DISTRICT COURT, LAS ANIMAS COUNTY, COLORADO 201 East 1st Street, Room 304 Trinidad, CO 81082	DATE FILED: January 6, 2016 3:12 PM CASE NUMBER: 2015CV30042
Plaintiff: PIONEER NATURAL RESOURCES USA, INC., a Delaware corporation, v. Defendant: PATRICK J. PFALTZGRAFF, in his official capacity as the Division Director of the Colorado Water Quality Control Division of the Colorado Department of Public Health and Environment.	**COURT USE ONLY** Case Number: 2015CV30042 Div.: D

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
AND
DENYING PLAINTIFF'S MOTION FOR LEAVE TO SERVE SUPPLEMENTAL COMPLAINT

THIS MATTER comes before the Court on Defendant's Motion to Dismiss and Plaintiff's Motion for Leave to Serve Supplemental Complaint. The Court, having reviewed the pleadings and otherwise being duly advised in the premises, hereby **FINDS AND ORDERS** the following:

FACTS AND PROCEDURAL HISTORY

This matter was initiated when Plaintiff filed a Complaint for Judicial Review on April 20, 2015 seeking reversal of the Colorado Water Quality Control Division of the Colorado Department of Public Health and Environment's ("Division") denial of Plaintiff's request for stay and for injunctive relief. Subsequently, the parties filed a Joint Motion to Stay the Proceedings indicating that they had entered into an Agreement to Engage in Facilitated Discussion ("Agreement"). On May 18, 2015, the Court issued an Order staying the proceedings and ordered the parties to file a status report within 60 days. The parties filed a status report on July 17, 2015 requesting that the stay be extended and indicating that pursuant to the Agreement, the facilitated discussion process would conclude no later than September 30, 2015. The Court extended the stay and ordered a second status report to be filed on October 9, 2015.

On October 9, 2015, the parties filed their second status reports. In Defendant's status report, the Defendant indicated that a stay is no longer appropriate or warranted because the Division issued the proposed renewal permits on May 29, 2015 and per the Agreement, the

facilitated discussion process concluded on September 30, 2015. Further, Defendant argues that the Court lacks subject matter jurisdiction and that Plaintiff has failed to state a claim which relief can be granted because Plaintiff lacks standing and the controversy is moot. Defendant requests that the Court issue an order lifting the stay. However, in Plaintiff's status report, it indicated that there are follow-up activities that resulted from the Agreement and therefore, the Plaintiff requested an extension of the stay in this matter. On October 13, 2015, the Court issued an order lifting the stay in this matter.

Subsequently, on October 16, 2015, the Defendant filed a Motion to Dismiss seeking dismissal of Plaintiff's claims for stays set forth in the original Complaint. Plaintiff filed a Response in Opposition to Defendant's Motion to Dismiss. In addition, Plaintiff filed a Motion for Leave to Serve Supplemental Complaint seeking to add claims for relief. Plaintiff opposes the Motion to Dismiss and Defendant opposes the Motion for Leave to Serve Supplemental Complaint. The Court will address each motion separately.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Motion to Dismiss

First, in the Motion to Dismiss, the Defendant contends that all three of Plaintiff's requests for stays set forth in the original Complaint involve only draft permits and do not constitute final agency actions. As such, Defendant asserts that Plaintiff failed to exhaust its administrative remedies and therefore this Court lacks subject matter jurisdiction. Further, Defendant contends that due to its subsequent action of issuing the final permits to Plaintiff on May 29, 2015, all of the claims in Plaintiff's original Complaint are now moot. Defendant also argues that Plaintiff lacks standing because it did not suffer an injury in fact. Consequently, Defendants requests that this Court dismiss Plaintiff's original Complaint.

In its Response in Opposition to Defendant's Motion to Dismiss, Plaintiff argues that the Defendant's Motion to Dismiss is moot because the Division has "issued final renewal permits and granted administrative stays or permit modifications that alleviate immediate compliance issues…." Ptf's Resp. at 3. However, Plaintiff's response fails to contain any arguments regarding the merits of the Motion to Dismiss or in support of its claims set forth in its original Complaint. In addition, the Plaintiff admits that its proposed Supplemental Complaint withdraws "the Original Complaint's claim for reversal of denial of stay…" and "…the preliminary and permanent injunctive relief sought in the Original Complaint." *Id.* at 3, 7. Plaintiff's response brief, therefore, focuses exclusively on the claims set forth in its proposed Supplemental Complaint. Further, Plaintiff admits that it filed an administrative appeal of the final permits issued on May 29, 2015 that is currently pending before the Office of Administrative Courts ("OAC").

"Under C.R.C.P. 12(b)(1), the plaintiff has the burden of proving jurisdiction, and the trial court is authorized to make appropriate factual findings." *Medina v. State of Colorado,* 35 P.3d 443, 452 (Colo. 2001) (internal citations omitted). It "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." *Id.* "Thus, whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff's allegations as true and draw all

inferences in the plaintiff's favor, Rule 12(b)(1) permits the court 'to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Id.*

"Final agency action occurs when the litigants exhaust their administrative remedies." *Hussein v. Regents of Univ. of Colo.*, 124 P.3d 871, 872 (Colo. App. 2005). "If complete, adequate, and speedy administrative remedies are available, a party must pursue these remedies before filing suit in district court." *City & County of Denver, v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000). "If a party fails to exhaust these remedies, the district court may lack subject matter jurisdiction over the action." *Id.* The exhaustion doctrine promotes several important and related policy interests:

> The exhaustion requirement allows agencies with expertise in a particular subject matter to develop the necessary factual record upon which the agency and subsequent reviewing courts may base their decisions. The doctrine promotes efficiency in the administrative context by preventing the interruption and fragmentation of the administrative process. Allowing the agency the opportunity to correct its own errors in the first instance preserves the autonomy of the agency. In addition to promoting the efficiency and integrity of the administrative forum, the requirement of exhaustion conserves judicial resources by insuring that courts intervene only if the administrative process fails to provide adequate remedies.

Id. at 1212-1213. (internal citations omitted).

The exhaustion requirement is subject to limited exceptions. For instance, exhaustion is not necessary, when it is "clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested." *Id.* "Exhaustion is also unnecessary, for instance, when the matters in controversy are matters of law that the agency lacks the authority or capacity to determine, such as constitutional issues." *Id.* Further, the doctrine of exhaustion applies unless "the policies underlying the doctrine would not be served by requiring the protesting party to pursue available administrative remedies." *Id.* In addition to the common law exceptions, C.R.S. § 24-4-106 provides for interlocutory review of an agency proceeding or of an agency action proposed to be taken "upon a showing of irreparable injury" where the agency is "clearly beyond the constitutional or statutory jurisdiction or authority of the agency." C.R.S. § 24-4-106(8).

Upon review of the pleadings and relevant authority, the Court notes that the parties have recognized and admitted that the claims set forth in Plaintiff's original Complaint are now moot. The Court **FINDS** that the claims set forth in Plaintiff's original Complaint involve preliminary draft agency actions that have been superseded by final permits issued by the Division on May 29, 2015. In addition, the Court **FINDS** that the Division has granted administrative stays and certain permit modification requests on May 29, 2015. Further, the Court **FINDS** that Plaintiff has filed an administrative appeal of the final permits issued on May 29, 2015 that is currently pending before the Office of Administrative Courts ("OAC"). Accordingly, the Court **FINDS** that the claims in Plaintiff's original Complaint are now moot.

Alternatively, the Court **FINDS** that the claims set forth in Plaintiff's original Complaint involve preliminary draft agency actions. The Court further **FINDS** that Plaintiff has admitted that it currently has an appeal pending before the OAC regarding the final permits. Upon review of the pleadings, exhibits and relevant authority, the Court **FINDS** that Plaintiff has failed to exhaust its administrative remedies regarding the relief requested in its original Complaint, and therefore, this Court concludes that it lacks subject matter jurisdiction to consider the claims and allegations set forth in Plaintiff's original Complaint.

Further, the Court notes that the Plaintiff has not argued that any of the exceptions to the doctrine of exhaustion of administrative remedies apply, and as such, the Court **FINDS** that neither the statutory nor common law exceptions to the exhaustion doctrine apply to Plaintiff's original Complaint. Lastly, the Court notes that the exhaustion doctrine allows for the Division to address the Plaintiff's concerns directly and to correct its own errors, if any, during the administrative process.

The Court has found that Plaintiff has failed to exhaust its administrative remedies and consequently this Court lacks jurisdiction to consider the claims in Plaintiff's original Complaint. In addition, the Court has determined, alternatively, that Plaintiff's claims set forth in the original Complaint are also moot due to the subsequent issuance of the final permits. Regardless of Plaintiff's arguments that the Motion to Dismiss is moot, the Court finds that the Motion to Dismiss is ripe for ruling and the Court agrees with the Defendants that the Plaintiff's original Complaint is moot and also that the Plaintiff failed to exhaust its administrative remedies and that this Court lacks subject matter jurisdiction. Based on these findings, the Defendant's Motion to Dismiss is hereby **GRANTED**.

B. Motion for Leave to Serve Supplemental Complaint

Next, in its Motion for Leave to Serve Supplemental Complaint, Plaintiff argues that pursuant to C.R.C.P. 15(d), it should be permitted to serve a supplemental complaint reflecting the Division's post-filing failure to expressly grant or deny Plaintiff's permit modification requests for WET Testing Modification, Iron Modification, and EC/SAR Testing Modification.

Specifically, in its Motion, Plaintiff argues that the Defendant should have explicitly granted or denied each of Plaintiff's requests for modification of the permit terms when the Division issued the final permits on May 29, 2015, and that it failed to do so. Plaintiff contends that it brings this lawsuit seeking clarification and certainty from the Division that when it issued the final permits on May 29, 2015, that Plaintiff's requests were actually denied.

Plaintiff further argues that because its modification requests were not explicitly granted or denied in the May 29, 2015 permits and fact sheets, it contends that it cannot risk that the OAC will determine that its modification requests were denied in the preliminary draft permits and fact sheets issued on February 6, 2015, and that it would not part of the pending appeal before the OAC. Plaintiff also contends that even if it is successful in the appeal before the OAC and it gets the final permits overturned, Plaintiff states that the previous unmodified draft permits

may go back into effect. Plaintiff argues that this lawsuit is its only vehicle for appealing the denials of its modification requests. Plaintiff argues that this Court must intervene to determine "when, where, and how the Division acted" on Plaintiff's permit modification requests. Plaintiff, therefore, seeks leave to serve its proposed Supplemental Complaint to preserve its appeal rights and protect itself from certain "potentially catastrophic" results that would arise from its alleged failure to appeal the denial of its modification requests.

In response, Defendant argues that Plaintiff is attempting to circumvent the administrative process by putting draft agency decisions before this Court in contravention of the doctrine of exhaustion of administrative remedies. Defendant argues that the Motion for Leave to Serve Supplemental Complaint should be denied because (1) the proposed Supplemental Complaint does not plead a new transaction or occurrence or event that has happened since the filing of the original Complaint as required by C.R.C.P. 15(d); and (2) supplementing the complaint would be futile because it cannot withstand a motion to dismiss because the Court's lacks jurisdiction, Plaintiff lacks standing, and the controversy is moot. The Court will address these arguments below.

C.R.C.P. 15(d) provides, in pertinent part:

> [u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

C.R.C.P. 15(d). In Colorado, whether to grant a motion for leave to supplement a complaint under Rule 15(d) is a discretionary decision of the trial court, but "the doctrine of futility authorizes a trial court to deny leave to amend pleadings if doing so would be futile" *Benton v. Adams*, 56 P.3d 81, 86-87 (Colo. 2002). An amendment is futile, if, for example, the amended pleading, "merely restates the same facts as the original complaint in different terms" or "could not withstand a motion to dismiss." *Id.* at 87.

First, in its Motion for Leave to Serve Supplemental Complaint, Plaintiff argues that the failure of the Division to explicitly grant or deny its permit modification requests on May 29, 2015 constitutes a transaction, occurrence or event that happened since the filing of the original Complaint pursuant to C.R.C.P. 15(d). Defendant, however, argues that neither the Motion to Supplement nor the proposed Supplemental Complaint meet the requirements of C.R.C.P. 15(d) because Plaintiff did not plead a new transaction or occurrence or event. Defendant contends that since Plaintiff filed its original Complaint, the facts have not changed because the draft permitting documents remain draft agency actions. Defendant states that the Division addressed Plaintiff's permit modification requests in the final permit documents that issued on May 29, 2015. Defendant contends that Plaintiff has simply repackaged the facts that were in the original Complaint to attempt to provide a basis for supplementing its complaint. Consequently, Defendant requests that Plaintiff's Motion for Leave to Serve Supplemental Complaint be denied.

Alternatively, Defendant argues that the Motion for Leave to Serve Supplemental Complaint should be denied because allowing the proposed Supplemental Complaint would be futile. Defendant contends that amendment of the proposed Supplemental Complaint is futile because it cannot withstand a motion to dismiss because this Court lacks subject matter jurisdiction, because Plaintiff lacks standing, and because the controversy is moot.

Specifically, Defendant argues that the proposed Supplemental Complaint cannot withstand a motion to dismiss under 12(b)(1) for lack of jurisdiction because Plaintiff failed to exhaust its administrative remedies and cannot satisfy the common law or statutory criteria associated with the exceptions to the doctrine of exhaustion of administrative remedies. The Defendant argues that Plaintiff has failed to exhaust its administrative remedies with respect to all three of its proposed supplemental claims because the supplemental claims all arise from statements contained in the draft fact sheets, which are not ripe for either administrative or judicial review. Defendant contends that these are not final agency actions and they have not been appealed through the OAC as is required for administrative exhaustion. Defendant argues that "there is nothing to be gained by taking judicial action on the agency's draft statements in the Draft Fact Sheets given the ongoing administrative process on the Final Permits" and that "[t]his Court's resources and the resources of the parties will be conserved by allowing the Division to develop a factual record and to correct any errors associated with the Final Permits through the ongoing administrative process." Def's Resp. at 21.

Further, Defendant argues that the proposed Supplemental Complaint would be dismissed under 12(b)(5) as Plaintiff has failed to assert a claim upon which relief can be granted because the controversy is moot. Defendant asserts that the controversy is moot because providing the relief requested by Plaintiff would have no practical effect because Plaintiff's permitting requirements would not change. Defendant maintains that the relief sought in the proposed Supplemental Complaint is the reversal of the Division's denial of certain modification requests to the draft permits and Defendant states that the draft permits "are no longer legally operative documents, meaning that [Plaintiff] is not and will not be required to comply with those permits." Def's Resp. at 4. The Defendant further clarifies that Plaintiff is "required to comply with the final permits which were issued May 29, 2015 ("Final Permits") during the pendency of the administrative adjudication, and thereafter will be required to comply with any decisions rendered by the Office of Administrative Courts." *Id.* Defendant also explains that the OAC cannot overturn the entire final permits that issued on May 29, 2015, because of the scope of that adjudicatory hearing. Based on the reasons set forth above, Defendant argues that the proposed Supplemental Complaint is futile as it could not withstand a motion to dismiss.

The Court agrees with Defendant. First, the Court incorporates the legal authority and its findings of fact as set forth previously in this Order. Next, the Court **FINDS** that the statements contained in the draft permits and fact sheets dated February 6, 2015 are the same draft agency documents and actions complained of in Plaintiff's original Complaint. Therefore, the Court **FINDS** that the proposed Supplemental Complaint simply restates and reframes the same facts as the original Complaint and, as such, the Court **FINDS** that Plaintiff has failed to allege a new transaction, occurrence or event that has happened since the filing of the original Complaint. The Court, therefore, **FINDS** that Plaintiff has not met its burden pursuant to C.R.C.P. 15(d) to serve its proposed Supplemental Complaint.

Next, based upon a review of the claims and allegations set forth in the proposed Supplemental Complaint, the Court **FINDS** that Plaintiff's proposed Supplemental Complaint involves preliminary draft agency actions that have been superseded by the final permits issued on May 29, 2015. In addition, the Court **FINDS** that Plaintiff currently has an appeal pending before the OAC regarding its modification requests[1]. The Court notes that Plaintiff has filed an administrative appeal regarding its modification requests while at the same time pursuing judicial review of the same modification requests. Accordingly, the Court **FINDS** that Plaintiff has failed to exhaust its administrative remedies. As such, the Court concludes that it lacks subject matter jurisdiction to consider the claims and allegations set forth in Plaintiff's proposed Supplemental Complaint.

Further, the Court notes that the Plaintiff has not argued that any of the exceptions to the doctrine of exhaustion of administrative remedies apply. Upon review of the pleadings and relevant authority, the Court **FINDS** that none of the exceptions to the exhaustion doctrine apply to Plaintiff's proposed Supplemental Complaint. Specifically, the Court **FINDS** that Plaintiff has not demonstrated that the Division lacked authority or capacity or that the policies underlying the doctrine of exhaustion would not be served. The Court **FINDS** that further administrative review by the Division would not be futile, because Plaintiff is currently seeking further administrative review while simultaneously seeking judicial review. The Court further **FINDS** that in the proposed Supplemental Complaint, Plaintiff's claims center on the draft agency permits which are not final agency actions. As such, the Court **FINDS** that Plaintiff has not demonstrated that it will suffer irreparable injury or that the Division exceeded its constitutional or statutory authority.

In addition, the Court **FINDS** that the terms of the draft permits have been superseded by the issuance of the final permits on May 29, 2015. Consequently, the relief required would have no practical effect because the final permits have issued and Plaintiff currently has a pending administrative appeal of those permits. Therefore, the Court **FINDS** that the claims in the proposed Supplemental Complaint are also moot. *See Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1102 (Colo. 1998) (an issue becomes moot when "the relief granted by the court would not have a practical effect upon an existing controversy").

Based on the above findings, the Court concludes that the Motion for Leave to Serve Supplemental Complaint would be futile because the proposed Supplemental Complaint cannot withstand a motion to dismiss. Accordingly, Plaintiff's Motion for Leave to Serve Supplemental Complaint is hereby **DENIED**.

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[1] The Court notes that Plaintiff has appealed the denial of its requested permit modifications before the OAC. Specifically, the Court notes that Plaintiff, in its notice of appeal, states that the requested modifications were "implicitly" denied in the final permits that issued on May 29, 2015. *See* Def's Resp Ex. H (Petitioner's Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay) ("the Division never states that it approved or denied the request [for WET Testing Modification, Iron Modification, and EC/SAR Testing Modification]. The Fact Sheet, Appendix C, and Renewal Permits implicitly deny the request, but contain no express statement to that effect. The Division's failure to explicitly approve or deny [Plaintiff's] request is an abuse of discretion. Also, absent a rationale for the implicit denial of the requested permit modification, the denial is also arbitrary and capricious").

Lastly, the Court notes that any relief that the Plaintiff is currently attempting to seek in this Court in its proposed Supplemental Complaint is premature, speculative, and/or moot. Further, the exhaustion doctrine allows for the Division to address the Plaintiff's concerns directly and to correct its own errors, if any, during the administrative process. The Court notes that the issues raised in this lawsuit can and should be resolved through the administrative process.

IT IS ORDERED that Defendant's Motion to Dismiss is hereby **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Complaint for Judicial Review is hereby **DISMISSED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to Serve Supplemental Complaint is hereby **DENIED**.

Dated this 6th day of January, 2016.

BY THE COURT:

Claude W. Appel

Claude W. Appel, District Judge