

**BEFORE THE ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY**

In the matter of:	(	
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Title V Air Operating Permit No. 95OPAD108	(	
	(	
For the Suncor Energy (USA), Inc. –	(	Permit No. 95OPAD108
Commerce City Refinery Plant 2	(	
	(	
Issued by the Colorado Department of Public	(	
Health and Environment	(	

**PETITION TO OBJECT TO THE TITLE V OPERATING PERMIT FOR SUNCOR  
ENERGY’S COMMERCE CITY REFINERY PLANT 2**

Pursuant to § 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), 350 Colorado (“Petitioner” or “350CO”) petitions the Administrator of the U.S. Environmental Protection Agency (“EPA”) to object to the above-referenced proposed renewal Title V permit issued by Colorado Department of Public Health and Environment (“CDPHE”) for the Suncor Refinery Plant 2, owned and operated by Suncor Energy, Inc. (“Suncor”).

As discussed below, Suncor refinery, a facility located within a surrounding area of disproportionately impacted communities, has repeated exceedances of the limits of its permit and is in violation of the Clean Air Act (CAA). CDPHE failed to take final action within 18 months of a timely and complete renewal application, delaying action for over 10 years. CDPHE failed to respond to Petitioners’ public comment dated May 11, 2021.

The EPA objected to this permit renewal on March 25, 2022. Appendix B of EPA’s objection acknowledged the acute environmental justice issues in the communities surrounding Suncor. After CDPHE revised the permit in response to EPA’s objection, EPA did not object to the revised permit. Petitioners now request the EPA to object to the revised permit and terminate the permit for cause. Suncor’s pollution exceedances are all the more urgent to address because of acute environmental justice concerns.

Additional issues include the permit’s citation of a guidance memo that was reported to the EPA by whistle-blowers as illegal. This guidance memo was subsequently withdrawn by CDPHE, but the proposed permit still contains the memo.

## BACKGROUND

### I. SUNCOR REFINERY

Suncor is a massive refinery located in Commerce City, Colorado, consisting of 3 facilities, Plants 1, 2, and 3, located at 5800 and 5801 Brighton Blvd., Commerce City, Colorado. Suncor acquired Plants 1 and 3 from ConocoPhillips in 2003.<sup>1</sup> It acquired Plant 2 from Valero in 2005.<sup>2</sup>

The Suncor facility presents urgent environmental justice concerns. According to the EPA objection to the initial proposed renewal permit,

*The Environmental Justice Index for all twelve of the EJScreen indicators in the three-mile area around the proposed facility exceeds the 90th percentile in the state. These indices are: particulate matter of less than 2.5 microns in diameter; ozone; diesel particulate matter; air toxics cancer risk; air toxics respiratory hazard; traffic proximity; lead paint; Superfund proximity; Risk Management Plan facility proximity; hazardous waste proximity; underground storage tanks; and wastewater discharge. According to EJScreen, the population in the area around the proposed facility is disproportionately low income (47%, compared to 25% for the state), people of color (74%, compared to 32% for the state) and includes persons with limited English proficiency. The Suncor facility is in an area that is heavily populated by industrial facilities and transportation corridors and is close to residential housing and schools. See Exhibit 1, Appendix B.*

According to the EPA's Toxic Release Inventory, Suncor ranks above the 99th percentile in the US among petroleum facilities for Risk-Screening Environmental Indicator Score (RSEI).<sup>3</sup> Its Risk-Screening Environmental Indicator (RSEI) score in 2020 was 30,607, more than 4 times higher than the industry median score of 7,703 for petroleum refineries.<sup>4</sup> Its score is about 3,000 times higher than the Adams County median score of 11.<sup>4</sup> It represented 11% of releases of toxics in Adams County in 2020, despite being only 1 of 49 TRI facilities.<sup>3</sup> In the past 5 years, there have been 5 informal enforcement actions and 4 formal enforcement actions against it.<sup>5</sup> Between October 1, 2019 and September 30, 2022, Suncor was in "High Priority Violation" of the Clean Air Act in 12 out of 12 quarters, with the last 4 quarters of violations remaining unaddressed by the State.<sup>5</sup> Total releases into the air of toxics between 2018-2020 were nearly 150 tons.<sup>3</sup>

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<sup>1</sup> ConocoPhillips refinery sold for \$150M, Denver Business Journal (Apr. 15, 2003), <https://www.bizjournals.com/denver/stories/2003/04/14/daily13.html>

<sup>2</sup> Steve Raabe, Suncor purchases Valero oil refinery, Denver Post (June 1, 2005), <http://www.denverpost.com/2005/06/01/suncor-purchases-valero-oil-refinery/>

<sup>3</sup> <https://www.epa.gov/toxics-release-inventory-tri-program>

<sup>4</sup> <https://enviro.epa.gov/enviro/rsei.html?facid=80022CNCDN5801B>

<sup>5</sup> <https://echo.epa.gov/detailed-facility-report?fid=110032913024>

## II. PERMIT BACKGROUND

The last permit issued to Suncor was on October 1, 2006 with an expiration date of October 1, 2011. Suncor Energy Inc. timely applied for a permit renewal for Commerce City Refinery Plant 2, Facility ID 001-0003, located at 5800 Brighton Blvd, Commerce City, Colorado, on October 1, 2010. (Exhibit 2), but CDPHE did not take action on this application until 2021. The 2021 proposed renewal permit, noticed by CDPHE on February 17, 2021, incorporates approximately 40 modification applications submitted by Suncor, some of them significant, between March 2009 and February 2020. The initial public comment period for the renewal permit was 30 days, ending on March 19, 2021. Petitioners timely submitted public comment on March 19, 2021. See Exhibit 3. CDPHE granted a request for public hearing, holding hearings on May 1 and May 4, 2021. At the May 1 public hearing, they granted a request to extend the written public comment period, extending the period to May 11, 2021.<sup>6</sup> Petitioners timely submitted a supplemental written comment on May 11, 2021. See Exhibit 4. CDPHE responded to Petitioners' March 19, 2021 written public comment (*see* Exhibit 5) but failed to respond to Petitioners' supplemental May 11, 2021 comment.<sup>7</sup>

On March 25, 2022, EPA objected to portions of the permit and returned it to CDPHE for revisions. In Appendix B of their objection (*see* Exhibit 1), EPA raised concerns about environmental justice issues, and made strong recommendations, including a recommendation that CDPHE should henceforth include public comment opportunities for minor modifications, and should reconsider whether previous modifications were wrongly classified as minor instead of significant. The CDPHE has not yet answered the comments in Appendix B: EPA sent a letter on August 4, requesting them to reply within 90 days. See Exhibit 6.

After revising the permit, CDPHE returned it to the EPA on June 22, 2022. See Exhibit 7. Petitioners are timely filing this petition by the October 11 deadline listed on the EPA Region 8's website,<sup>8</sup> to petition the EPA to object to the proposed permit renewal and terminate the permit for cause. This date is within 60 days of the expiration of the EPA's 45-day review period, which expired on August 7, 2022.

On June 24, 2021, HB21-1189 passed into Colorado law, requiring Suncor to include a Fenceline Monitoring Plan in the Title V permit. The Plan was not complete at the time of the proposed permit and thus was not included, but is expected to be added later. After Suncor's initial proposal for the Fenceline Monitoring Plan, it was strengthened and finalized by CDPHE on August 18, 2022.<sup>9</sup> Suncor has since filed suit to contest the strengthened plan.<sup>10</sup>

<sup>6</sup> Information contained in CDPHE's "Response to General Public Comment," available at [https://drive.google.com/drive/folders/1vtdUPx\\_WesdX\\_QgqpILW2uBUaeOr85g3](https://drive.google.com/drive/folders/1vtdUPx_WesdX_QgqpILW2uBUaeOr85g3)

<sup>7</sup> All of the CDPHE's response to initial comment period can be found in a folder available at [https://drive.google.com/drive/folders/1vtdUPx\\_WesdX\\_QgqpILW2uBUaeOr85g3](https://drive.google.com/drive/folders/1vtdUPx_WesdX_QgqpILW2uBUaeOr85g3)

<sup>8</sup> <https://www.epa.gov/caa-permitting/epa-comments-clean-air-act-title-v-renewal-permit-suncor-energy-refinery-plant-2>

<sup>9</sup> <https://cdphe.colorado.gov/press-release/state-health-department-requires-changes-to-suncors-fenceline-monitoring-plan>

<sup>10</sup> <https://www.denverpost.com/2022/09/14/suncor-lawsuit-fenceline-monitoring-cdphe/>

### **III. PETITIONER**

350 Colorado is a state-based 501(c)3 nonprofit organization with a mission to work locally to build the global grassroots movement to solve the climate crisis, work for environmental justice, and transition to a sustainable future. We have over 20,000 members statewide working to address the root causes of the climate crisis and to promote solutions. We have members living and working within the area impacted by Suncor Energy's Commerce City Refinery.

### **IV. TITLE V PERMIT REQUIREMENTS**

To protect public health and the environment, the Clean Air Act prohibits stationary sources of air pollution from operating without or in violation of a valid Title V permit, which must include conditions sufficient to “assure compliance” with all applicable Clean Air Act requirements. 42 U.S.C. §§ 7661c(a), (c); 40 C.F.R. §§ 70.6(a)(1), (c)(1). “Applicable requirements” include all standards, emissions limits, and requirements of the Clean Air Act. 40 C.F.R. § 70.2. Congress intended for Title V to “substantially strengthen enforcement of the Clean Air Act” by “clarify[ing] and mak[ing] more readily enforceable a source’s pollution control requirements.” S. Rep. No. 101-228 at 347, 348 (1990), *as reprinted in* “A Legislative History of the Clean Air Act Amendments of 1990” (1993), at 8687, 8688. As EPA explained when promulgating its Title V regulations, a Title V permit should “enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” Operating Permit Program, Final Rule, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992). Among other things, a Title V permit must include compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1).

If Colorado submits a Title V permit that fails to include and assure compliance with all applicable CAA requirements, EPA must object to the issuance of the permit before the end of a 45-day review deadline. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). If EPA does not object to a Title V permit, “any person may petition the Administrator within 60 days after the expiration of the Administrator’s 45-day review period . . . to take such action.” 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The CAA provides that EPA “shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the” Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also N.Y. Pub. Interest Group v. Whitman*, 321 F.3d 316, 333 n.12 (2d Cir. 2003) (explaining that under Title V, “EPA’s duty to object to non-compliant permits is nondiscretionary”). Although petitioners bear the burden of demonstrating that a Title V Permit is deficient, once that showing has been made, “EPA has no leeway to withhold an objection.” *Sierra Club v. EPA*, 557 F.3d 401, 405 (6th Cir. 2009). EPA must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2).

## GROUNDS FOR OBJECTION

EPA must object to the permit because it does not comply with the CAA and Part 70. Petitioners respectfully request EPA to terminate the permit on the basis of the issues detailed below. The following sections contain references to the following contained in Exhibits: EPA's objection letter to CDPHE (Exhibit 1), 350 CO's March 19, 2021 comment (Exhibit 3), 350 CO's May 11, 2021 comment (Exhibit 4), CDPHE's response to 350 CO's March 19 comment (Exhibit 5), and EPA's letter of objection to the permit (Exhibit 1)

### **I. PROCEDURAL RULES NOT FOLLOWED BY CDPHE**

Petitioner's March 19, 2021 comment expressed concern that the facility was being allowed to operate under an expired permit. Exhibit 3. In its written response to Petitioner, CDPHE stated that "Although the Plant 2 renewal permit has not been issued and the existing permit lists an expiration date of October 1, 2011, since a timely and complete renewal application was submitted, under Colorado Regulations, specifically Regulation No. 3, Part C, Section VI.C, the permit does not expire until the renewal permit is issued. Therefore, the existing permit for Plant 2 is valid." Exhibit 5. CDPHE rightly points out that a timely and complete renewal application was submitted and therefore Suncor can legally continue to operate. This response, however, does not address the basic problem: despite an expiration date of October 1, 2011 on the 2006 permit, and a timely and complete renewal application submitted, the facility has been operating under a 2006 permit for over 15 years, and with 40 unanswered modification applications. This is not in compliance with part 70, which states that "...the program shall provide that the permitting authority take final action on each permit application (including a request for permit modification or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application." 40 C.F.R. § 70.7(a)(2). This is sufficient grounds for EPA to terminate the permit: "If the permitting authority fails to act in a timely way on a permit renewal, EPA may invoke its authority under section 505(e) of the Act to terminate or revoke and reissue the permit." 40 C.F.R. § 70.7(a)(2). Petitioners request the EPA terminate the permit, rather than revoke and reissue it. CDPHE's failure to take action on the permit renewal application for over 10 years suggests a serious problem with the permitting agency. That, in combination with the issues discussed below – ongoing significant violations of the CAA and environmental justice issues – show that continued violations with inadequate enforcement are likely and the harms to the surrounding communities will continue unabated unless the permit is terminated.

Additional procedural rules were not followed when CDPHE did not respond to Petitioner's supplemental written comment, dated and submitted May 11, 2021. (See previous footnote #7. Despite Petitioner's significant comment raising the issue of an outdated, illegal memo about modelling and ambient air analysis cited in the TRD, CDPHE, in its response to comments, failed to offer any response to Petitioners' concerns, in violation of Title V requirements (as reflected in 40 C.F.R. § 70.7(h)(6)). Thus, Petitioners cannot "explain how [CDPHE's] response to the comment is inadequate to address the issue raised in the public comment." See 40 C.F.R. § 70.12(a)(2)(vi).

CDPHE's obligation to respond to significant comments is rooted both in the Clean Air Act's regulatory requirements and core principles of administrative law. See 40 C.F.R. §

70.7(h)(6); 40 C.F.R § 70.8 (a)(1). The Act’s implementing regulations require a permitting authority to “respond in writing to all significant comments raised during the public participation process, including any such written comments submitted during the public comment period and any such comments raised during any public hearing on the permit.” 40 C.F.R. § 70.7(h)(6). *See also: Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (“[A]n agency must consider and respond to significant comments received during the period for public comment.”)

EPA has clarified what types of comments qualify as significant for Title V purposes and thus require a written response. Significant comments include but are not limited to those raising issues concerning a permitting authority’s “adequate monitoring and related recordkeeping and reporting requirements.” *See* 85 Fed. Reg. at 6436. Petitioner’s comment regarding a guidance memo on modelling requirements, which was alleged as illegal by whistleblowers, reported to the EPA, and then rescinded by CDPHE but still included in the proposed permit should qualify as a significant comment to which CDPHE was required to respond.

## **II. ENVIRONMENTAL JUSTICE CONCERNS NOT ADEQUATELY ADDRESSED**

Petitioner raised concerns about environmental justice in its March 19, 2021 comment. Exhibit 3. CDPHE acknowledged in its response (Exhibit 5) that “the Division acknowledges that Suncor is located in an area that meets the Environmental Justice Act’s statutory definition of Disproportionately Impacted Community because of its demographics” and that “the communities around Suncor are disproportionately impacted by multiple sources of industrial and transportation-related air pollution.” The CDPHE goes on to state that it is committed to advancing environmental justice and gives a detailed account of how it has changed its process to increase procedural access for disproportionately impacted communities. EPA, in Appendix B of its March 25, 2022 objection to the initial proposed permit, also acknowledges the environmental concerns and the outreach CDPHE has done. Exhibit 1. EPA notes that for better access, the public should have the opportunity to comment on minor modification applications and that CDPHE should change this in the future. EPA also recommends that CDPHE do further analysis on the minor modifications to ascertain whether that status is correct, or whether any of them are actually significant modifications (*Id.*).

Petitioner finds that CDPHE’s response to their public comment is inadequate to the spirit of 350CO’s concerns, as detailed below. CDPHE’s actions in response to EPA’s letter also falls short, as the agency has not done any further analysis on the minor modification applications, nor changed the way it conducts minor modification applications with respect to public comment.

350CO acknowledges that CDPHE has improved procedural access for disproportionately impacted communities, and that it continues to refine this important process. 350CO also acknowledges that CDPHE added additional reporting requirements into the draft permit in order to address environmental justice concerns. However, changes that address substantive rights of the people to live free from harmful pollution are lacking. Having a voice in policymaking is meaningless if the voice is not heeded. The permit does not decrease pollution in the surrounding communities. It doesn’t even prevent an increase of pollution, as it raises

emissions levels overall. The Legislative Declaration in Colorado’s Environmental Justice Act, HB21-1266, states that “The general assembly recognizes that the key to addressing these historic wrongs is to rapidly reduce pollution in disproportionately impacted communities, including from electric power, industrial, and manufacturing.” HB21-1266 created statute 24-4-109, which states “The goal of outreach to and engagement of disproportionately impacted communities is to build trust and transparency, provide meaningful opportunities to influence public policy, and *modify proposed state action in response to received public input to decrease environmental burdens or increase environmental benefits for each disproportionately impacted community*” (*emphasis added*). C.R.S. § 24-4-109.

CDPHE states in its response to Petitioner’s comments about the pollution-related health impacts on the surrounding communities, “These comments do not identify a specific issue with the draft permit. Thus the Division is not able to provide a specific response.” This response misses the point of 350CO’s comment, which is that since the surrounding community is being harmed (actually poisoned) by Suncor’s pollution, there is not a specific issue with the draft permit – the issue is the entire permit, which will increase pollution in a disproportionately impacted community. As Petitioner requested in its public comment, the proposed permit should be denied. Petitioner now respectfully requests EPA to terminate the permit.

As discussed above, Suncor has recently filed suit against the CDPHE for the Fenceline Monitoring Plan. CDPHE had strengthened the plan that Suncor had submitted, to make it more protective of the surrounding communities. Suncor’s suit to bar this strengthened plan is a further demonstration of its operating principles: putting profit over protection of the community.

### **III. RENEWING THE PERMIT WILL NOT MEET COLORADO LAW AND CLEAN AIR ACT REQUIREMENTS**

Petitioner stated in their March 19, 2021 comment, “We urge you to use the power granted to you in the Clean Air Act to terminate Suncor Energy Inc.’s Commerce City Oil Refinery’s Title V operating permit for cause (42 U.S.C. § 7661a(b)(5)(D)).” Exhibit 3. In response, CDPHE cites C.R.S. § 25-7-114.5(7)(a):

*Any permit required pursuant to this article shall be granted by the division or the commission, as the case may be, if it finds that: (I) The source or activity will meet all applicable emission control regulations and regulations for the control of hazardous air pollutants; (II) The source or activity will meet the requirements of part 2 or 3 of this article, if applicable; (III) For construction permits, the source or activity will meet any applicable ambient air quality standards and all applicable regulations; (III.5) For renewable operating permits, the source or activity will meet all applicable regulations; and (IV) For renewable operating permits, the United States environmental protection agency has not made a timely objection to issuance of such permit pursuant to the federal act. Exhibit 5.*

CDPHE makes the argument that it has no choice but to grant the permit (unless EPA objects to it) because it has determined that Suncor meets the requirement in subsections (I), (II), (III), and (III.5). Petitioner finds the CDPHE’s determination that Suncor “will” meet the

requirement in subsection (I) and (III.5) to be flawed. Suncor has demonstrated that it most likely will not meet requirements. As stated above, Suncor was in “High Priority Violation” of the Clean Air Act in 12 out of 12 quarters. CDPHE’s determination that Suncor will meet the requirement of subsection (III) is not based on complete information. EPA states in its objection to the initial proposed permit,

*The record supporting a minor NSR permitting action must include the preliminary analysis addressing the elements described in section III.B.5; must state the Division’s determinations as to compliance with NAAQS, applicable regulations, and other required elements; and must contain sufficient information to support those determinations. In some cases, we have noted concerns with the sufficiency of the supporting record. These concerns are exacerbated by the fact that as a general practice the state does not provide the record for the minor NSR permit determinations to EPA, but instead provides only the minor NSR construction permit application and (where applicable) the title V minor modification used to process the application. Further, it appears that in some instances the state rejected the use of modeling in assessing permitting actions without sufficient justification. Exhibit 1.*

CDPHE cannot show that Suncor “will” meet the requirements in C.R.S. § 25-7-114.5(7)(a). It is not bound to grant the permit renewal. In fact, with Suncor so often in violation of its permit, CDPHE is bound by the Clean Air Act to prevent Suncor from operating. 42 U.S.C. § 7661a. It has authority to terminate the permit. The CAA stipulates “a requirement that the permitting authority have adequate authority to terminate, modify, or revoke and reissue permits for cause.” 42 U.S.C. § 7661a(b)(5)(D). The permit does indeed contain this authority, but CDPHE has failed to use this authority. Petitioners call upon EPA to use its authority to terminate the permit due to the high likelihood Suncor will continue its pattern of violation.

## CONCLUSION

CDPHE failed to take final action within 18 months of the timely and complete permit renewal application submitted by Suncor on October 1, 2010. EPA is authorized to terminate the permit for this reason alone.

CDPHE failed to respond to 350 Colorado’s substantial comment concerning the inclusion in the permit of an illegal memo.

Suncor has an egregious history of violations, being in highly significant violation of the Clean Air Act for 12 of the last 12 quarters, and CDPHE has failed to prohibit Suncor from operating in violation of its permit.

Suncor is perpetuating and increasing pollution within an environmental justice community, and CDPHE, despite improvements in outreach to this community, has failed to take action to decrease pollution from Suncor or even to stop Suncor from increasing pollution.



For all these reasons, Petitioner respectfully requests EPA to terminate Suncor Energy Inc.'s Title V permit to pollute.

Respectfully submitted this 11th day of October, 2022 on behalf of 350 Colorado.

/s/ Heidi Leathwood  
Heidi Leathwood, Climate Policy Analyst  
350 Colorado  
P.O Box 607  
Boulder, CO 80306  
(720)839-2549  
heidi@350Colorado.org

/s/ Micah Parkin  
Micah Parkin, Executive Director  
350 Colorado  
P.O. Box 607  
Boulder, CO 80306  
(720)551-7041  
Micah@350Colorado.org

Enclosures: 350 Colorado Exhibits in separate document

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4. p. 100-101: 350 Colorado's supplemental written public comment, dated May 11, 2021
5. p. 102-117: CDPHE's response to 350CO's March 19, 2021 public comment, dated February 8, 2022
6. p. 118-119: EPA's letter to CDPHE requesting a response to Appendix B of their letter of objection, dated August 4, 2022
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