

**BEFORE THE COLORADO DEPARTMENT OF
PUBLIC HEALTH AND ENVIRONMENT,
WATER QUALITY CONTROL COMMISSION
STATE OF COLORADO**

**IN THE MATTER CONCERNING THE WATER QUALITY CONTROL DIVISION'S
FINAL 401 CERTIFICATION FOR THE NORTHERN INTEGRATED SUPPLY
PROJECT**

**WATER QUALITY CONTROL DIVISION AND NORTHERN COLORADO WATER
CONSERVANCY DISTRICT'S MOTION TO DISMISS THE CACHE LA POUFRE
RIVER AS PARTY UNDER C.R.C.P. 12(b)(1)**

Respondents the Water Quality Control Division ("Division") and the Northern Colorado Water Conservancy District ("Northern") by and through their respective counsel, submit this Motion to Dismiss the Cache la Poudre River as a Party under C.R.C.P. 12(b)(1).

CERTIFICATION OF CONFERRAL UNDER C.R.C.P. 121 § 1-15(8)

On July 15, 2020, counsel for the Division (acting on behalf of both the Division and Northern) emailed counsel for Save the Poudre in an attempt to confer regarding the parties' intent to file this motion. We have received no response from Save the Poudre as of the time of this filing.

INTRODUCTION

On April 15, 2020, a nonprofit organization called "Save the Poudre" filed a Notice of Appeal ("NOA") and Request for Adjudicatory Hearing with the Water Quality Control Commission ("Commission") concerning the Division's 401 Certification of the Northern Integrated Supply Project ("NISP"). The NOA also named the Cache La Poudre River as a party to the proceedings, asserting that the River itself appeals the Division's 401 Certification. To that end, the NOA states: "The Cache la Poudre River is a watershed flowing through Larimer

and Weld Counties, Colorado. The Cache la Poudre River is unable to represent itself and relies on others to do so.” NOA at 7.

The Cache la Poudre River (“River”) does not have standing to appeal or request an adjudicatory hearing before the Commission on the Division’s 401 Certification of NISP. Because standing is a component of subject matter jurisdiction and is a prerequisite to maintaining a legal proceeding, the Division and Northern bring this motion to dismiss under C.R.C.P. 12(b)(1), based on lack of subject matter jurisdiction. *See, e.g., Hansen v. Barron’s Oilfield Serv., Inc.*, 429 P.3d 101, 103 (Colo. App. 2018) (analyzing a motion to dismiss for lack of standing under C.R.C.P. 12(b)(1)). Specifically, the Division and Northern seek dismissal of the River as a party to this appeal because the River lacks standing.¹

ARGUMENT

The River lacks standing to appeal the Division’s § 401 certification and must be dismissed as a party

To establish standing under Colorado law, a plaintiff must prove that she (1) “suffered injury in fact,” and (2) that the injury was to a “legally protected interest as contemplated by statutory or constitutional provisions.” *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008) (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977)). Whether the plaintiff’s alleged injury was to a legally protected interest “is a question of whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation.” *Id.* at 246 (citing *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004)). In this appeal, Colorado’s statutes and the Commission’s regulations are determinative, as explained below.

¹ The Division and Northern are not challenging the standing of Save the Poudre.

Standing to appeal the Division's 401 certification decisions derives generally from the State Administrative Procedure Act ("APA") at C.R.S. § 24-4-105(2)(c), and more specifically from the Colorado Water Quality Control Act ("WQCA") at C.R.S. § 25-8-302(1)(f).

Under the APA, "[a] person who may be affected or aggrieved by agency action shall be admitted as a party to the proceeding upon his filing with the agency a written request therefor, setting forth a brief and plain statement of the facts which entitle him to be admitted . . ." C.R.S. § 24-4-105(2)(c) (emphasis added). A "[p]erson" includes an individual, limited liability company, partnership, corporation, association, county, and public or private organization of any character other than an agency." C.R.S. § 24-4-102(12). The River, as characterized in the NOA, is a "watershed," and is not a "person" under the APA. NOA, at 7. The River therefore lacks standing to appeal under the APA.

The WQCA provides that "[a]ppeals by an affected entity of a final 401 certification decision of the division shall be heard in accordance with section 24-4-105, C.R.S., of the State Administrative Procedure Act." C.R.S. § 25-8-302(1)(f) (emphasis added). Thus, the River needs to qualify as an "entity" to have standing to appeal under the WQCA. "Entity," however, is not defined in the WQCA (or the APA). *See generally* C.R.S. § 25-8-103; C.R.S. § 24-4-102 (definitions sections of the statutes).

Black's Law Dictionary (11th ed. 2019), defines "entity" as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners." (emphasis added). The term "entity" is therefore consistent with the definition of "person" under the WQCA, C.R.S. § 25-8-103(13), which defines "person" as "an individual, corporation, partnership, association, state or political subdivision thereof, federal agency, state agency,

municipality, commission, or interstate body” – all entities that have legal identities. In short, an “entity” is neither different from nor in addition to a “person,” but rather a subset of a “person.”

The Cache la Poudre River is admittedly “unable to represent itself” and therefore lacks the legal identity necessary to qualify as an “entity.” NOA, at 7. Rather, the River is a “watershed,” which is neither an entity nor a person. *Id.*

It is also relevant how the Commission determines standing in its regulations promulgated under the authority of the WQCA. *See, e.g., Wine & Spirits Wholesalers of Colorado, Inc. v. Colorado Dep't of Revenue, Liquor Enft Div.*, 919 P.2d 894, 897 (Colo. App. 1996) (“[a]n agency's construction of its own governing statute is entitled to great weight.”) (internal citation omitted). The WQCA authorizes the Commission to promulgate rules and regulations governing the Division’s 401 certifications, and to act as an appellate body to review certain determinations of the Division, including 401 certification decisions. C.R.S. §§ 25-8-202(1)(i.5) and (k). These Commission regulations are codified as Regulation #82 (“401 Certification Regulation”) and Regulation #21 (“Procedural Rules”).

Regulation #82 simply refers back to the governing statutes, providing that certification determinations “shall be reviewable pursuant to § 25-8-302(1)(f) C.R.S., and the applicable provisions of the State Administrative Procedure Act.” *See* 5 C.C.R. § 1002-82:82.8. The Commission’s Procedural Rules at section 21.10, however, state that “401 certification decisions may be appealed to the Commission by any person adversely affected or aggrieved by such decision.” 5 C.C.R. § 1002-21:21.10 (emphasis added). The Commission therefore construes the

term “entity” as used in section 25-8-302(1)(f) to mean “person,” consistent with the APA² and consistent with other sections of Regulation #21 dealing with various aspects of 401 appeals.³

The River is a “watershed,” and not “entity” or “an individual, corporation, partnership, association, state or political subdivision thereof, federal agency, state agency, municipality, commission, or interstate body” under the WQCA and the Commission’s regulations. The River therefore does not possess the requisite standing to appeal the Division’s 401 Certification of NISP and must be dismissed as a party, leaving “Save the Poudre” as the sole petitioner in this appeal.

A proposed order is attached.

Respectfully submitted this 16th day of July, 2020.

FOR THE ATTORNEY GENERAL

/s/ Annette M. Quill

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² As mentioned above, the APA confers standing on “persons” who may be affected or aggrieved by an agency action. C.R.S. § 24-4-105(2)(c).

³ Other pertinent examples in the Commission’s Procedural Rules include section 21.4(B)(2)(a), 5 C.C.R. § 1002-21:21.4(B)(2)(a) (requests for adjudicatory hearings must identify the “person(s) requesting the hearing”); section 21.4(D)(2), 5 C.C.R. § 1002-21:21.4(D)(2) (“A person who may be affected or aggrieved by the agency action shall be admitted as a party to the proceeding....”); and section 21.4(J)(3)(b), 5 C.C.R. § 1002-21:21.4(J)(3)(b) (“In hearings on orders or determinations of the Division concerning 401 certifications under section 25-8-302(1)(f)... the burden of proof shall be on the person requesting the hearing.”).

FOR NORTHERN COLORADO WATER
CONSERVANCY DISTRICT

/s/ Peter D. Nichols

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CERTIFICATE OF SERVICE

I hereby certify that on July 16th, 2020, a copy of this **WATER QUALITY CONTROL DIVISION AND NORTHERN COLORADO WATER CONSERVANCY DISTRICT'S MOTION TO DISMISS THE CACHE LA POUDRE RIVER AS PARTY UNDER C.R.C.P. 12(b)(1)** was served upon all parties herein via electronic mail to the email addresses listed in the attached Party Status List.

/s/ John Watson

John Watson



COLORADO

Water Quality Control Commission

Department of Public Health & Environment

PARTY STATUS LIST

May 18, 2020

IN THE MATTER OF THE WATER QUALITY CONTROL DIVISION'S FINAL CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION FOR THE NORTHERN INTEGRATED SUPPLY PROJECT.

November 9, 2020

HEARING CHAIR: Joan Card

	NAME	REPRESENTED BY/ADDRESS	TELEPHONE/E-MAIL
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NOTE TO PARTIES: Please send electronic copies of all documents (prehearing statements, rebuttals, etc.) directly to the Commission Office.