” (C.R.S. § 25-7-102, emphasis added)

54) The APCD and the AQCC failed to conduct a thorough analysis of production processes and available methods, systems and techniques for achieving a maximum degree of reduction of air emissions. The APCD and AQCC also failed to conduct a thorough analysis of energy, environmental and economic impacts and other costs of the proposed Unit 3 and alternative processes for producing electricity. These analyses are required by CDPHE Regulation 3, Part D, Sections II.A.8. and VI.A.1.

#### V. Failure to Specify BACT Standards that Will Achieve A Maximum Degree of Reduction in Pollutants

55) The emission levels chosen by the CDPHE in their BACT analysis for the proposed Unit 3 in Pueblo did not achieve the “maximum degree of reduction” that is possible for regulated pollutants, a violation of the requirements in CDPHE Regulation 3, Part D, Section II.A.8. and VI.A.1.

#### VI. Failure to Reach a Reasoned Decision on Protection of Visibility in Class I Areas

56) The APCD and the AQCC failed to take appropriate action to remedy existing and prevent future visibility impairments in Class I areas such as Rocky Mountain National Park (“RMNP”) and the Great Sand Dunes Wilderness Area (GSD). The APCD and AQCC failed to properly assess existing impairments of visibility and inappropriately accepted Xcel’s modeling which ignored impairment from emissions of all pollutants, including SO<sub>2</sub> and NO<sub>x</sub>.

57) Modeling data available from the National Park Service indicates that existing emissions of pollutants from Units 1 and 2 are having a very significant impact on visibility at RMNP and GSD and that significant impairments of visibility will occur even after the imposition of Settlement Agreement reductions on Units 1 and 2 and the construction of Unit 3.

58) In failing to obtain and act on available information on visibility impacts on Class I areas as a result of the existing and proposed power plants in Pueblo, Colorado, the APCD and the AQCC have failed to make a reasoned decision and have failed to fulfill their obligation under the federal CAA and under CDPHE Regulation 3, Part D, Sections XIII. and XIV. In particular, under CDPHE Regulation 3, Part D, Section XIII. C. if the APCD determines that there is an adverse impact on visibility in a Class I area, it shall not issue a permit. APCD and AQCC inappropriately failed to consider existing and future impairments to visibility in Class I areas from all pollutants, including SO<sub>2</sub> and NO<sub>x</sub>.

#### VII. Failure to Give Appropriate Consideration to Specified Variables When Exempting the Land Preparation Permit from Public Comment

59) On May 2, 2005, Xcel Energy submitted an application to begin land preparation activities at the site of the proposed Unit 3 in Pueblo, Colorado. On May 19, 2005, the CDPHE issued a construction permit to Xcel Energy for land development activities. The permit runs until June 1, 2010. CDPHE issued the permit without allowing public comment because APCD estimated that particulate emissions from the proposed land preparation activities would be 41 tons per year and pursuant to CDPHE Regulation 3, Part B, Section III. C. 1.a. public comment is only required for sources that will emit more than 50 tons per year in an attainment area like Pueblo County.

60) Pursuant to Regulation 3, Part B, Section III. C. 3., the APCD is to determine whether public comment is warranted. "In making such determinations, the division shall take into consideration the duration of the operation, its location, the nature and projected amount of emissions, anticipated public concern and other relevant factors."

61) APCD and AQCC either failed to consider the factors specified in CDPHE Regulation 3, Part B, Section III. C. 3., or inappropriately considered them in issuing the construction permit to Xcel after a mere 17 days of review. Forty one tons of particulates is 82% of the 50 tons that would lead to mandatory public comment and there is a significant chance that CDPHE has underestimated the particulate emissions that could occur. In addition, the construction permit issued by CDPHE runs until 2010 so it is for a long duration. In addition the proposed Unit 3 is a very controversial project and there is substantial public concern about the project. Finally, Xcel Energy has been meeting with the CDPHE regarding the construction of the proposed Unit 3 since the fall of 2003. Clearly Xcel could have submitted the permit request earlier and allowed enough time for public comment. All of these factors should have led CDPHE to determine that public comment was warranted.

## PLAINTIFF'S CLAIMS

### FIRST CLAIM

(Failure to Give Appropriate Consideration to Environmental Justice Considerations)

62) Plaintiffs restate and incorporate by reference all allegations set forth in this complaint.

63) Defendants APCD and AQCC failed to ensure that all health and environmental laws were fully complied with before issuing the permit for Xcel's proposed Unit 3 in Pueblo, Colorado. The APCD and AQCC also failed to give adequate consideration to the disproportionate share of the state's pollution already borne by Pueblo County. The status of Pueblo as an environmental justice community intensifies the seriousness of the already serious violations of law and regulation set forth below.

### SECOND CLAIM

(Failure to Conduct an Investigation of the EPA Notice of Violation)

64) Plaintiffs restate and incorporate by reference all allegations set forth in this complaint.

65) Defendants APCD and AQCC violated C.R.S. § 25-7-115 by failing to conduct an investigation of the June 2002 Notice of Violation issued by E.P.A. to Xcel Energy for the Comanche Plants in Pueblo, Colorado and the Pawnee Plants in Brush, Colorado.

### THIRD CLAIM

(Failure to Comply With Applicable Regulations on Netting Transactions)

66) Plaintiffs restate and incorporate by reference all allegations set forth in this complaint.

67) Defendants APCD and AQCC failed to comply with state and federal laws and regulations governing netting transactions. These violations include inter alia violation of CDPHE Regulation 3, Part A, Section V.E.7. (failure to certify emissions as below compliance levels), Section V.F.2. (failure to determine if there will be an increased concentration of hazardous pollutants at the point of maximum impact), Section V. F. 13.f. (failure to obtain a State Implementation Plan revision).

FOURTH CLAIM

(Failure to Conduct a Thorough BACT Analysis)

68) Plaintiffs restate and incorporate by reference all allegations set forth in this complaint.

69) As detailed above, defendants APCD and AQCC violated state and federal law governing BACT analyses including inter alia CDPHE Regulation 3, Part D, Section II.A.8. and VI.A.1. Despite abundant information in the record, CDPHE failed to conduct a thorough analysis of alternatives for preventing and reducing air pollution. Defendants APCD and AQCC also failed to conduct a thorough analysis of energy, environmental and economic impacts of the various alternatives.

FIFTH CLAIM

(Failure to Select BACT Emission Limitations That Achieve Maximum Reductions of Air Pollutants)

70) Plaintiffs restate and incorporate by reference all allegations set forth in this complaint.

71) Defendants APCD and AQCC violated federal and state law regarding BACT determinations including inter alia CDPHE Regulation 3, Part D, Section II.A.8. and VI. A. 1. in not establishing emission limitations that are based on the maximum degree of reduction for each pollutant.

SIXTH CLAIM

(Failure to Protect Visibility in Class I Areas)

72) Plaintiffs restate and incorporate by reference all allegations set forth in this complaint.

73) Defendants APCD and AQCC violated their obligation under federal and state law to protect visibility in Class I areas including inter alia the Department's obligation under CDPHE Regulation 3, Part D, Section IV, to prevent future and remedy existing impairment of visibility in Class I areas.

SEVENTH CLAIM

( Failure to Provide for Public Comment on the Construction Permit for Land Preparation)

74) Plaintiffs restate and incorporate by reference all allegations set forth in this complaint.

75) Defendants APCD and AQCC inappropriately granted a construction permit to Xcel Energy for land development activities in Pueblo without providing for public comment; in doing so, APCD and AQCC failed to give due consideration to the factors in CDPHE Regulation 3, Part B, Section III. C. 3.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. Pursuant to C.R.S. 24-4-106 (7), the Plaintiffs ask that the Court find the actions of APCD and AQCC a denial of state and federal statutory rights.

B. Pursuant to C.R.S. 24-4-106 (7), the Plaintiffs ask that the Court find the actions of APCD and AQCC arbitrary and capricious, not supported by the record and an abuse of discretion.

C. Pursuant to C.R.S. 24-4-106 (7), the Plaintiffs ask that the Court find the actions of APCD and AQCC not in accord with procedural provisions of federal and state law and otherwise contrary to law.

D. The Plaintiffs ask therefore that the Court set all 10 permits aside and direct the APCD and AQCC to comply with all appropriate laws and regulations related to Xcel's proposed Unit 3 and associated facilities.

E. Afford such other relief as this Court deems just and proper including the awarding of Plaintiffs' costs of litigation and reasonable attorneys' fees.

Respectfully submitted this 4th day of August, 2005.

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Attorney for Plaintiffs