IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-01342

WILDEARTH GUARDIANS,
SIERRA CLUB,
CENTER FOR BIOLOGICAL DIVERSITY, and
HIGH COUNTRY CONSERVATION ADVOCATES,

Plaintiffs,

v.

MOUNTAIN COAL COMPANY, and
ARCH RESOURCES, INC.,

Defendants.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

The Clean Air Act (CAA) prohibits Defendants Mountain Coal Company and Arch Resources, Inc. (collectively, "Mountain Coal") from operating the West Elk Mine (Mine) and constructing the Mine's expansion without requisite air-pollution permits. This Colorado underground coal mine emits air pollution—specifically, volatile organic compounds (VOCs)—in amounts that trigger CAA permitting requirements. In their two-count Complaint, Plaintiffs assert that Mountain Coal is unlawfully (1) constructing the Mine's expansion (Expansion) without a "Prevention of Significant Deterioration" (PSD) construction permit—the First Claim, and (2) operating the Mine without a "Title V" operating permit—the Second Claim. Plaintiffs filed this lawsuit against Mountain Coal to enforce these CAA violations.

With this Motion, Plaintiffs seek summary judgment on their standing to bring both claims. The Mine and its unpermitted VOC emissions harm Plaintiffs-members' recreational

and aesthetic interests, and Mountain Coal's failure to monitor and report VOC emissions—as the CAA permits would require—is causing informational injury. Plaintiffs have standing.

Plaintiffs also seek summary judgment on their Second Claim for Relief. There is no factual dispute that: (1) Mountain Coal is operating the Mine; (2) the Mine is emitting over 100 tons per year of VOCs, triggering the Title V permitting requirement; and (3) Mountain Coal does not have a Title V permit. Both the CAA and Colorado's State Implementation Plan prohibit Mountain Coal from operating the Mine "without first obtaining an operating permit." 5 C.C.R. § 1001-5:3C.II(A)(1); 42 U.S.C. § 7661a(a); 40 C.F.R. § 70.1(b). Plaintiffs ask the Court to hold that Mountain Coal has been violating this prohibition each day since at least April 29, 2015—when Colorado's Air Pollution Control Division (Air Division) determined Mountain Coal required a Title V permit to operate the Mine.

LEGAL AND FACTUAL BACKGROUND

I. The Clean Air Act: The CAA requires the U.S. Environmental Protection Agency (EPA) to establish air pollution standards, known as the National Ambient Air Quality Standards (NAAQS), for certain designated pollutants. 42 U.S.C. § 7409. One such pollutant is ground-level ozone, 40 C.F.R. § 50.19, also known as smog, which is created when emissions of VOCs and nitrogen oxides react in the presence of sunlight, *see* 40 C.F.R. § 51.21(b)(50)(i)(b)(1) ("[V]olatile organic compounds and nitrogen oxides are precursors to ozone.").[1] EPA determines whether air quality is better or worse than the NAAQS for ozone within particular areas of each state. 42 U.S.C. § 7407(b) & (d). An area below a NAAQS is classified an

[1] VOCs include a wide-range of hydrocarbons. Methane is a VOC, but, because it contributes minimally to ground-level ozone pollution, it is not regulated as a VOC under the CAA. *See* 40 C.F.R. § 51.100(s). Some VOCs, like hexane, are also regulated as "hazardous air pollutants" under 42 U.S.C. § 7412(b)(1). The Mine emits various kinds of VOCs, including methane and hexane. *See* MSUMF No. 22, Ex. 3 at WEG004887.

"attainment" area, 42 U.S.C. § 7407(d)(1)(A)(ii), and those exceeding it as "nonattainment" areas, *id*. § 7407(d)(1)(A)(i). Different rules apply depending on a polluting source's location: attainment or nonattainment area. *Clean Wisc. v. EPA*, 964 F.3d 1145, 1153-54 (D.C. Cir. 2020).

States assist EPA to satisfy the NAAQS, 42 U.S.C. § 7407(a), by developing "state implementation plans" (SIP), *id*. § 7410(a); *see U.S. Magnesium v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012) ("States create their own SIPs to bring nonattainment areas into compliance with the NAAQS and to prevent deterioration of air quality in attainment areas."). SIPs are a collection of state regulations that must contain and conform to CAA requirements. *See* 42 U.S.C. § 7410(k)(1). They include "enforceable emission limitations and other control measures, means, or techniques…, as well as schedules and timetables" for achieving and maintaining compliance with the NAAQS. *Id*. § 7410(a)(2)(A). If EPA finds a SIP adequate, it becomes federal law and its provisions are enforceable in federal courts. *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989); *see* 42 U.S.C. § 7604(a)(1) & (f)(4) (CAA allows citizens to enforce SIP and other violations in federal court). Colorado's EPA-approved SIP is set forth in state regulations implementing the Colorado Air Pollution Prevention and Control Act (C.R.S. §§ 25-7-101 *et seq*.). 40 C.F.R. §52.320. The Air Division, within the Colorado Department of Public Health and Environment, administers the state's SIP. Colo. Rev. Stat. § 25-7-111.

The Clean Air Act and the SIP mandate that stationary sources obtain construction and operating permits.[2] Before constructing in attainment areas, the operator of a "major source"

[2] A "stationary source" is defined as "any building structure, facility or installation, or any combination thereof belonging to the same industrial grouping that emits or may emit any air pollutant subject to regulation under the Federal Act, that is located on one or more contiguous or adjacent properties and that is owned or operated by the same person or by persons under common control." 5 C.C.R. § 1001-5:3A.I(B)(43); *see also* 40 C.F.R. § 51.166(b)(5) & (6).

must secure a PSD permit from the Air Division. 42 U.S.C. § 7475(a)(1); 5 C.C.R. § 1001-5:3D.I(A)(1) (major sources "shall not begin actual construction in a[n]…attainment…area unless a permit has been issued containing all applicable state and federal requirements"); *see Resisting Envtl. Destruction on Indigenous Lands v. EPA*, 716 F.3d 1155, 1159-60 (9th Cir. 2013) ("The [PSD] program's purpose is to protect the public from any adverse health or welfare effects of air pollution that may occur despite achievement of NAAQS, and to require careful evaluation of all consequences of new industrial development."). For PSD construction-permit purposes, "major sources" include those that emit or have the "potential to emit" 250 tons per year of VOCs. 42 U.S.C. § 7479(a)(1); 5 C.C.R. § 1001-5:3D.II(A)(25)(a)(ii).[3] Among other PSD-permitting requirements, a source must use the "best available control technology" (BACT) to limit its VOC emissions. 42 U.S.C. § 7475(a)(4); 5 C.C.R. § 1001-5:3D.VI(A)(1).[4]

Second, to operate and emit air pollution, major sources must also obtain a Title V operating permit. 5 C.C.R. § 1001-5:3C.II(A)(1); *see* 42 U.S.C. § 7661a(a) ("[I]t shall be unlawful for any person…to operate…a major source…except in compliance with a permit issued by a permitting authority.").[5] A Title V major source is defined as a "stationary facility or

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[3] "Potential to emit" means the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable." 40 C.F.R. § 51.166(b)(4); 5 C.C.R. § 1001-5:3A.I(B)(37).

[4] Through BACT, a source must reduce emissions of VOCs as well as other regulated pollutants, including greenhouse gases like methane. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 51.166(b)(48); 5 C.C.R. § 1001-5:3A.I(B)(44); *id.* § 1001-5:3D.II(A)(40)(e).

[5] EPA approved Colorado's Title V permit program on October 16, 2000, 65 Fed. Reg. 49,919 (Aug. 16, 2000), which means the Air Division is responsible for issuing Title V permits. *See* 42 U.S.C. § 7661a(d); *Sierra Club v. EPA*, 964 F.3d 882, 886 (10th Cir. 2020).

source of air pollutants that directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." 42 U.S.C. § 7661(2)(B) (citing, 42 U.S.C. § 7602(j)). Title V permits consolidate all emission limits that govern a source's operations, such as those imposed through a PSD construction permit, *Sierra Club*, 964 F.3d at 886, while also establishing "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions," 42 U.S.C. § 7661c(c).

The public can enforce CAA violations, like a source's unpermitted activities and failure to comply with particular permit terms. The CAA's citizen suit provision provides that citizens may bring a civil action "against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter." 42 U.S.C. § 7604(a)(1). Relevant here, the definition of "emission standard or limitation" includes "any requirement to obtain a permit as a condition of operations." *Id.* § 7604(f)(4); *see NPCA v. TVA*, 480 F.3d 410, 418 (6th Cir. 2007). A lack of knowledge is not a defense to a CAA claim, as owners and operators are strictly liable for their violations. *Pound v. Airosol Co.*, 498 F.3d 1089, 1097 (10th Cir. 2007); *Sierra Club v. Pub. Serv. Co. of Colo.*, 894 F.Supp. 1455, 1459 (D. Colo. 1995).

II. <u>The West Elk Coal Mine</u>: Mountain Coal owns and operates the Mine. MSUMF No. 25. The Mine is located on public lands managed by the U.S. Forest Service, in Gunnison County, MSUMF No. 26, and in an attainment area for ozone, MSUMF No. 21. It has been operating since approximately 1982. MSUMF No. 27.

The Mine emits VOCs and methane from its ventilation air system (known as the Deer Creek shaft and Sylvester Gulch portal) and methane drainage wells, which release excess methane and are required to mine. MSUMF Nos. 15, 30, 46. Such emissions harm public health

and the environment. VOCs are "ozone precursors"—the chemical ingredients to ozone pollution. MSUMF No. 17. Methane is a potent greenhouse gas (GHG) that traps heat in the atmosphere and consequently contributes to global warming. MSUMF No. 23. In Colorado, climate change has decreased snowpack, increased the frequency and intensity of wildfires, put human health at risk from extreme temperatures, made forests more susceptible to pests, and increased the duration, frequency, and severity of drought. MSUMF No. 24; MSUMF No. 23, Ex. 4 at 109 (Forest Service concluded in 2017 that Mine's "GHG emissions will directly contribute to potential climate change").

Recently, Mountain Coal completed a federal and state approval process to expand the Mine by over 1,700 acres, with the last authorization occurring on January 13, 2020. MSUMF No. 28. Mountain Coal has begun constructing this Expansion, which involves building new access roads in the National Forest, laying the foundation for additional well pads, and drilling dozens of new methane drainage wells above the coal seams. MSUMF No. 40. The Expansion and these construction activities are needed to operate the Mine. *Id*., Ex. 5 at 15 ("MCC has indicated the No Action would result in the West Elk Mine running out of minable coal in December 2019"); MSUMF No. 46. Mountain Coal does not have a PSD construction permit for the Expansion. *See* MSUMF No. 42.

The Mine emits more than 100 tons of VOCs annually. MSUMF No. 31, 32, 36. During an inspection on April 29, 2015, the Air Division determined that the Mine emits far more than 100 tons per year of VOCs. MSUMF No. 33, Ex. 13 at MCC003112 ("All analyses determined that the MCC mine emitted VOCs in excess of 200 tons per year."). In 2019, Mountain Coal's monitoring revealed the Mine's potential-to-emit VOC are approximately 220 tons per year. MSUMF No. 36, Ex. 2 at MCC003732, MCC003738, MCC003741, MCC003745; Ex. 11 at

WEG001044, WEG001077, WEG001089. After the Air Division questioned the sufficiency of the 2019 results, additional testing and analysis in 2020 pushed the Mine's potential-to-emit to 465 tons per year. MSUMF Nos. 38, 44. Mountain Coal does not have a Title V operating permit for the Mine's operations. *See* MSUMF Nos. 34, 41.

After receiving Plaintiffs' December 17, 2019 statutorily required pre-suit notice letter (ECF Doc. 1, Exh. 1; MSUMF No. 1), Mountain Coal applied for a minor-source construction permit on January 16, 2020, MSUMF No. 37, and Title V operating permit on March 30, 2020, MSUMF No. 32. But because VOC emissions were double what was disclosed in those applications, MSUMF Nos. 36, 44, Mountain Coal submitted a new construction permit application on September 15, 2020, MSUMF No. 39. For the same reason, Mountain Coal intends to resubmit its Title V permit application. MSUMF No. 41. Mountain Coal has been and is operating the Mine, MSUMF No. 35, 43, without a Title V permit, MSUMF No. 32, 34, 41.

III. <u>Plaintiffs and their two CAA claims</u>: WildEarth Guardians, Sierra Club, Center for Biological Diversity, and High Country Conservation Advocates are non-profit organizations with offices and members throughout Colorado. MSUMF No. 5. Their missions include promoting clean air and protecting public lands and wilderness. *Id*.

Plaintiffs filed this lawsuit on May 12, 2020. ECF Doc. 1.[6] In their First Claim, Plaintiffs allege Mountain Coal has started construction activities for the Mine's Expansion without the required PSD permit. *Id*. ¶¶ 47, 61, 78-81.[7] In the Second Claim, Plaintiffs assert that Mountain

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[6] Plaintiffs served the Complaint on Mountain Coal, ECF Doc. 10, as well as the U.S. Attorney General and the EPA Administrator, MSUMF No. 47; *see* 42 U.S.C. § 7604(c)(3).

[7] The PSD permitting requirement applies here because the Expansion itself has the potential-to-emit at least 250 tons per year of VOC. *See* 40 C.F.R. § 51.166(b)(1)(i)(C); 5 C.C.R. § 1001-5:3D.II(A)(25)(c).

Coal is operating the Mine without the required Title V permit. *Id*. ¶¶ 82-86. For both violations, Plaintiffs seek declaratory and injunctive relief, and the imposition of civil penalties. *Id*. at 28. In this Motion, Plaintiffs seek summary judgment on their standing for both claims and on Mountain Coal's liability for operating the Mine without a Title V permit—the Second Claim.

STANDARD OF REVIEW

Summary judgment must be granted if "there is no genuine disputes as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A fact is "material" if it pertains to an element of a claim or defense. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). "The substantive law at issue determines which facts are material in a given case." *Stone v. Autoliv ASP*, 210 F.3d 1132, 1136 (10th Cir. 2000). "Whether there is a genuine dispute as to a material fact depends on whether the evidence presents a sufficient disagreement to require submission to a jury or, conversely, is so one-sided that one party must prevail as a matter of law." *Nelsons v. FedEx Ground Package Sys.*, 2019 WL 1437765, at *2 (D. Colo. Feb. 8, 2019) (citations omitted). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original). "Once the moving party meets its initial burden of demonstrating the absence of a genuine dispute as to a material fact, the burden then shifts to the party opposing summary judgment to move beyond the pleadings and to designate evidence that demonstrates the existence of a genuine dispute for trial." *Nelsons*, 2019 WL 1437765, at *2.

ARGUMENT

I. PLAINTIFFS HAVE ARTICLE III STANDING TO BRING THIS CASE

Standing is a component of federal court jurisdiction, rooted in Article III of the Constitution's "cases or controversies" language. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). It ensures the plaintiff has a personal stake in the dispute. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). At summary judgment, Plaintiffs can satisfy their standing burden by setting forth "by affidavit or other evidence specific facts." *Lujan*, 504 U.S. at 561.

A. Plaintiffs Have Standing To Represent Members And On Their Own Behalf.

An organization can sue to protect their own or their members' interests. "Associational standing" on behalf of members exists when: "(a) [an organization's] members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *accord Renewable Fuels Assn. v. EPA*, 948 F.3d 1206, 1231-32 (10th Cir. 2020).[8] Individual members have standing—and support an organization's standing—when: (1) they have an injury-in-fact; (2) the injury is fairly traceable to defendant's action; and (3) it is likely the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61; *Sierra Club*, 964 F.3d at 888. "In the environmental litigation context, the standing requirements are not onerous." *Am. Canoe Ass'n. v. Murphy Farms*, 326 F.3d 505, 517 (4th Cir. 2003).

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[8] These last two elements of "associational" standing under *Hunt* are met. Plaintiffs have missions and purposes—protecting and enhancing clean air, public health, and wilderness areas—that are germane to the goals of this lawsuit. MSUMF No. 5. And it is settled that citizen suits do not require the participation of individual members, as this *Hunt* element is only implicated when individualized proof of damages is required. *See Sierra Club v. TVA*, 430 F.3d 1337, 1345 (11th Cir. 2005); *Sierra Club v. Young Life Campaign*, 176 F.Supp.2d 1070, 1085 (D. Colo. 2001).

Courts in this District have ruled twice that these Plaintiffs have standing to challenge the Mine. *High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F.Supp.3d 1107, 1117-18 (D. Colo. 2018); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp.3d 1174, 1186-87 (D. Colo. 2014). Plaintiffs proved their standing through injury to their members' recreational and aesthetic interests from the Mine, its construction and operations, and emissions. *Id.* This Court should rule the same and grant Plaintiffs summary judgment on standing.

1. Plaintiffs and their members have suffered an injury in fact.

Injuries must be concrete, particular, and actual or imminent. *Lujan*, 504 U.S. at 560. A concrete injury is a "real" one—not abstract—sometimes validated by the statute being enforced. *Spokeo v. Robins*, 136 S.Ct. 1540, 1548-49 (2016). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id*. at 1548; *see, e.g.*, *Nat. Res. Def. Council v. Vilsack*, 2011 WL 3471011, at *5 (D. Colo. Aug. 5, 2011). The injury must be ongoing or there must be an imminent threat. *Lyons*, 461 U.S. at 101-02.

Aesthetic and Recreational Injury: "In environmental suits, an injury-in-fact exists when the [plaintiff] 'use[s] the affected area' and is a person 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.'" *Sierra Club*, 964 F.3d at 888 (quoting, *Friends of the Earth v. Laidlaw Servs.*, 528 U.S. 167, 183 (2000)). The relevant showing is injury to the plaintiff, not the environment. *Laidlaw*, 528 U.S. at 181; *Utah Physicians for a Healthy Env't v. Diesel Power Gear*, 374 F.Supp.3d 1124, 1132 (D. Utah 2019); *see also Nat. Res. Def. Council*, 2011 WL 3471011, at *4 (no showing of NAAQS violation required to establish injury). "[A]n injury [need not] meet some threshold of pervasiveness to satisfy Article III…an 'identifiable trifle'" will suffice. *Am. Humanist Ass'n v. Douglas Cty. Sch. Dist.*, 859 F.3d 1243, 1248 (10th Cir. 2017); *see also LaFleur v. Whitman*, 300 F.3d 256, 270-71

(2d Cir. 2002) (finding "likely exposure" to air pollution is "certainly something more than an 'identifiable trifle,' even if the ambient level of air quality does not exceed [certain national limits]."). "A person who has 'reasonable concerns' about pollution suffers injury in fact when their concerns directly affect their recreational, aesthetic or economic interests." *Utah Physicians*, 374 F.Supp.3d at 1132 (citing, *Laidlaw*, 528 U.S. at 183-84).[9]

Each of the following is an injury-in-fact for standing purposes: impaired aesthetic appreciation, *S. Utah Wilderness All. v. OSM*, 620 F.3d 1227, 1234 (10th Cir. 2010); impaired enjoyment of solitude, *id.*; seeing unwanted pollution, *Laidlaw*, 528 U.S. at 181; *Sierra Club v. TVA*, 430 F.3d at 1345; diminished visibility, *Sierra Club*, 964 F.3d at 888; curtailing recreation or enjoying it less, *Laidlaw*, 528 U.S. at 181-184; *Utah Physicians*, 374 F.Supp.3d at 1132; physical discomfort, *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001); and having a reasonable concern about the effects of pollution, *Laidlaw*, 528 U.S. at 183-84; *Utah Physicians*, 374 F.Supp.3d at 1132. There is also injury when required information about pollution is not disclosed, thereby preventing individuals from assessing and avoiding risks. *WildEarth Guardians v. Colo. Springs Utils*., 2018 WL 317469, at *6 (D. Colo. Jan. 8, 2018) (finding, without monitoring data, members lacked information about pollution's extent).[10]

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[9] The Supreme Court explained the "reasonable concerns" analysis like this: "it is undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed…[T]he only 'subjective' issue here is [t]he reasonableness of [the] fear that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas…[W]e see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact." *Laidlaw*, 528 U.S. at 184-85.

[10] *See also Am. Canoe Ass'n v. City of Louisa Water & Sewer*, 389 F.3d 536, 542 (6th Cir. 2004) ("[Plaintiffs' member] attested that the lack of information [due to defendant's failure to

Allison Melton, Matthew Reed, and Jeremy Nichols are members of Plaintiffs-organizations (the "Members"). MSUMF No. 7. As their filed declarations show, each routinely hikes, camps, bird watches, observes scenery, and enjoys solitude on the public lands near the Mine, and they have concrete and continuing plans to do so in the future. MSUMF No. 8.

The Members are each adversely affected by the smog and brown haze in the air near the Mine. MSUMF Nos. 11, 13, 16. The Members do not want to breathe ozone pollution. MSUMF No. 11. They do not want such foreign substances in their lungs, as they are concerned about the adverse health effects caused by breathing VOCs. MSUMF No. 11, 19, 22. Ms. Melton attests to getting winded more quickly than usual when hiking near the Mine. MSUMF No. 20, Melton Dec. ¶¶ 17, 18. When hiking and camping near the Mine, the Members see, but do not want to see, smog that impairs their views across the landscape. MSUMF No. 13, 16. These Members are also concerned about ozone damaging vegetation in the area, both where they hike near the Mine and at the local farms where they buy produce. MSUMF No. 10.

"[T]here is no threshold concentration below which ground-level ozone is known to be harmless." *Clean Wisc.*, 964 F.3d at 1158 (citations and quotations omitted).[11] Breathing ozone can cause stinging eyes and throat, chest pain, coughing, and breathing difficulty. MSUMF No. 19, 20. "It also has a broad array of effects on trees, vegetation, and crops and can indirectly

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follow monitoring and reporting obligations] deprived him of the ability to make choices about whether it was 'safe to fish, paddle, and recreate in this waterway."); *Sierra Club v. Simkins Industries*, 847 F.2d 1083, 1112-13 (4th Cir. 1988) (finding injury element met where company failed to submit reports required by Clean Water Act, creating reasonable fears of pollution because members were unable to know full extent of pollution in affected waterway).

[11] "Ozone [is] a colorless gas that occurs both in the Earth's upper atmosphere and at ground level. Although ozone is an essential presence in the atmosphere's stratospheric layer, it becomes harmful at ground level and can cause lung dysfunction, coughing, wheezing, shortness of breath, nausea, respiratory infection, and in some cases, permanent scarring of the lung tissue." *Clean Wisc.*, 964 F.3d at 1154 (citations and quotations omitted).

affect other ecosystem components such as soil, water, and wildlife." *Clean Wisc.*, 964 F.3d at 1154. Ozone decreases visibility, creating haze. MSUMF No. 18. Ozone levels in Gunnison County, where the Mine is located, are close to exceeding the NAAQS. MSUMF No. 21.

The Members' enjoyment of the area is also marred by the physical presence of the Mine, including the Mine's construction activities in the Expansion area, which they see while hiking. MSUMF No. 9, 12. They attest that the Mine's air pollution and its operating and construction activities spoil the solitude they enjoy in the National Forests and wilderness. MSUMF Nos. 9, 11-13, 16. And absent data about the Mine's emissions, Members are deprived of the ability to make choices about where and when to use areas impacted by the Mine. MSUMF No. 14.

Informational Injury: Plaintiffs themselves, as organizations, are suffering informational injury. "[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *accord Nat. Res. Defense Council v. EPA*, 961 F.3d 160, 168-69 (2nd Cir. 2020). This injury supports a plaintiff's standing when "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016); *see also Colo. Envtl. Coal. v. Lujan*, 803 F.Supp. 364, 367 (D. Colo. 1992) (affirming "[i]njury to informational interests has been held to support standing").

Here, the Mine lacks a Title V operating permit and a PSD construction permit (MSUMF No. 32, 34, 41 and 37, 39, 42) and both permits, if issued, would require Mountain Coal to monitor and report the Mine's actual air emissions. 42 U.S.C. § 7661c(a) & (c); 40 C.F.R. § 70.6(a)(3)(i)-(iii); 5 C.C.R. § 1001-5.3C.V(C)(4)-(7); *see also* 42 U.S.C. § 7475(a)(7) (permittee

"agrees to conduct such monitoring as may be necessary to determine" emissions' effects).[12] This information must be publicly available, 42 U.S.C. § 7414(c), "[t]o aid citizen enforcement," *Pub. Serv. Co.*, 894 F.Supp. at 1459; *see also Sierra Club*, 964 F.3d at 886 ("Title V is designed to enhance compliance and improve enforcement."); 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (when promulgating Title V regulations, EPA explained its goal is "[i]ncreased source accountability and better enforcement"); 40 C.F.R. § 70.6(c)(1) (Title V regulations require monitoring, record-keeping, and reporting terms to be "sufficient to assure compliance" with permit limits). Because Mountain Coal has not obtained these air permits, Plaintiffs do not have access to information about the Mine's air emissions and pollution, and are thus unable to use this data in their work. MSUMF No. 6.

2. These injuries are fairly traceable to Mountain Coal's CAA violations.

The "fairly traceable" element requires some causal connection between the plaintiffs' injury and the challenged conduct. *Lujan*, 504 U.S. at 560. It ensures plaintiffs' injuries are not completely "the result of the independent action of some third party not before the court." *Id*.

As a Court in this District held, "[i]n the context of an environmental pollution case, a plaintiff 'must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.'" *Colo. Springs Utils.*,

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[12] *See also* 5 C.C.R. § 1001-5.3D.VI(A)(3)(c) (providing "continuous air quality monitoring data gathered for the purpose of determining whether emissions of that pollutant would cause or contribute to a violation of the applicable standard or maximum allowable increase"); 5 C.C.R. § 1001-5.3D.VI(A)(4) (authority to require continuous monitoring of ambient air); 5 C.C.R. § 1001-5.3D.VI(A)(6) (requiring source to analyze impacts of other emitted pollutants); 40 C.F.R. § 51.166(m) (detailing air monitoring source is required to perform for air quality analysis); 40 C.F.R. § 51.166(n) & (o) (identifying information source must provide, including source's design, operating and construction schedule, emission estimates, emission reduction technologies to be employed, and visibility monitoring).

2018 WL 317469, at *7 (quoting, *Friends of the Earth v. Gaston Copper*, 204 F.3d 149, 161 (4th Cir. 2000)). "The requirement that plaintiff's injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's [pollution] and defendant's [pollution] alone, caused the precise harm suffered by the plaintiffs." *Pub. Int. Res. Grp. of NJ v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3rd Cir. 1990); *see also Sierra Club*, 964 F.3d at 899 (finding existence of other contributors to pollution does not bear on traceability of defendant's conduct); *Utah Physicians*, 374 F.Supp.3d at 1135 (finding traceability element met, while acknowledging "Defendants' emissions are a small fraction of total emissions in the Wasatch Front").[13]

Here, the Mine's unpermitted emissions cause or contribute to the Members' injuries. VOCs released from the Mine contribute to ozone pollution, which can cause physical symptoms that Members have experienced and can impair visibility in places the Members visit and enjoy. MSUMF Nos. 10-11, 13, 15-22; *see, e.g.*, *Sierra Club v. Tri-State Generation and Transmission*, 173 F.R.D. 275, 280 (D. Colo. 1997) ("Plaintiff's allegations—that defendants' emissions impair its members' ability to breathe clean air and view natural scenery and wildlife—clearly satisfy [the causation] requirement."). Mountain Coal's unlawful construction of the Mine's Expansion mars the scenery and solitude in the National Forests and wilderness areas that Members enjoy and VOC-emitting operations contribute to impaired air quality in the areas that the Members regularly use. MSUMF Nos. 9, 12. And the inability to obtain information about Mine emissions, both for the Members and the Plaintiffs-organizations, is directly tied to Mountain

[13] Courts have cautioned against overextending the traceability element. *See Laidlaw*, 528 U.S. at 181 (warning to not "raise the standing hurdle higher than the necessary showing for success on the merits"). Traceability "is not equivalent to a requirement of tort causation." *Powell Duffryn*, 913 F.2d at 72; *see Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

Coal's failure to obtain required CAA permits. MSUMF Nos. 6, 14.

3. Plaintiffs' injuries can be redressed through declaratory and injunctive relief and civil penalties.

Courts have found that the relief Plaintiffs seek in this case (ECF Doc. 1 at 28) satisfies the redressability element. Civil penalties can deter future violations. *Laidlaw*, 528 U.S. at 185-86; *accord Benham v. Ozark Materials River Rock*, 885 F.3d 1267, 1273 (10th Cir. 2018). Declaratory relief provides significant relief where, as here, there is systemic noncompliance and Mountain Coal continues to operate the Mine and construct the Expansion without CAA permits. *See Colo. Springs Utils.*, 2018 WL 317469, at *8 (finding judicial declaration provides valuable relief because defendant-utility was disputing whether it was violating CAA); *see also Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (finding declaratory relief sufficient even when court ruling did not ensure government officials would make relevant changes).

An injunction ordering Mountain Coal to cease construction and halt operations until the required permits are obtained will eliminate the air emissions that impair air quality, halt further blight on the public lands, and enhance the Members' health and aesthetic and recreational enjoyment of areas affected by the Mine. In addition, the required permits are likely to include mandatory limits that require VOC and methane emission reductions. *See Tri-State Generation*, 173 F.R.D. at 281 (reducing emissions would alleviate plaintiff-members' injuries); *Ohio Valley Envtl. Coal. v. Hobet Mining*, 702 F.Supp.2d 644, 653 (S.D. W.Va. 2010) (injunctive relief that reduces, if not eliminates, pollution was "likely to alleviate some of the distress, anger, and fear Plaintiffs experience in relation to their knowledge of" defendants' pollution in areas they frequent); *see also Clean Wisc.*, 964 F.3d at 1154 ("[C]ompliance with the ozone NAAQS largely depends on reducing emissions from ozone-precursor producers."). And permits that

require Mountain Coal to report emissions will ensure Plaintiffs and the Members have access to information about the Mine and its VOC emissions.

Ordering all or any one of these types of relief can redress Plaintiffs' injuries.

II. MOUNTAIN COAL IS LIABLE FOR OPERATING THE MINE WITHOUT A TITLE V PERMIT

The Court should grant Plaintiffs summary judgment on their Second Claim as to Mountain Coal's liability. The undisputable facts establish: (1) Mountain Coal is operating the Mine; (2) the Mine is a stationary source that emits more than 100 tons of VOCs per year; and (3) Mountain Coal does not have a Title V permit covering Mine emissions. *See* 5 C.C.R. § 1001-5:3C.II(A)(1); 42 U.S.C. § 7661a(a); 40 C.F.R. § 70.1(b).

There is no dispute that a Title V permit is required. Indeed, on March 30, 2020, Mountain Coal applied for a Title V permit. MSUMF No. 32. That application confirms the Mine is a stationary source, MSUMF No. 29, that emits and has the potential-to-emit over 100 tons per year of VOCs, MSUMF Nos. 32; *see also* MSUMF Nos.31, 33, 36, 41, 44. On May 27, 2020, the Air Division concluded that "[t]esting has revealed that this facility exceeds the emission levels required to obtain a Title V Operating Permit." MSUMF No. 33, Ex. 15 at 1. VOC-emission results from 2020 show that the Mine's potential-to-emit for VOCs is 465 tons per year, MSUMF No. 44, requiring Mountain Coal to update its Title V application, MSUMF No. 41. These emission totals affirm what the Air Division determined during a 2015 inspection: the Air Division "has obtained sufficient information to determine [Mountain Coal] has been operating with VOC emissions from the ventilation shafts above the 100 [tons-per-year] major source threshold since at least 2011." MSUMF No. 31, Ex. 13 at MCC003144.

Mountain Coal does not have a Title V operating permit. MSUMF No. 34. Yet the Mine has been operating every day since at least April 29, 2015. MSUMF Nos. 35, 45. Mountain Coal is in violation of the CAA prohibition against operating without a Title V permit.

Mountain Coal's belated March 30, 2020 Title V permit application, which now requires a revised application, MSUMF No. 41, Ex. 3 at WEG004887, does not shield the company from this enforcement action. In certain circumstances, a major source that applies for a Title V permit may continue to operate while the permit application is pending. 42 U.S.C. § 7661b(d); 40 C.F.R. § 70.5(a)(1)(i); 5 C.C.R. § 1001-5:3C.II(B). But those circumstances do not apply here.

First, Mountain Coal's application is not complete. *See* 42 U.S.C. § 7661b(d); 5 C.C.R. § 1001-5:3C.II(B); *id*. § 1001-5:3C.III(C). The March 30, 2020 application contained flawed emission data—underreporting the Mine's VOC emissions. That deficiency prompted Mountain Coal to inform the Air Division that it plans to submit a new updated or revised Title V application "in an expeditious manner." MSUMF No. 41, Ex. 3 at WEG004887 ("WEM is planning to submit an updated Title V permit application based on the more recent data, emission calculations, and specific details concerning conclusions around PSD applicability.").

Second, only a timely application—one filed "not later than 12 months after the date on which the source becomes subject to a permit program," 42 U.S.C. § 7661b(c); 5 C.C.R. § 1001-5:3C.III(B)(2)—can shield liability. Mountain Coal has not submitted a timely application. Even when considering the March 30, 2020 application, the Air Division found Mountain Coal had not timely applied for a Title V permit. MSUMF No. 33, Ex. 15 at WEG000563 ("[T]he Division believes this application was submitted more than twelve months after this source became subject to the Operating Permit program."), Exh. 14 at MCC003656 ("Division is

currently assuming that emissions exceeded 100 tpy well before 2019."). The Air Division, upon performing a routine inspection on April 29, 2015, determined that Mine's VOC emissions exceeded the 100 ton-per-year threshold—more than twelve months before Mountain Coal applied for a Title V permit. MSUMF No. 33, Ex. 13 at MCC003126 ("[T]he data consistently shows the facility is operating with VOC emissions above the 100tpy Title V Operating Permit threshold…The Division has obtained sufficient information to determine [Mountain Coal] has been operating with VOC emissions from the ventilation shafts above the 100 tpy major source threshold since at least 2011.").

Third, an application offers no protection for a source that lacks an applicable construction permit. 42 U.S.C. § 7661b(d) (application shield exception: "sources required to have a permit before construction or modification"); *see U.S. v. Duke Energy Corp.*, 278 F.Supp.2d 619, 652 (M.D.N.C. 2003) ("Title V permits are generally given temporary protection with the exception of sources that are not in compliance with applicable construction or modification permit requirements. 42 U.S.C. § 7661b(d)."), *aff'd*, 411 F.3d 539 (4th Cir. 2005), *vacated sub nom. Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007), and *vacated in part on other grounds*, 2010 WL 3023517 (M.D.N.C. July 28, 2010). Mountain Coal has neither a major-source PSD construction permit nor even a minor-source construction permit that limits VOC emissions from the ventilation air system and methane drainage wells. MSUMF Nos. 37, 39, 42; MSUMF No. 32, Ex. 11 at WEG001044 (checking box certifying Mine complying with all requirements, except for securing construction permit).[14] Without an applicable construction permit, the shield is not available to Mountain Coal. *See State of New York v. Niagara Mohawk*

[14] For its Expansion project, Mountain Coal has twice applied for a "minor-source" construction permit, not the required "major-source" PSD permit: first on January 16, 2020 and again on September 15, 2020. MSUMF Nos. 37, 38, 39.

Power, 2003 WL 23356447, at *4 (W.D.N.Y. Dec. 31, 2003) ("[G]iven the first clause of § 7661b(d), there is a question as to whether this section even applies to Niagara Mohawk" because source lacked construction permit for emissions of certain pollutants).

Accordingly, Mountain Coal is violating the CAA's prohibition on operating the Mine without a Title V permit. Mountain Coal's violations have been occurring on each day of operations since April 29, 2015, when the Air Division determined the Mine's VOC emissions exceeded 100 tons per year. MSUMF No. 35. Mountain Coal operates the Mine every day of the year. MSUMF No. 44. Plaintiffs are entitled to summary judgment on this claim.

CONCLUSION

For the reasons set forth above, the Court should grant summary judgment (1) as to Plaintiffs' standing to bring their claims, and (2) finding Mountain Coal liable on the Second Claim for each day from April 29, 2015 through the present.

Respectfully submitted on November 18, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2020, I electronically transmitted Plaintiffs' Motion for Partial Summary Judgment, Movants' Statement of Undisputed Facts, and Declaration of Neil Levine and attached Exhibits to the Clerk's Office using the CM/ECF System for filing and service on all registered counsel.

/s/ Neil Levine
Neil Levine