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<tr><td>DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO

Adams County Justice Center
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Brighton, CO 80601</td><td rowspan="2">DATE FILED: April 15, 2024 5:56 PM
FILING ID: 4018F5AE9D97D
CASE NUMBER: 2024CV30592

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<tr><td>Plaintiff: Suncor Energy (U.S.A.) Inc.

v.

Defendants: Nicole Rowan, in her official capacity as the Division Director of the Water Quality Control Division of the Colorado Department of Public Health and Environment; and the Water Quality Control Division of the Colorado Department of Public Health and Environment</td></tr>
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Division/Courtroom:</td></tr>
<tr><td colspan="2">COMPLAINT FOR JUDICIAL REVIEW OF AGENCY ACTION AND PETITION FOR STAY</td></tr>
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Plaintiff, Suncor Energy (U.S.A.) Inc. ("Suncor") by and through its attorneys, hereby submits this Complaint for Judicial Review of Agency Action and Petition for Stay.

INTRODUCTION

1. Suncor owns and operates the Commerce City Refinery ("Refinery"). The Refinery is comprised of a petroleum refinery located at 5801 Brighton Boulevard, Commerce City ("Plant 1"), a petroleum refinery located 5800 Brighton Boulevard, Commerce City ("Plant 2"), and the asphalt plant located approximately at 3875 E. 56th Avenue, Commerce City ("Plant 3"). In addition, Suncor owns a maintenance facility known as the Nelson Property, located north of Highway 270. The Refinery processes approximately 98,000 barrels per day, which provides fuel and petroleum products critical to Coloradans.

2. The Refinery operates pursuant to a Colorado Discharge Permit System ("CDPS") permit, which regulates point source discharges into state surface waterbodies.

3. Defendant, the Colorado Water Quality Control Division ("Division") of the Colorado Department of Public Health and Environment ("CDPHE") is authorized to issue CDPS permits, and must do so consistent with the Colorado Water Quality Control Act ("CWQCA"), C.R.S. § 25-8-101 *et seq*., and its associated regulations.

4. On November 12, 2021, the Division published a draft permit and supporting fact sheet and water quality assessment for the Refinery (collectively, "Draft Permit") for public comment, which included numerous new terms and conditions. Suncor submitted extensive, detailed comments and supporting exhibits to the Draft Permit on February 17, 2022, April 14, 2022, and May 26, 2022. Suncor also provided certain information the Division requested after the public comment period ended.

5. On March 6, 2024, the Division issued a final renewal permit ("Renewal Permit") for the Refinery (attached hereto as **Exhibit 1**), together with the final fact sheet ("Final Fact Sheet") and final water quality assessment ("Final WQA") (attached hereto as **Exhibit 2**), with an effective date of May 1, 2024.

6. Suncor supports many of terms and conditions in the Renewal Permit that are reasoned, fact-driven requirements designed to "achieve the maximum practical

degree of water quality in the waters of the state consistent with the welfare of the state" as envisioned by the CWQCA. C.R.S. § 25-8-102(1).

7. However, the Renewal Permit contains numerous terms and conditions that are arbitrary, capricious, unlawful, unsupported by the record, and unnecessary to protect water quality, including permit conditions that were not in the Draft Permit and had not been addressed in public comments.

8. For example, when issuing the Renewal Permit, the Division included terms and conditions that required Suncor to: (A) reduce the salt content of its effluent at a cost of hundreds of millions of dollars, with significant collateral negative environmental consequences, even though the river downstream of Suncor's discharge meets the applicable standards; (B) meet an arsenic standard that has been stayed throughout the state and which the Division has sought to change; (C) conduct groundwater studies or expend significant costs to line the Burlington Ditch even though decades of evidence have demonstrated there is no migration of groundwater off-site into the Burlington Ditch; (D) meet terms and conditions applicable to process water outfalls at outfalls that discharge stormwater runoff; (E) monitor and meet effluent limits at internal points in Suncor's stormwater management system in contravention of the applicable law; (F) monitor and meet effluent limits that do not apply to stormwater outfalls; (G) monitor at a frequency that is unreasonable and unnecessary to protect water quality; (H) continuously reevaluate the terms and conditions of the Renewal Permit in contravention of the Division's obligation to establish clear permit terms at the time of permitting; (I) implement a public notice requirement that conflicts with the effective public communication process already in place that was developed after extensive input from CDPHE and community members; (J) use an incorrect sampling; and (K) fulfill numerous other conditions that are unreasonable, costly, contrary to law and the Division's own guidance, and lack public benefit.

9. Suncor filed a timely Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay ("Request for Hearing and Stay") with the Division on March 29, 2024, attached hereto as **Exhibit 3**, challenging these and other terms and conditions in the Renewal Permit and requesting an adjudicatory hearing and partial stay of the Renewal Permit pursuant to the CWQCA and the State Administrative Procedure Act ("State APA").

10. On April 8, 2024, the Division issued an Order Regarding Suncor Energy (U.S.A.) Inc.'s Notice of Appeal Request for Adjudicatory Hearing and Request for Stay ("Hearing Order") (attached hereto as **Exhibit 4)**.

11. The Division's Hearing Order granted a hearing on the contested terms and conditions summarized in Paragraphs 61-200. Hearing Order, ¶ 21.

12. However, the Division arbitrarily and unlawfully included findings related to the scope of the hearing based on a purported requirement that is not found in the CWQCA or the implementing regulations of Water Quality Control Commission ("Commission") and determinations that are unsupported by the record. Hearing Order, ¶ 26.

13. In its Hearing Order, the Division also erroneously denied all but a part of one of Suncor's requests for stays of the permit conditions, despite Suncor providing extensive supporting evidence demonstrating it was entitled to the requested stays pursuant to the regulations. Hearing Order, ¶¶ 30-113.

14. Because the actions of the Division are unlawful, arbitrary, capricious, unsupported by the record, and an abuse of discretion, Suncor seeks: (1) judicial review of the Division's unlawful restriction of the scope the adjudicatory hearing of the contested terms and conditions in the Renewal Permit under C.R.S. § 24-4-106 and C.R.S. § 25-8-404, or alternatively, declaratory judgment regarding the proper scope of the hearing pursuant to C.R.C.P. 57; (2) a judicial stay of certain of the contested terms and conditions of the Renewal Permit set forth in Paragraph 215 under C.R.S. § 25-8-404(4); and (3) judicial review of the Division's denial of the administrative stay under C.R.S. § 24-4-106 and C.R.S. § 25-8-404.

PARTIES

15. Plaintiff Suncor Energy (U.S.A.) Inc. is a Delaware Corporation authorized to do business in Colorado, and is in good standing.

16. Suncor owns and operates the Refinery, which is located in Commerce City, Colorado.

17. The permitted discharge points and the Refinery are located in Adams County, Colorado.

18. Suncor, as the permittee, is adversely affected by terms and conditions of the Renewal Permit, and has standing to make the claims asserted in this Complaint.

19. Defendant Nicole Rowan is the Division Director of the Division, which has its principal place of business at 4300 Cherry Creek South Drive, Denver, Colorado, 80246. The Division is a state agency within CDPHE.

20. Defendant Water Quality Control Division has its principal place of business at 4300 Cherry Creek South Drive, Denver, Colorado, 80246. The Division is a state agency within the CDPHE.

JURISDICTION AND VENUE

21. Judicial review of final agency action is available under the CWQCA, C.R.S. § 25-8-404, and the State APA, C.R.S. § 24-4-106.

22. Any person adversely affected or aggrieved by a final order or determination of the Division may commence an action for judicial review consistent with the State APA within 30 days after the issuance of the order or determination. C.R.S. § 25-8-404(3).

23. The time allowed for seeking judicial review is stayed and extended while any application for administrative hearing or reconsideration is pending with the Division. C.R.S. § 25-8-404(3).

24. Suncor filed its Request for Hearing and Stay with the Division on March 29, 2024, and the Division issued its Hearing Order on April 8, 2024, thus this Complaint was timely filed.

25. The Division's Hearing Order, including findings about the scope of the hearing and denying Suncor's request for an administrative stay of the contested terms and conditions in the Renewal Permit, is a final agency action subject to *de novo* review pursuant to C.R.S. § 25-8-404. C.R.S. § 25-8-406; *see also*, 5 CCR 1002-61 ("Regulation 61"), § 61.7(1)(f).

26. Section § 24-4-106(4) of the State APA provides that any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court.

27. Section § 25-8-404(4)(a) provides that any person against whom the Division has made an adverse determination may petition the district court in the district where the pollution source is located for a stay of the effectiveness of such order or determination.

28. This Court, as a court of general jurisdiction under the Constitution and the statutes of the State of Colorado, has jurisdiction over the claims stated in this Complaint.

29. Venue is proper in Adams County District Court under the State APA, C.R.S. § 24-4-106(4), the CWQCA, C.R.S. § 25-8-404(2), and pursuant to C.R.C.P. 98, because the Refinery and the outfalls are located in Adams County.

FACTUAL BACKGROUND

30. Suncor discharges to Sand Creek Segment COSPUS16i ("Sand Creek"), tributary to the South Platte River, pursuant to its CDPS discharge permit via several authorized discharge points known as "outfalls."

31. Suncor discharges treated process water from its wastewater treatment system combined with treated groundwater from its groundwater treatment system to Sand Creek in via Outfall 020 in accordance with its permit.

32. In addition, Suncor has several permitted stormwater outfalls which discharge runoff from the Refinery plant areas (Outfalls 004, 023, 024, 025, 026, 027, 028) and the separate Nelson Property maintenance facility (Outfalls 021 and 022). Outfalls 004, 023, and 026 are rarely used, as the stormwater runoff is typically routed to Suncor's wastewater treatment system before being discharged to Sand Creek.

33. Prior to the Renewal Permit, Suncor had a sperate stormwater permit (COS000009) and process water permit (CO0001147) for the Refinery, which were effective on November 1, 2012 (collectively, the "Prior Permits").

34. Suncor timely applied for renewal of its Prior Permits.

35. The Prior Permits were administratively extended by the Division on October 31, 2017, because Suncor had timely applied for a renewal discharge permit for the Refinery and the Division did not issue renewal permits before the Prior Permits expired. Regulation 61, § 61.8(3)(o).

36. On November 12, 2021, the Division published the Draft Permit for public comment.

37. Suncor submitted extensive comments and supporting exhibits to the Draft Permit on February 17, 2022, April 14, 2022, and May 26, 2022. These comments identified numerous concerns with the terms and conditions in the Draft Permit documents, including, but not limited to all of the issues identified above in Paragraph 8, except those related to the inclusion of the internal monitoring points and the effluent evaluation requirement, which were included for the first time in the Renewal Permit.

38. On November 3, 2022, after the public comment period ended, the Division issued a Request for Information ("RFI") to Suncor requesting additional information about the treatment needs, projected costs, and timeframes to meet some of the new proposed effluent limits in the Draft Permit, which Suncor had identified in its permit comments. Suncor provided responses on December 16, 2022 and February 6, 2023, which detailed the advanced water treatment technologies that are projected to cost hundreds of millions of dollars that would likely be required to meet the Division's proposed limits and the complexities of trying to site this treatment at the Refinery.

39. On March 6, 2024, the Division issued the Renewal Permit together with the Final Fact Sheet and Final WQA. Although the Division made some changes to the permit in response to Suncor's comments, the Renewal Permit includes terms and conditions which Suncor challenged in its permit comments, as well as new terms and conditions that were not included in the Draft Permit and which Suncor and other stakeholders were unable to review and provide feedback in contravention of the requirements of the applicable regulations.

40. On March 29, 2024, Suncor filed with the Division its Request for Hearing and Stay, challenging several terms and conditions in the Renewal Permit ("Contested Terms and Conditions"). *See* Request for Hearing and Stay, Section IV.

41. As recognized by the Division, Suncor's sixty-page Request for Hearing and Stay set forth all the information required by the regulations for requests for an adjudicatory hearing, Hearing Order, ¶¶ 18-21, and extensively detailed the legal and factual arguments in support of its request for hearing on the Contested Terms and Conditions, summarized in Paragraphs 61-200 below.

42. The issues of law and fact raised in the Request for Hearing and Stay, except those for which Suncor and other stakeholders were denied an opportunity to review and provide feedback because they were included for the first time in the Renewal Permit, were all raised in extensive comments to the Draft Permit or in Suncor's responses to the Division's RFI.

43. Suncor's Request for Hearing and Stay included a demonstration that each issued identified in the Request was identified during the public comment period, including public hearings, except for those issues that were not reasonably ascertainable during the public comment period because they related to terms and conditions that were not included in the Draft Permit documents.

44. The Request for Hearing and Stay also included requests to administratively stay a number of the Contested Terms and Conditions during the pendency of the litigation challenging the Renewal Permit. *See* Request for Hearing and Stay, Section IV.

45. Pursuant to the regulations, the Division is required to grant an administrative stay "if it reasonably appears that serious harm would otherwise result and . . . [a refusal to grant the stay] would not provide corresponding public benefit." Regulation 61, § 61.7(1)(c). During an administrative stay, the corresponding terms and conditions of the prior permit remain effective and enforceable. C.R.S. § 25-8-406; Regulation 61, § 61.7(1)(e).

46. Suncor's Request for Hearing and Stay thoroughly explained the lack of public benefit that would result from implementing the challenged conditions during the resolution of the underlying appeal and the serious harm to Suncor that would result if the conditions were not stayed, which entitled Suncor to an administrative stay pursuant to the applicable regulations.

47. Suncor's Request for Hearing and Stay was also supported by a water quality evaluation, an engineering report regarding the timing and cost of constructing new water treatment measures, and detailed affidavits from Suncor employees, Kurt Manteufel, process engineering specialist, Elliott Trzcinski, Senior Environmental Advisor, and Eric Marler, Regulatory Specialist.

48. On April 8, 2024, the Division issued its Hearing Order.

49. In the Hearing Order, the Division stated that it granted Suncor's request for a hearing on the Contested Terms and Conditions. Hearing Order, ¶ 21.

50. However, the Division unlawfully attempted to restrict Suncor's ability to raise issues of law and fact at the hearing that were identified in detail in Suncor's Request for Hearing and Stay and identified during public comment period or in Suncor's responses to the Division's RFI.

51. The Division admitted that issues related to conditions that were not found in the Draft Permit documents were not reasonably ascertainable during the public comment period. Hearing Order, ¶ 25. However, the Division arbitrarily and unlawfully found that "Suncor failed to demonstrate that all other issues raised in its Request for Hearing [and Stay] were properly identified during the public comment period." Hearing Order, ¶ 26.

52. In fact, Suncor's Request for Hearing and Stay demonstrated that all other issues were identified during the public comment period. *See* Request for Hearing and Stay, pp. 17-18.

53. In addition, the Division asserted that Suncor did not "demonstrate where 'each' issue of law and fact identified in its Request for Hearing [and Stay] was identified during the public comment period." Hearing Order, ¶ 26.

54. A requirement to list the specific page numbers where each issue of law or fact was identified is found nowhere in the CWQCA or Commission Regulations. The Division therefore acted inconsistently with the Commission Regulations.

55. The Division also disregarded the record when it ignored the issues identified by Suncor in public comment.

56. The Commission Regulations limit an adjudicatory hearing to "issues of law or fact identified by the applicant or other person during the public comment period (including any public hearing) or not reasonably ascertainable from the draft permit." Regulation 61, § 61.7(c). The Commission Regulations do not limit an adjudicatory hearing based on whether the hearing requestor identified where the issues of law or fact were identified during public comment.

57. Based on its erroneous interpretation of the regulatory requirements, the Division concluded that "some issues of fact and law identified in Suncor's Request for Hearing [and Stay] might be prohibited from being 'identified at the adjudicatory hearing.'" Hearing Order, ¶ 26.

58. The Division also denied all but part of one of Suncor's requests for stay based on incorrect findings that Suncor's detailed requests for stay, supported by affidavits, an engineering study, and a water quality assessment, were insufficient proof of a reasonable appearance of harm to support Suncor's request.

59. The Division ignored the extensive evidence and arguments offered by Suncor. Short of suffering the harms detailed by Suncor, it is unclear what evidence would be sufficient to satisfy the requirements the Division reads into the regulation. The Division also disregarded the legal standards governing a ruling on a request for stay.

SUMMARY OF CONTESTED TERMS AND CONDITIONS OF THE RENEWAL PERMIT AND PETITIONS FOR STAY

60. The following paragraphs summarize the Contested Terms and Conditions challenged by Suncor, as well as its petitions for stay.

A. Inclusion of chloride and EC/SAR effluent limits

61. The Renewal Permit includes a chloride effluent limit of 250 mg/L beginning November 1, 2030, at Outfall 020A, and effective immediately at Outfalls 023A, 004A, and 026A. The Renewal Permit also includes an electrical conductivity ("EC") limit of 1.8 dS/m and a sodium adsorption ratio ("SAR") limit capped at 9 effective November 1, 2030 at Outfall 020A, effective immediately at Outfalls 023A, and

effective May 1, 2025, at Outfalls 004A and 026A.These permit conditions are collectively referred to herein as the "Salt Reduction Measures."

62. Chlorides are salts and EC/SAR is a method of measuring salt content in water used to protect irrigated agricultural.

63. The Division can only include water quality-based effluent limitations in a permit for parameters that the "Division determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or measurably contribute to an excursion above any water quality standard." Regulation 61, § 61.8(2)(b)(i)(A).

64. The Division erred in finding a "reasonable potential" for Suncor's effluent to cause or contribute to a violation of applicable standards.

65. Suncor discharges to Sand Creek, which does not have a chloride standard or an irrigated agriculture use, therefore, there was no basis to include the Salt Reduction Measures in the Renewal Permit.

66. Instead, the Division incorrectly included chloride and EC/SAR limits in the Renewal Permit based on its flawed consideration of the downstream segment of the South Platte River.

67. However, even if it was appropriate for the Division to consider the South Platte River segment when writing Suncor's permit (which it was not), Suncor does not have the reasonable potential to cause or contribute to exceedance of the salt standards in the South Platte.

68. Suncor has been discharging water under its previous permits for decades. Ample data from the South Platte downstream of the confluence with Sand Creek show that the chloride standard is attained downstream of Sand Creek. It also shows that levels of EC and SAR in the South Platte do not impair the beneficial uses and are not toxic to irrigated crops or other plants.

69. Therefore, there was no basis to include chloride and EC/SAR effluent limits in the Renewal Permit. And even if there were, there was no basis to set them at levels lower than those of Suncor's historical effluent levels, which have been

demonstrated to not cause or contribute to an exceedance of the chloride standard that is consistently attained or impair the irrigated agriculture uses downstream.

70. In addition, the Division failed to properly consider available dilution for chloride, failed to allocate any assimilative capacity to Suncor, failed to properly allocate waste loads among affected permittees, failed to follow the procedure required by the regulations and applicable EPA guidance for allocating waste loads, failed to property evaluate in-stream data, relied on an unpromulgated policy for setting EC/SAR limits, and failed to follow its own policy.

71. To reduce salt to the level required by the Renewal Permit will likely require Suncor to install an advanced water treatment technology, called reverse osmosis ("RO") treatment, at an estimated capital cost of $191 to $286.5 million and estimated operation and maintenance costs of several million dollars *each year* in order to meet stringent limits for salt in the Renewal Permit even though the chloride standard is already attained and the irrigated agricultural uses are already adequately protected in the South Platte.

72. In addition, RO treatment has significant negative collateral environmental impacts, including increased energy demands and solid waste streams that outweigh any benefit from reducing the salt content in Suncor's discharge to the levels required by the Renewal Permit.

73. The Division failed to consider the economic reasonableness of its action and the result does not have a reasonable relationship with the economic, environmental, and energy impacts, and is therefore inconsistent with the CWQCA. *See* C.R.S. § 25-8-102.

74. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the Salt Reduction Measures were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

75. Suncor requested a stay of the Salt Reduction Measures in the Renewal Permit and demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

76. Immediate implementation of the incorrect Salt Reduction Measures while the underlying appeal is pending would confer no public benefit because the salt content in the South Platte already meets the applicable standard for chloride and agricultural uses are adequately protected. Therefore, the public and is fully protected without any further salt reduction by Suncor.

77. Denial of the stay will cause serious harm to Suncor. The only known technology to reduce salt content to the levels required by the Renewal Permit is RO. Because the Division compressed the schedule to implement this treatment, the cost to construct the unnecessary RO plant projected to cost hundreds of millions of dollars will begin in the near term, far sooner than Suncor expected, and long before any appeal would reasonably be resolved.

78. To support RO, Suncor must first, and immediately begin, segregating wastewater streams. A process that would be unnecessary absent these permit conditions.

79. Denial of stay would therefore force significant, unnecessary capital costs on Suncor beginning in 2024.

80. A denial of a stay would also limit Suncor's options for treating multiple per- and polyfluoroalkyl substances ("PFAS") at its wastewater treatment system.

81. Suncor has not challenged the PFAS effluent limits at Outfall 020 in the Renewal Permit.

82. In its Hearing Order, the Division falsely claimed Suncor had not quantified the significant costs that Suncor would incur in the near term. The Division ignored the engineering report and additional information Suncor provided to the Division's own RFI.

83. An exact dollar figure and timing is not necessary to show a reasonable appearance that the costs within the first year to begin implementing a treatment system that will cost hundreds of millions of dollars constitutes significant harm.

B. Inclusion of arsenic limits at Outfalls 020 and 023

84. The Renewal Permit includes an interim total recoverable arsenic limit and final limits of 0.02 μg/L effective November 1, 2030, at Outfall 020 and May 1, 2025, for Outfall 023. The inclusion of these effluent limits was arbitrary, capricious, not supported by substantial evidence, and contrary to law.

85. There is no reasonable potential for Suncor's discharge to cause or contribute to an exceedance of the arsenic standard. Sand Creek represents only a small fraction of the flow of the South Platte downstream of the confluence, and the Division failed to correctly consider the hydrology when considering the need for limits in Suncor's permit.

86. The arsenic standard in the South Platte on which the final of 0.02 μg/L limit is based is currently subject to a temporary modification, which the Division has proposed to extend until the Commission can adopt a new, appropriate state-wide arsenic standard.

87. The Division has recently recognized that there is substantial uncertainty about the appropriate water quality standard for arsenic, that the current standard of 0.02 μg/L is broadly infeasible to meet, and that permittees should be subject to feasible measures to control arsenic while the Division continues to determine safe levels of arsenic in Colorado waters.

88. Yet, the Division included as a limit the very standard it has recognized is infeasible and has proposed to change, and even made that limit effective in as little as one year at Suncor's outfall. Because the Division acknowledges that other dischargers should not be required to commit significant capital resources to meeting the current standard of 0.02 μg/L, it was error to require Suncor alone to do so.

89. As with chloride and EC/SAR, meeting the final arsenic limit will likely require the construction of RO treatment with significant impacts to the environment and a cost of hundreds of millions of dollars.

90. The Division failed to consider the economic reasonableness of its action and the result does not have a reasonable relationship with the resulting economic, environmental, and energy impacts, and is therefore inconsistent with the CWQCA. *See* C.R.S. § 25-8-102.

91. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the arsenic effluent limits in the Renewal Permit were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

92. Suncor requested a stay of the arsenic limits at 0.02 μg/L at Outfalls 020A and 023A and demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

93. The Division has recognized that there is no need to immediately implement arsenic limits of 0.02 μg/L, and has adopted state-wide modifications of this standard, which it has recently proposed to extend. Thus, a stay of this standard has been effectively granted to every discharger in the state except Suncor.

94. There is no public benefit to requiring Suncor alone to comply with a standard that has already been stayed for other dischargers, before Suncor's appeal can even be heard.

95. A denial of a stay would cause serious harm to Suncor. Suncor has preliminarily determined that meeting the arsenic standards in the Renewal Permit will, like the treatment required to meet chloride and EC/SAR, require the use of RO technology. It is simply not feasible to construct an RO treatment system in the 1 year allowed to meet this standard at Outfall 023.

96. Further, the economic and negative environmental cost of this technology is unreasonable in light of the slight benefit to be gained.

C. <u>Burlington Ditch study or liner</u>

97. The Renewal Permit requires that within two years of the effective date of the permit, Suncor must either: (a) submit a certification that the Burlington Ditch, which Suncor does not own and is not on Suncor's property, is now fully lined; or (b) submit a study to the Division that will demonstrate that there is currently no seepage from groundwater on the Suncor site into the Burlington Ditch and has been no such seepage in the last ten years.

98. Under the Clean Water Act and the CWQCA, the Division only has jurisdiction to regulate point source discharges into state surface waters and groundwater discharges that are the functional equivalent of a direct discharge. C.R.S. § 25-8-202(7)(b); *County Of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020); *Stone v. High Mountain Mining Co.*, 89 F.4th 1246 (10th Cir. 2024).

99. Over the course of two decades, Suncor has conducted exhaustive studies and years of groundwater monitoring that have all demonstrated that there is no point source discharge to the Burlington Ditch.

100. The Farmers Reservoir and Irrigation Company ("FRICO"), which owns an interest in the ditch, has conducted its own study, which also showed that there are no point source discharges to the ditch from the Suncor site.

101. Suncor provided all of this evidence with its comments to the Draft Permit, however, it was ignored by the Division when it issued the Renewal Permit.

102. Thus, because there is no evidence of point source discharges or the functional equivalent of point source discharges, the Division has no authority to include the Burlington Ditch study or alternatively require Suncor to line the Burlington Ditch.

103. The CWQCA limits the Division's authority to evaluating and issuing permits or taking enforcement action against unpermitted discharges in violation of the act. C.R.S. §§ 25-8-503(1); 25-8-601(1). The inclusion of this term and condition in the Renewal Permit impermissibly attempts to shift the burden of proof to Suncor to prove there is not a point source discharge into the Burlington Ditch.

104. Even if there was a point source discharge from the Suncor site to the Burlington Ditch (which there is not), the CWQCA does not authorize the Division to require a specific remedial action such as lining the ditch on another's property.

105. Moreover, under well-settled Colorado law, Suncor does not have authority to unilaterally alter a ditch and no legal right to demand the ditch owner(s) and other property owners cooperate and allow access to the Ditch. *Roaring Fork Club, L.P. v. St. Jude's Company*, 36 P.3d 1229 (Colo. 2001).

106. The Hazardous Materials Waste Management Division ("HMWMD") of the CDPHE has exclusive jurisdiction to regulate groundwater at the Suncor site. The CWQCA states that while the Division "shall be solely responsible for the issuance and enforcement of permits authorizing point source discharges to surface waters of the state," neither the Commission nor Division "shall require permits for, or otherwise regulate, other activities subject to the jurisdiction" of the HMWMD, except in the limited circumstances outlined in the statute, which do not apply in this case. See C.R.S. § 25-8 202(7)(b).

107. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the Burlington Ditch condition were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

108. Suncor requested a stay of the requirement to perform a study demonstrating no discharge to the Burlington Ditch, or, in the alternative, the requirement to line the Ditch, and demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if these requirements were not stayed and that a refusal would not provide a corresponding public benefit.

109. The Division already has more than sufficient information, in the form of studies, including a study from FRICO, and groundwater monitoring, which all demonstrate that groundwater from Suncor's site is not impacting the Burlington Ditch.

110. Further, Suncor has already entered agreements with HMWMD for a process for resolving issues related to groundwater contamination, including managing risks for such contamination going offsite, including ongoing groundwater monitoring. Therefore, there is no public benefit from these additional permit requirements.

111. Conversely, Suncor would suffer serious harm if these conditions were allowed to go into effect.

112. The study required by the Renewal Permit unlawfully shifts the burden to Suncor to establish a negative, i.e, that there is no point-source discharge — a fact that has already been established with decades of evidence.

113. Given that Suncor only has two years to comply with these conditions, it will be required to devote substantial resources to one of these activities before the underlying appeal is resolved.

114. Furthermore, lining the Burlington Ditch or completing the study include steps that are outside of Suncor's control, and it is unlikely that it would be able to complete either of the requirements within the time allowed by the Renewal Permit.

115. Suncor is also prohibited from unilaterally lining the Burlington Ditch by well settled Colorado law. These types of projects require extensive engineering, planning, and coordination with the ditch owners, and could require court authorization. This process, if Suncor is even allowed to make such a modification, will take much longer than the two years allowed by the Renewal Permit.

D. <u>Conversion of Outfalls 004, 023, and 026 to process water outfalls</u>

116. The Renewal Permit incorrectly converted stormwater Outfalls 004, 023, and 026 from stormwater to process water outfalls and applied numeric effluent limits, monitoring requirements, WET testing requirements and other terms and conditions applicable to process water outfalls that were not in Suncor's previous stormwater permit (COS000009) even though these outfalls discharge stormwater and not process water.

117. The Division incorrectly converted Outfalls 004 and 026 to process water outfalls due to "contributions from . . . non-contact cooling water." This interpretation is inconsistent with the facts and applicable law.

118. The applicable federal regulations are clear that cooling water flows are not considered process water. *See* 40 C.F.R. §§ 419.22(d), 419.23(e), 419.24(d).

119. Moreover, these flows are "cooling water blowdown drift," a term that is defined in Suncor's Previous Permit as "incidental windblown mist from cooling towers" that collects on the ground or adjacent structures and "uncontaminated condensate from air conditioners, coolers, and other compressors."

120. These types of non-stormwater discharges are appropriate to regulate as stormwater in the Renewal Permit because they are not potentially contaminated sources.

121. The Division converted Outfall 023 to a process water outfall based on its finding that the outfall discharges stormwater comingled with "contaminated groundwater." This is not supported by the facts, and not in accordance with the law. Suncor has completed extensive activities that prevent contaminated groundwater from surfacing at the site upgradient from the outfall in accordance with an order from the HMWMD.

122. Given that nothing has changed related to these outfalls since issuance of the previous stormwater permit, the Division had no basis to alter its approach in the Renewal Permit.

123. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the conversion of Outfalls 004, 023, and 026 to process water outfalls were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

124. Suncor requested a stay of all the new effluent limits and monitoring requirements for Outfalls 004, 023, and 026 and demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

125. These outfalls rarely discharge as these stormwater flows are typically routed to Suncor's wastewater treatment system. In the rare event that there are discharges after a large storm event, these outfalls are already managed as stormwater outfalls under the terms and conditions of Suncor's Previous Permit, which would remain in place while any stay is in effect.

126. Suncor would suffer serious harm if these conditions are allowed to go into effect. Many of the new effluent limits for these outfalls become effective in one year, so Suncor would need to immediately being the engineering, design and construction work required to re-route these flows.

127. Given the short time to comply with the permit conditions, Suncor will likely have to expend significant resources to redesign efforts before the underlying appeal is resolved.

E. Addition of Internal Monitoring Points 005B, 006B, 007B, 008B, and 009B

128. In the Renewal Permit, the Division identified several points in Suncor's stormwater management system as new internal outfalls (Outfalls 005B, 006B, 007B, 008B, and 009B) (the "Internal Monitoring Points") and applied numeric effluent limitations and sampling requirements, that except in exceptional circumstances not present here, should only be applied at the point of discharge offsite. Regulation 61, § 61.8(2)(j).

129. No wastewater or stormwater is discharged from these locations to any waterbody and these monitoring points are simply where runoff flows from one stormwater control feature to the next.

130. The Division included the Internal Monitoring Points and the associated effluent limitations and other terms and conditions for the first time in the Renewal Permit. Accordingly, Suncor was never provided notice that these Internal Monitoring Points could be included in the Renewal Permit or an opportunity to comment on the addition of these features.

131. The addition of these features was a significant and substantial change from the Draft Permit for which the Division was required by the CWQCA and Commission regulations to provide notice and opportunity to comment. *See* C.R.S. § 25-8-502(4); Regulation 61, §§ 61.5(2)(b), 61.5(2)(b)(i),(iv).

132. It is not impractical or infeasible to apply permit limits at the outfalls to state waters and therefore the Division has no authority to include internal monitoring points. Regulation 61, § 61.8(2)(j).

133. The discharge points are accessible, the waste discharged from the outfalls is not so diluted as to make monitoring impractical, nor is there interferences among pollutants at the point of discharge that would make detection of analysis impractical at the outfalls.

134. Conversely, it is infeasible to monitor at these Internal Monitoring Points as they are located within a concrete ditch or at locations that are routinely underwater.

135. Because these Internal Monitoring Points are just locations where stormwater flows from one control feature to the next there is not opportunity to treat this water before it reaches the new points where effluent limits are applied.

136. The inclusion of the Internal Monitoring Points in the Renewal Permit was not reasonably ascertainable from the Draft Permit.

137. In the Request for Hearing and Stay, Suncor requested a stay of the Internal Monitoring Points (005B, 006B, 007B, 008B, and 009B) and all associated terms and conditions in the Renewal Permit, including but not limited to effluent limitations and monitoring requirements. Suncor demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

138. The internal monitoring points do not discharge offsite to state waters, therefore there is no benefit to the public from monitoring at these locations.

139. Under ordinary operations, water that passes through these points is sent to Suncor's wastewater treatment system before being discharged.

140. Even in extraordinary storm events, this stormwater can be discharged from Outfall 004, but only after an evaluation to ensure it meets all applicable permit requirements.

141. This existing management system more than adequately protects the public.

142. The Division Hearing Order does not claim there is a benefit to the public from the immediate implementation of these conditions. Rather, the Division claims that it is required to impose limits at these internal points. This is contrary to the plain language of the regulations, which only allow such internal monitoring when it is impractical or infeasible to apply limits at the point of discharge. Regulation 61, § 61.8(2)(j).

143. Suncor cannot meet the permit conditions at these internal points and will be out of compliance the moment they take effect on May 1, 2024, through no fault of its own.

144. Suncor was never provided notice that these Internal Monitoring Points could be included in the Renewal Permit, or an opportunity to comment on the appropriateness, feasibility, or compliance concerns associated with these monitoring points. Had Suncor been given the required opportunity to investigate and comment on these conditions, it would have explained that is simply impossible to comply with the Division's conditions.

145. The Division only granted part of Suncor's request and stayed: (1) the total organic carbon effluent limit and monitoring at Internal Monitoring Point 006B; and (2) the continuous flow monitoring at Internal Monitoring Point 005, 007, 008, and 009.

146. There was no basis to deny Suncor's request for stay of the other terms and conditions applicable to these Internal Monitoring Points.

F. Addition of monitoring requirements and effluent limits for stormwater outfalls

147. The Division's inclusion of effluent limits and monitoring requirements for some of the stormwater outfalls (Outfalls 024, 025, 027, and 028) was arbitrary, capricious, not supported by substantial evidence, and contrary to law.

148. The EPA has long recognized that numeric water quality-based effluent limitations are based on conditions that are not representative of stormwater and should not apply to stormwater outfalls.

149. Even if it were appropriate to include effluent limits at these stormwater outfalls (which it is not), it was erroneous to deny a three-year compliance schedule to meet the limits, as this will require Suncor to conduct monitoring to identify potential sources, in particular sources of selenium, and to plan, design, and construct significant changes to its stormwater system.

150. There is no basis to include PFAS monitoring at the stormwater outfalls, because they do not discharge process water.

151. Stormwater Outfalls 021 and 022 are associated with the maintenance facility that is separated from Plants 1, 2, and 3 by Sand Creek and highway I-270. And

these outfalls do not receive stormwater flows from the refinery nor is are chemicals or firefighting foam used or stored at this facility. Therefore, there was no basis to include monitoring requirements for PFAS or any other parameters at these outfalls.

152. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the terms and conditions for the stormwater outfalls in the Renewal Permit were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

153. Suncor sought a partial stay of these conditions. Suncor requested a stay of the numeric selenium limits, and the immediate implementation of those limits at Outfalls 024, 025, 027, and 028. Suncor demonstrated that there was more than a reasonable appearance that serious harm would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

154. Selenium is naturally occurring element and elevated selenium is known to naturally occur in the soils of Sand Creek.

155. There is no basis to believe that selenium could be contributed to the stormwater outfalls from Suncor's activities.

156. Suncor will be harmed if it is required to immediately meet the selenium limits at certain outfalls and within a year at others. Selenium data is not currently available to identify sources and implement treatment.

G. <u>Monitoring and WET testing frequencies</u>

157. The Renewal Permit includes unreasonable monitoring frequencies at all Outfalls, including up to once a week for some PFAS parameters and up to five times a week for other parameters, including for those that the Refinery has met for years and is unlikely to ever exceed.

158. Requiring Suncor to monitor and test at the frequency required by the Renewal Permit is unreasonable, unnecessary to ensure protection of water quality, and is inconsistent with the law and Division policy.

159. The Division's Baseline Monitoring Frequency, Sample Type, and Reduced Monitoring Frequency Policy for Industrial and Domestic Wastewater

Treatment Facilities ("WQP-20") does not apply to intermittent or batch discharges like stormwater. Therefore, it was erroneous for the Division to rely on this policy when determining monitoring frequencies for Suncor's Stormwater Outfalls (Outfalls 004, 021, 022, 023, 024, 025, 026, 027, 028).

160. It is not feasible to sample and receive PFAS results on a weekly basis as required by the Renewal Permit.

161. There are a limited number of labs that have the capability to conduct the required testing and this analysis cannot be done instantaneously. Suncor must collect the samples, ship them to the labs, allow time for analysis, and then wait for the results — a process that typically takes at least two weeks.

162. This places Suncor at serious risk of violating the Renewal Permit due to laboratory constraints outside of its control.

163. The Division's Baseline Monitoring Frequency Policy (WQP-20) does not support weekly monitoring for organic parameters and sampling at this frequency is unnecessary to characterize Suncor's discharge.

164. The requirement to conduct monthly WET testing at outfalls 020, 004, 023, and 026 is not supported by the facts and is contrary to law and the Division's WET Testing Policy.

165. The Division should have reduced the monitoring frequencies in the Renewal Permit in accordance with WQP-20 and Suncor's comments to the Draft Permit.

166. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the monitoring frequencies in the Renewal Permit were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

167. Suncor requested a stay of all monitoring frequencies and WET testing frequencies for Outfalls 020, 023 and 004, which added to or changed the monitoring required by Suncor's Previous Permits. Suncor demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

168. Suncor has consistently complied with effluent limitations since 2017 when improvements to the facility's wastewater management were implemented. More frequent monitoring will not provide additional public protection where these standards are consistently being met.

169. Suncor is harmed by the excessive and unnecessary staffing required to sample and test water at the frequency required by the Renewal Permit, especially where the levels of these parameters have generally been stable for the past seven years.

170. Further, Suncor is at risk for noncompliance through third-party laboratory error and backlog through no fault of its own. Laboratory analysis and reporting, especially for PFAS takes considerable time. This places Suncor at risk of violation for dozens of monitoring events even though it diligently takes samples and sends them for analysis.

H. <u>Effluent Evaluation</u>

171. For the first time in the Renewal Permit, the Division included a requirement that if Suncor becomes aware that a parameter not currently subject to an effluent limitation may exceed a water quality standard for the receiving water after performing the analysis in the Water Quality Assessment, Suncor must (1) halt or reduce any activity if necessary to prevent the discharge in concentrations that exceed the standard; and (2) submit a modification application to the Division for the possible inclusion of new effluent monitoring requirements or effluent limits.

172. This term and condition was not included in the Draft Permit and Suncor and other stakeholders were never given notice and opportunity to comment.

173. Even if this condition had been properly noticed (which it was not), the Division does not have authority to include ambiguous, unspecified effluent limits and monitoring requirements in a permit.

174. It is the Division's responsibility at the time of permitting to determine the applicable effluent limits and monitoring requirements. Regulation 61, § 61.8(2)(b).

175. The Division does not have authority to impose an affirmative duty on permittees to "halt or reduce" their activities. While the Division certainly can bring an

enforcement action when a permittee violates a properly developed and clearly articulated limit in its permit, it cannot impose this term as a requirement of the permit, particularly where the permit does not contain effluent limits.

176. The Division also does not have authority to require permittees to apply for a modification of the terms of its permit. it is the responsibility of the Division to initiate a modification if it believes that there are circumstances that warrant such a modification under Regulation 61, section 61.8(8) and shall not do so unless good cause exists. Regulation 61, § 61.8(8)(j).

177. The inclusion of the effluent evaluation condition was not reasonably ascertainable from the Draft Permit.

178. Suncor requested a stay of the requirements to conduct the effluent evaluation at all Outfalls. Suncor demonstrated that there was more than a reasonable appearance that serious harm would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

179. The Division retains its authority under the regulations to require any necessary permit modifications.

180. The detection of other contaminants that are not already addressed in the Renewal Permit and Suncor's Prior Permits is extremely unlikely.

181. The effluent evaluation permit conditions reverse the ordinary burden of proof from the Division to Suncor and make Suncor alone, of all the dischargers in the State of Colorado, subject to a procedure other than those required by the Commission Regulations.

182. Permittees, including Suncor, plan and design treatment upgrades in order to comply with the limits in its permit. Under this provisions, Suncor could be forced to "halt or reduce" its operations or be subject to an enforcement action even when it is in compliance with all effluent limits and monitoring requirements in the Renewal Permit.

I. Public notice process

183. The Renewal Permit includes a new public notice requirement that conflicts with Suncor's existing public communications process that has been approved by CDPHE.

184. Pursuant to the Renewal Permit, Suncor would need to provide public notice via text message, phone call, or email of any event requiring notice to the Division— even if it has no impact on the community or environment.

185. Suncor developed its existing public communications process through negotiations with CDPHE and extensive community outreach. This public communication process already includes procedures that apply to water quality matters at the Refinery, including with respect to events requiring notice to the Division.

186. CDPHE approved Suncor's existing public communications process.

187. The new public notice requirement included in the Renewal Permit is inconsistent with Suncor's existing public communications process and will likely lead to public confusion.

188. Nothing in the CWQCA, Regulation 61, or any other regulation adopted by the Commission authorizes the Division to require permittee notifications directly to the public, particularly for events that do not threaten public health and the environment.

189. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the public notice requirement in the Renewal Permit were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

190. Suncor requested a stay of the new public notice requirement and demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

191. There is no benefit to the public from implementing a public notice procedure that is inconsistent with the effective public communications process that was developed with input from CDPHE and the community.

192. The procedures required by the Renewal Permit will likely cause public confusion and unnecessary concern by requiring public notice by a call-out system of non-emergent events. The current public communications process was developed to avoid these issues and concerns by posting this type of non-emergent information on Suncor's website.

193. Suncor would be harmed should this condition take effect. After investing considerable time and resources in developing a notification process that provides accurate, timely, and useful information to the public, the Division now wants to require Suncor to implement a system that conflicts with the effective public communications process already in place.

J. <u>Test method for mercury</u>

194. The Renewal Permit includes a mercury sampling method that is incorrect and inconsistent with EPA's approved test method, which requires the use of grab samples.

195. Using the correct sampling method is critical to ensuring accurate laboratory results.

196. The method required by the Division would also require an unreasonable amount of staff time to obtain the number of samples required.

197. All of the issues of law and fact raised in Suncor's Request for Hearing and Stay related to the Mercury Sampling Method in the Renewal Permit were identified in the public comments to the Draft Permit or Suncor's responses to the Division's RFI.

198. Suncor sought a stay of the incorrect mercury sampling method and demonstrated that there was more than a reasonable appearance that serious harm to Suncor would result if a stay was not granted and that a refusal would not provide a corresponding public benefit.

199. There is not benefit to the public from immediately implementing an inaccurate testing methodology.

200. Suncor would be harmed by the requirement to use an unsound methodology that leads to potentially inaccurate results and requires more staff time than the more accurate sampling method approved by the EPA.

FIRST CLAIM FOR RELEIF

Petition for Judicial Review and Declaratory Judgment Regarding the Division's Finding About Hearing Scope pursuant to C.R.S. § 24-4-106, C.R.S. § 25-8-404, and C.R.C.P. 57.

201. Suncor incorporates by reference the allegations in Paragraphs 1 through 200 as though fully set forth herein.

202. Under C.R.S. § 25-8-404(1), a final order, including the Division's Hearing Order, is subject to judicial review.

203. Regulation 61, section 61.7(a) provides that the "applicant or any other person, affected or aggrieved by the Division's final determination may demand an adjudicatory hearing within thirty (30) days of the issuance of the final permit determination."

204. Regulation 61, section 61.7(c) provides that: "Only issues of law or fact identified by the applicant or other person during the public comment period, including any public hearing, or not reasonably ascertainable from the draft permit may be identified at the adjudicatory hearing."

205. In revising Section 61.7(c) in 2018, the Commission expressly stated that "[a]n intent [of the revision] is that issues (interpreted broadly) are brought to the Division's attention early in the permitting process, so that the Division has the opportunity to address the issues prior to reaching the adjudicatory hearing procedure state." Regulation 61, § 61.72(D).

206. All issues of fact and law identified in Suncor's request for adjudicatory hearing, except those that were included for the first time in the Renewal Permit and Suncor was denied an opportunity to comment, were the subject of extensive

comments, exhibits, and reports from Suncor and other parties, and were all part of the record before the Division before it issued the Renewal Permit.

207. Thus, the Division's finding that Suncor failed to demonstrate that issues were properly identified during the public comment period was arbitrary, capricious, and abuse of discretion, and contrary to law.

208. The Division is impermissibly trying to read into this regulation a requirement that permittees must identify in its request for hearing the specific page or comment number where the issue was raised or potentially be precluded from offering any support or argument at an adjudicatory hearing. This requirement is found nowhere in applicable law.

209. The Division also lacks authority to limit the issues at an adjudicatory hearing, so long as those issues were actually identified during the public comment period.

210. Because Suncor properly raised all issues of fact and law during the public comment period, the Division's determination that some issues of law or fact "might be prohibited from being 'identified at the adjudicatory hearing'" is arbitrary, capricious, an abuse of discretion and contrary to law under C.R.S. § 24-4-106(7)(b).

211. Furthermore, C.R.C.P. 57 provides that the district court has the power to declare rights, status, and other legal relations and to remove legal uncertainties.

212. Suncor, therefore, alternatively seeks a declaratory judgment regarding the correct requirements of the applicable regulations and the proper scope of the adjudicatory hearing.

SECOND CLAIM FOR RELIEF

Petition for Partial Stay of the Contested Terms and Conditions in the Renewal Permit Pursuant to C.R.S. § 24-4-106 and C.R.S. § 25-8-404.

213. Suncor incorporates by reference the allegations in Paragraphs 1 through 212 as though fully set forth herein.

214. The Court shall stay the effectiveness of any order or determination of the Division if there is probable cause to believe that the refusal to grant a stay will cause serious harm to the affected person, and the refusal to grant a stay would be without sufficient corresponding public benefit. C.R.S. § 25-8-404(4).

215. For the reasons set forth above in Paragraphs 61-200, Suncor requests the Court stay the terms and conditions set forth below until the administrative hearing, and any judicial appeal thereof, has resolved the Contested Terms and Conditions.

a. Chloride effluent limits for Outfalls 020, 023, 004, 026 (Renewal Permit, Parts I.E.1 & I.H).

b. EC/SR limits for Outfalls 020, 023, 004 and 026 (Renewal Permit, Parts I.E.1 & I.H).

c. Arsenic limit of 0.02 μg/L at Outfalls 020 and 023 (Renewal Permit, Parts I.E.1 & I.H)

d. Burlington Ditch study or liner requirement (Renewal Permit, Part I.G.4)

e. Conversion of Outfalls 004, 023, 026 to process water outfalls and the inclusion of numeric effluent limits, WET testing, and other terms and conditions (Renewal Permit, Parts I.A, I.E.1, I.F, I.G, & I.H, among others)

f. Addition of Internal Monitoring Points 005B, 006b, 007B, 008B, 009B and all associated terms and conditions, including but not limited to the application of monitoring requirements and effluent limits (Renewal Permit, Parts I.A & I.E, among others)

g. Numeric selenium limits and the immediate implementation of those limits at Outfalls 024, 025, 027, and 028 (Renewal Permit, Part I.E & I.H, among others).

h. Monitoring frequencies (all Outfalls) and WET testing frequencies for Outfalls 020, 023, 004 that change or add to the monitoring required by Suncor's Previous Permits (Renewal Permit, Parts I.E & I.F, among others).

i. Effluent evaluation condition (Renewal Permit, Part I.G.13).

j. Public notification requirement (Renewal Permit, Part I.O.3).

k. Mercury sampling method (Renewal Permit, Parts I.E.1 & Appendix B.6).

216. The terms in the Prior Permits for the Contested Terms and Conditions provide more than adequate protection of water quality during the pendency of the adjudicatory and judicial hearing, and would preserve the status quo.

217. There is probable cause to believe that a refusal to grant a stay of these terms and conditions will cause serious harm to Suncor. *See* Paragraphs 61-200, above.

218. Refusal to grant a judicial stay would be without sufficient corresponding public benefit because there is nothing in the Renewal Permit or supporting rationale to suggest these terms and conditions are necessary to ensure protection of public health and environment.

THIRD CLAIM FOR RELIEF

Petition for Judicial Review of the Division's Denial of Suncor's Request for an Administrative Stay Pursuant to C.R.S. § 24-4-106, C.R.S. § 25-8-404

219. Suncor incorporates by reference the allegations in Paragraphs 1 through 218 above as through fully set forth herein.

220. Under C.R.S. § 25-8-406, the Division may stay any contested terms and conditions for good cause shown.

221. The Division shall grant a stay of permit terms and conditions if it reasonably appears that serious harm would result and a refusal to grant a stay would not provide corresponding public benefit. Regulation 61, § 61.7(1)(C).

222. An order by the Division denying a stay is a final agency action subject to de novo determination pursuant to C.R.S. § 25-8-404. C.R.S. § 25-8-406.

223. The Division's denial of Suncor's request for administrative stay of the subset of the Contested Terms and Conditions of the Renewal Permit should be reversed. Suncor provided more than sufficient information demonstrating that it would suffer serious harm if it were forced to comply with these Contested Terms and Conditions of the Renewal Permit during the pendency of the litigation, and the Division's findings to the contrary are arbitrary, capricious, not supported by substantial evidence, and contrary to law.

PRAYER FOR RELEIF AND PETITION FOR STAY

WHEREFORE, Plaintiff Suncor Energy (U.S.A.) Inc. requests this Court:

A. Find the Division's order regarding the scope of the adjudicatory hearing was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law and remand back to the Division to correct the Hearing Order.

B. Alternatively, enter a declaratory judgment that all of the issues raised in the Request for Hearing and Stay are properly within the scope of the adjudicatory hearing and declaring that all issues of fact and law raised by Suncor in its Request for Hearing and Stay may be raised at the adjudicatory hearing.

C. Stay the effectiveness of the following terms and conditions as of the effective date of the Renewal Permit, as follows:

    - Chloride effluent limits for Outfalls 020, 023, 004, 026 (Renewal Permit, Parts I.E.1 & I.H).

    - EC/SR limits for Outfalls 020, 023, 004 and 026 (Renewal Permit, Parts I.E.1 & I.H).

    - Arsenic limit of 0.02 μg/L at Outfalls 020 and 023 (Renewal Permit, Parts I.E.1 & I.H)

    - Burlington Ditch study or liner requirement (Renewal Permit, Part I.G.4)

    - Conversion of Outfalls 004, 023, 026 to process water outfalls and the inclusion of numeric effluent limits, WET testing, and other terms and conditions (Renewal Permit, Parts I.A, I.E.1, I.F, I.G, & I.H, among others)

- Addition of Internal Monitoring Points 005B, 006b, 007B, 008B, 009B and all associated terms and conditions, including but not limited to the application of monitoring requirements and effluent limits (Renewal Permit, Parts I.A & I.E, among others)

- Numeric selenium limits and the immediate implementation of those limits at Outfalls 024, 025, 027, and 028 (Renewal Permit, Part I.E & I.H, among others).

- Monitoring frequencies (all Outfalls) and WET testing frequencies for Outfalls 020, 023, 004 that change or add to the monitoring required by Suncor's Previous Permits (Renewal Permit, Parts I.E & I.F, among others).

- Effluent evaluation condition (Renewal Permit, Part I.G.13).

- Public notification requirement (Renewal Permit, Part I.O.3).

- Mercury sampling method (Renewal Permit, Parts I.E.1 & Appendix B.6).

D. Reverse the Division's denial of Suncor's request for an administrative stay.

E. Provide any other relief that the Court finds just and proper.

F. Award attorney fees, expenses, and costs to the extent authorized under applicable law.

Respectfully submitted this 15th day of April, 2024.

VRANESH and RAISCH, LLP

Signature on file pursuant to C.R.C.P. 121 § 1-26(7)

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