

DISTRICT COURT, ADAMS COUNTY COLORADO
1100 Judicial Center Drive
Brighton, Colorado 80601

Plaintiff(s):

SUNCOR ENERGY (U.S.A.) INC.,

v.

Defendant(s):

COLORADO DEPARTMENT OF PUBLIC HEALTH
AND ENVIRONMENT, AIR POLLUTION
CONTROL DIVISION

and

GREENLATINOS, CONSERVATION COLORADO,
ELYRIA SWANSEA NEIGHBORHOOD
ASSOCIATION, HEALTHY AIR AND WATER
COLORADO, SIERRA CLUB, and WOMXN FROM
THE MOUNTAIN

▲ COURT USE ONLY ▲

*Attorneys for Defendant-Intervenors GreenLatinos,
Conservation Colorado, Elyria Swansea Neighborhood
Association, Healthy Air and Water Colorado, Sierra
Club, and Womxn from the Mountain*

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Case No. 2022CV031234

Division W

Judge Arturo Hernandez

**DEFENDANT-INTERVENORS EJ GROUPS' RESPONSE TO MOTION FOR
APPROVAL OF SETTLEMENT AGREEMENT**

1. Defendant-Intervenors GreenLatinos, Conservation Colorado, Elyria Swansea Neighborhood Association, Healthy Air and Water Colorado, Sierra Club, and Womxn from the Mountain (collectively, “EJ Groups”) submit their response to Plaintiff Suncor Energy, Inc. (“Suncor”) and Defendant Colorado Department of Public Health and Environment, Air Pollution Control Division (“Division”)’s February 5, 2024 Joint Motion for Approval of Settlement Agreement (“Settlement Motion”). The EJ Groups take no position on the Settlement Motion, but we write to raise issues concerning the process around the settlement and the process around enforcement of the Fenceline Monitoring Law.

2. This case has been pending before the Court for over one and a half years. Suncor filed the case on September 9, 2022. The Division and Suncor have requested four separate extensions of case deadlines before requesting a full stay of the case on November 5, 2023.

3. On January 30, 2024, counsel for the Division requested a meeting with counsel for the EJ groups to discuss the case. Counsel for the two parties met remotely on January 31, 2024. At that meeting, the Division informed the EJ Groups that the Division and Suncor were entering into a settlement agreement and intended to file a motion with the Court to approve the settlement. The EJ Groups had no prior warning of the settlement and had not seen a copy of the Settlement Motion, the Settlement Agreement, or the revised Fenceline Monitoring Plan. The Division asked for the EJ Groups’ position on the motion and gave EJ Groups until the following day, February 1, 2023, to respond.

4. Following the remote meeting, counsel for the Division emailed counsel for the EJ Groups draft copies of the Settlement Motion, the Settlement Agreement, and the Fenceline Monitoring Plan (“Final Plan”). The draft Final Plan was 108 pages and substantially changed

from the Division’s August 2021 revisions to Suncor’s fenceline monitoring plan (“Revised Plan”), including, among other things, (1) extending the timeline for Suncor to monitor its entire fenceline until December 31, 2024, and (2) removing the obligation to monitor for 11 additional compounds. *Compare* Settlement Mot. Ex. A § 1.6 *with* Compl. Ex. 4 § 1.6. The draft Settlement Agreement was eight pages long and included substantive provisions concerning monitoring three of the additional compounds.

5. On February 1, 2024, counsel for the EJ Groups emailed Suncor and the Division stating that the EJ Groups were unable to take a position on the Settlement Motion because they were not given sufficient time to review and evaluate various the terms of the Settlement Agreement and the Final Plan.

6. On February 5, 2024, Suncor and the Division filed the Settlement Motion. The Settlement Motion requests that the Court enter an order approving the Settlement Agreement. Settlement Mot. 2. The Settlement Motion states that the EJ Groups “determined that they did not have adequate time to evaluate the motion and associated settlement, so the EJ Groups could not take a position on the motion at the time of filing.” *Id.* The Settlement Motion further states that following the Court’s order, Suncor and the Division will move the court for an order approving their stipulation of voluntary dismissal with prejudice. *Id.* at 2–3 ¶ 2.

7. The EJ Groups have reviewed the Final Plan, the Settlement Agreement, and the Motion. While the EJ Groups take no position on the Settlement Motion, the EJ Groups provide three remaining issues into the record.

8. *First*, at the time of filing the Settlement Motion, Suncor and the Division did not provide the EJ Groups with adequate time to consider the Settlement Agreement and the Final

Plan. Pursuant to C.R.C.P. 121 § 1-15(8), parties have a duty to confer with counsel before filing a motion. The EJ Groups have not participated in settlement negotiations. As a result, the Division's late conferral was the EJ Groups' first opportunity to review the Final Plan, the Settlement Agreement, and the Settlement Motion. Given the length and complexity of the filings, the EJ Groups could not reasonably review and take a position on the proposed settlement, and, therefore, the Division and Suncor did not meaningfully satisfy their conferral obligation.

9. *Second*, the Settlement Agreement allows Suncor to violate the Fenceline Monitoring Law for two years without penalty. Under the Fenceline Monitoring Law, Suncor was required to begin monitoring its fenceline on January 1, 2023, C.R.S. § 25-7-141(5)(a)(I), and this monitoring was required to cover Suncor's entire fenceline. *Id.* § 25-7-141(2)(a) (requiring that the fenceline monitoring system use "equipment that encompasses the covered facility and continuously measures and records air pollutant concentrations at or adjacent to a covered facility's boundary"). Both Suncor's initial monitoring plan and the Division's Revised Plan recognized that Suncor's system must cover the entire fenceline. *See* Compl. Ex. 4 § 1.61. Suncor never sought any interim relief from the binding requirements of the Fenceline Monitoring Law. However, to this day, Suncor's fenceline monitoring system only monitors a fraction of its property line.¹ And the Final Plan would allow Suncor to continue to violate this requirement until December 31, 2024. Settlement Mot. Ex. A § 1.6.

¹ *See* Suncor Energy (U.S.A.) Inc., *Commerce City Refinery Fenceline Air Monitoring Portal: Monitoring Locations*, <https://suncor.data.spectrumenvsoln.com/learning-center/monitoring-locations> (last accessed February 26, 2024).

10. Throughout the case, Suncor and the Division requested four extensions and a stay that has deprived communities of the information guaranteed by the Fenceline Monitoring Law; this delay is further perpetuated by the extended timeline in the Final Plan. In passing the Law, the legislature determined that “Colorado communities have a right to know about exposures to air toxics in real time” and that real-time monitoring “can provide valuable air quality data to assess the potential impacts of air toxics emissions in nearby communities, to understand temporal variations in air toxics emissions, and to advise facilities of significant changes in air toxics emissions.” C.R.S. § 25-7-141(1)(b)(I), (III). Each day that Suncor fails to meet its obligations under the Fenceline Monitoring Law, the surrounding communities are deprived of the very information that the legislature guaranteed to them.

11. Importantly, even on December 31, 2024, Suncor will still not be required to monitor its entire fenceline. The Final Plan includes a gap in the monitoring network for monitors along Brighton Boulevard. Settlement Mot. Ex. A § 1.6. Thus, the Final Plan would not result in monitoring that encompasses the facility. Nothing in the Final Plan or the Settlement Motion explains this gap in the monitoring coverage.

12. *Last*, the Settlement Agreement would not provide the Court with sufficient opportunities to enforce and supervise Suncor’s implementation of the Final Plan. The EJ Groups are concerned that Suncor may not implement the Final Plan in a timely manner. The EJ Groups are also concerned that Suncor may not comply with the Settlement Agreement’s terms. The Settlement Agreement includes Suncor’s obligation to monitor for three additional compounds, but this requirement is not included in the Final Plan. *See* Settlement Mot. Ex. 1 § 3. As a result, the Division’s power to enforce these requirements is very limited.

13. Under the Division and Suncor’s Settlement Motion, the terms of the Settlement Agreement would not be enforceable by the Court or under the Division’s enforcement authority.

14. By seeking voluntary dismissal, as opposed to a consent decree, the Court would not retain jurisdiction to enforce the terms of the settlement. With a consent decree, the Settlement Agreement, itself, would be an order of the Court and would allow the Court to oversee and enforce the terms of the settlement. *City of Boulder v. Sherrelwood, Inc.*, 604 P.2d 686, 688–89 (Colo. App. 1979) (allowing a trial court’s continued jurisdiction and active supervision of a consent decree); *see Floyd v. Ortiz*, 300 F.3d 1223, 1226 (10th Cir. 2002) (“A trial court retains jurisdiction to enforce consent decrees.”). Dismissal, on the other hand, removes the Court’s jurisdiction.

15. Meanwhile, because the additional compounds are not included in the Final Plan, the Division cannot enforce the additional compound monitoring requirement under its statutory power to enforce air quality violations. *See* C.R.S. § 25-7-115.

16. Instead, the Division’s only recourse for Suncor breaching the Settlement Agreement would be to file a breach of contract action with far more limited remedies. The default remedy for breach of contract is money damages, *Air Sols., Inc. v. Spivey*, 529 P.3d 644, 658–59 (Colo. App. 2023), and nonbreaching parties are not entitled to specific performance as a matter of right. *Id.* at 655. As a result, the Settlement Motion and the Settlement Agreement do not provide, request, or guarantee accountability or reasonable enforceability of the terms of the Settlement Agreement.

17. In light of the foregoing problems in the settlement process and the enforceability of the settlement terms, the EJ Groups cannot affirmatively support the Settlement Motion. Therefore, the EJ Groups take no position on the Settlement Motion.

DATED: February 26, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this February 26, 2024, a true and correct copy of the above document **DEFENDANT-INTERVENORS EJ GROUPS' RESPONSE TO MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT** was served electronically via the Colorado Courts E-Filing System upon the following counsel of record:

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