IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01342-RM-STV

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

Plaintiffs,

v.

MOUNTAIN COAL COMPANY and
ARCH RESOURCES, INC.,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Defendants' Motion to Dismiss the Complaint Pursuant to F.R.C.P. 12(b)(6) Based on the Statute of Limitations (the "Motion") [#18], which has been referred to this Court [#19]. This Court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, as well as oral argument held on December 16, 2020. For the following reasons, this Court respectfully **RECOMMENDS** that the Motion be **GRANTED**.

I. FACTUAL ALLEGATIONS[1]

Defendant Mountain Coal Company ("Mountain Coal") operates the West Elk coal mine (the "Mine"). [#1, ¶¶ 1, 24] The Mine is an underground coal mine located

[1] The facts are drawn from the allegations in the Complaint [#1], which must be taken as true when considering a motion to dismiss. *See Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)).

near Somerset, Colorado that was opened in 1981 and where mining began in 1982. [*Id.* at ¶ 39] Defendant Arch Resources, Inc., formerly known as Arch Coal, Inc., ("Arch") is Mountain Coal's parent company and has owned the Mine since 1998. [*Id.* at ¶¶ 1, 25; #24] Arch is responsible for making decisions about environmental compliance at the Mine. [#1, ¶ 25]

Federal authorizations are required for the Mine. [*Id.* at ¶ 40] The Mine lies beneath mostly federal land, which is managed by the United States Forest Service. [*Id.*] The United States Bureau of Land Management ("BLM") administers the underlying coal deposits and is authorized to issue coal leases. [*Id.*] The Mine is authorized by seven coal leases, issued by BLM with Forest Service consent. [*Id.*] In addition to the coal leases, the United States Office of Surface Mining, Reclamation and Enforcement must approve a mining plan and Colorado's Division of Reclamation, Mining and Safety must issue a mining permit. [*Id.*]

The Mine has access to six seams that are stacked underground horizontally, which are referred to alphabetically as the A through F seams. [*Id.* at ¶ 42] Only one coal seam is mined at a time. [*Id.* at ¶ 43] When operations began, coal was extracted from the shallow F seam. [*Id.*] From 1992 until 2008, coal was mined from the deeper B seam. [*Id.* at ¶¶ 44, 45] The B seam was mined using the longwall-mining method, which is a deep mining technique that progresses along a seam in sections or "panels." [*Id.* at ¶ 44] Panel construction involves building roadways and safety and take-out rooms. [*Id.*] Once a panel is mined out, the longwall machine is moved to the next panel. [*Id.*] Mountain Coal typically moves the longwall machine to a panel approximately every nine to ten months. [*Id.*]

In 2008, Mountain Coal began mining the shallower E seam, because Mountain Coal was concerned that continuing mining in the B seam would prevent mining the overlaying E seam. [*Id.* at ¶ 45] To mine the E seam to completion, Mountain Coal proposed and obtained authorization to expand two of the seven federal coal leases (the "Expansion"). [*Id.* at ¶ 46] Under the Expansion, the Mine would extend onto 1,720 acres of the National Forest, within highly valued scenic areas and wildlife habitat known as the Sunset Roadless Area. [*Id.*] The Expansion approvals authorized construction of methane drainage wells, road-building activities at the Mine, and construction of new longwall panels. [*Id.*]

Without the Expansion, Mountain Coal could not continue to mine the E seam, and the Mine would have run out of mineable coal in the E seam in December 2019. [*Id.* at ¶ 47] The Expansion will extend mining for approximately 2-3 years and provide access to approximately 10 million tons of coal. [*Id.*] Mining in the Expansion area began in January 2020, and construction and mining in the Expansion area are ongoing and continuing. [*Id.*] The Expansion approvals did not obtain Clean Air Act ("CAA") permits and neither Colorado nor the Environmental Protection Agency ("EPA") have required Mountain Coal to stop construction or operations until the company secures the required air pollution permits. [*Id.* at ¶¶ 46-47] Mountain Coal intends to return to mining the B seam after E-seam mining has been completed. [*Id.* at ¶ 48]

On December 17, 2019, Plaintiffs—environmental and conservation organizations—sent Defendants a Sixty-Day Notice of Intent to Sue (the "Notice") for alleged CAA violations at the Mine. [#1 at 31-44] On May 12, 2020, Plaintiffs initiated the instant action. [#1] Claim One alleges that Defendants violated the CAA by failing

to obtain a Prevention of Significant Deterioration ("PSD") construction permit for the Expansion pursuant to Colorado's implementation of the PSD program under the CAA. [*Id.* at ¶¶ 31-32, 77-81] Claim Two alleges that the Mine is a major source for emitting volatile organic compounds ("VOCs") and Defendants thus are violating the CAA by failing to obtain a Title V operating permit. [*Id.* at ¶¶ 82-86]

On July 14, 2020, Defendants filed the instant Motion. [#18] Defendants argue that both Claims should be dismissed because they are barred by the five-year statute of limitations for citizen suits applicable to claims brought under the CAA. [*Id.*] Plaintiffs have responded to the Motion [#32], and Defendants have filed a reply [#39]. Additionally, the Colorado Department of Public Health and Environment, Air Pollution Control Division (the "CDPHE") has filed an amicus brief arguing that Plaintiffs' claims are not barred by the statute of limitations. [#38] On December 16, 2020, this Court held oral argument on the Motion. [##58, 67] Following oral argument, Plaintiff, Defendant, and the CDPHE filed supplemental briefs. [##64-66]

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting *Twombly*, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

III. ANALYSIS

Defendants argue that Plaintiffs' claims are barred by the statute of limitations. [#18] "Although a statute of limitations bar is an affirmative defense, questions regarding the statute of limitations may be resolved under Rule 12(b)(6) when it is clear from the face of the complaint that the right sued upon has been extinguished." *Int'l Bd. of Elec. Workers, Local #111 v. Pub. Serv. Co. of Colo.*, 176 F. Supp. 3d 1102, 1112 (D. Colo. 2016); *see also Park v. First Am. Title Ins. Co.*, 743 F. App'x 902, 904 (10th Cir. 2018) ("A statute of limitations bar is an affirmative defense, but may be resolved on a motion to dismiss if the dates given in the complaint make clear that the right sued upon has been extinguished." (quotation omitted)); *Whalen v. Wiley*, No. 06-cv-00809-WDM-

CBS, 2007 WL 2154184, at *4 (D. Colo. July 16, 2007) ("Because the statute of limitations defense is not patently clear from the face of the Complaint or based on adequately developed facts, the court is unable to determine on a motion to dismiss that [the plaintiff's] claims are barred by the statute of limitations."), *recommendation adopted by*, 2007 WL 2412797 (D. Colo. Aug. 21, 2007). Here, the parties agree that the five-year statute of limitations set forth in 28 U.S.C. § 2462 applies.[2] [#18 at 1; #32 at 16; *see also Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 670 (10th Cir. 2016) (applying Section 2462's five-year limitation period to a CAA citizen suit)] Plaintiffs filed their Complaint on May 12, 2020 [#1] and therefore the Court must determine whether Plaintiffs' claims accrued prior to May 12, 2015.[3]

A. Claim One

Claim One alleges that Defendants violated the CAA by "[c]onstructing and [o]perating the West Elk Mine without a PSD permit" as required by the CAA. [#1 at 25] Defendants argue that Plaintiffs' "claims, as pled, first accrued when the [Mine] was

[2] The CDPHE argues that there are "critical differences between the federal statute of limitations and the Colorado statute of limitations" and thus requests that the Court "explicitly limit any ruling in Defendants' favor to the federal statute." [#38 at 15-16] Because neither party argues that the Colorado statute of limitations applies to Plaintiff's claims, the Court has not considered the Colorado statute of limitations and takes no position with regard to how the Colorado statute of limitations would apply to the claims presented.

[3] Pursuant to 42 U.S.C. § 7604(b)(1), plaintiffs are required to provide 60-days' notice prior to commencing a citizen suit. Some courts have held that the statute of limitations is tolled during this 60-day waiting period and thus that the limitations period extends back five years and 60 days. *See, e.g.*, *Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 76 (3d Cir. 1990) (concluding that "the statute of limitations is tolled . . . for the statutory sixty day notice period"); *Cmty. Ass'n for Restoration of Env't (CARE) v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 983 (E.D. Wash. 1999). Here, although Plaintiffs argue that "civil penalties tied to [Claim Two] are limited to the past five years plus sixty days" [#32 at 22 n.13], any tolling resulting from the 60-day notice period is irrelevant to the instant Motion, because neither party makes any argument that Plaintiffs' claims accrued during the sixty-day notice period.

constructed and began operations in 1981-82" and thus are barred by the statute of limitations. [#18 at 6] In their response to the Motion, Plaintiffs clarify that "the triggering event for [the PSD-permit violation alleged in Claim One] is constructing the Mine's [E]xpansion and that only started after all federal approvals for the [E]xpansion were finalized in January 2020." [#32 at 17; *see also id.* at 19 ("[T]he [E]xpansion is the basis for Plaintiffs' First Claim.")]

Defendants contend that, to the extent Claim One is premised on the Expansion, it fails for two reasons.[4] First, Defendants argue that Claim One—and the relief sought—is not limited to the Expansion and thus that the Complaint "assert[s] a PSD construction permit claim for the West Elk Mine as a whole" and "includes no separate claim for an alleged PSD permit violation for the 'Expansion.'" [#39 at 6] The Court disagrees. Although certain allegations with regard to the PSD permit violation are somewhat ambiguous, the Court finds the Complaint's allegations sufficient to assert a claim based upon Defendants' failure to obtain a PSD construction permit for the Expansion. In Claim One, Plaintiffs expressly allege that "Mountain Coal has been constructing the Mine's Expansion without a PSD permit" and that "Mountain Coal began operating the Mine's Expansion without a PSD permit since at least January 2020." [#1, ¶ 80]

Second, Defendants argue that, to the extent Claim One is based upon Defendants' failure to obtain a PSD permit for the Expansion, it fails as a matter of law

[4] Plaintiffs argue that the Motion was based only upon the statute of limitations and Defendants have not "filed a motion seeking dismissal" on these alternative grounds. [#66 at 4 n.6] The Court disagrees. The Motion expressly argues that (1) the Complaint fails to "assert a separate claim for the alleged 'expansion'" [#18 at 10], and (2) the allegations in the Complaint do not support a finding that Defendants were required to obtain a PSD construction permit for the Expansion [*id.* at 11-13].

because the allegations do not plausibly allege that Defendants were required to obtain a PSD permit for the Expansion. [#39 at 6-7; *see also* #18 at 11-14] The parties agree that, as relevant here, the regulations require a PSD permit for "any physical change that would occur at a stationary source not otherwise qualifying as a major stationary source under Sections II.A.25.a and II.A.25.b . . . if the change would constitute a major stationary source by itself."[5] [#32 at 17 (quoting 5 Colo. Code Regs. 1001-5:3D.II.A.25.c); #39 at 6] For pursues of the instant Motion, the parties agree that a "major stationary source" for purposes of the PSD requirements is a stationary source that emits or has the potential to emit 250 tons per year or more of VOCs. [#32 at 9 (citing 42 U.S.C. § 7479(a)(1); 5 Colo. Code Regs. 1001-5:3D.II.A.25.a(ii)); #64 at 2 (citing 5 Colo. Code Regs. 1001-5:3D.II.A.25.a(ii))]

Defendants contend that the allegations in the Complaint do not plausibly allege a violation of the PSD permit regulations, because the Complaint alleges that the Mine had the potential to emit 250 tons per year or more of VOCs prior to the Expansion and thus the Mine was not "a stationary source *not otherwise qualifying as a major stationary source*." [#39 at 7] The Court agrees. The Complaint estimates that the Mine's VOC emissions in 2011 exceeded 1,122 tons [#1, ¶ 69] and likely exceeded the 250-ton threshold each year between 2011 and 2018 [*id.* at 37-38].[6] The Complaint

[5] The parties also note that the regulations require a PSD permit for "[a]ny physical change in or change in the method of operation of a major stationary source that would result in a significant emissions increase of a regulated NSR pollutant and a significant net emissions increase of that pollutant from the major stationary source." [#18 at 12 (quoting 5 Colo. Code Regs. 1001-5:3D.II.A.23); #32 at 19] Plaintiffs expressly state in their response to the Motion, however, that Plaintiffs "are not pursuing a 'major-modification' argument here." [#32 at 19]

[6] The Court may consider allegations included in the Notice that Plaintiffs attached to the Complaint without converting the Motion into one for summary judgment. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) ("[I]n deciding a motion to

further alleges that these estimates of the Mine's actual emissions—as well as Mountain Coal's own estimate that the Mine emitted 213.844 tons of VOCs in 2019 [*id.* at ¶ 64]—significantly understate the amount of VOCs the Mine has the potential to emit.[7] [*See id.* at ¶ 65 (alleging that Defendants' 2019 estimate was based upon daily averages taken on days when the longwall was not moved, whereas the rate of VOC emissions is greatest in the weeks after the longwall is moved), ¶ 70 (alleging that "the Mine's potential-to-emit VOCs should be doubled that" of Defendants' estimate of 2019 actual emissions and of Plaintiffs' estimates of actual emissions because those figures do not taken into account the potential for mining the B seam), ¶ 72 (alleging that the estimates of actual emissions are understated because they "did not include VOC emissions from sources other than the ventilation system and the methane drainage wells"), ¶ 73 (alleging that the Mine's "potential-to-emit VOCs should account for the Mine's maximum annual production rate of 8.5 million tons" rather than the lesser amount of coal actually mined)] Thus, because the Complaint alleges that the Mine had the

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dismiss pursuant to Rule 12(b)(6), a court may look both to the complaint itself and to any documents attached as exhibits to the complaint").

[7] In their supplemental brief, Plaintiffs point to allegations in the Complaint that Mountain Coal's public filings state the Mine did not exceed the VOC major source threshold of 250 tons per year. [#66 at 5 (citing #1, ¶¶ 60, 61, 64, 76)] Plaintiffs' allegations, which the Court must accept as true, however, make clear that Mountain Coal's reported VOC emissions understated the amount of actual emissions and significantly understated the Mine's potential VOC emissions. [*See, e.g.*, #1, ¶¶ 63, 65, 69, 70, 72, 73, 76] Although Plaintiffs argue that "alternative or inconsistent allegations about emissions are acceptable in a complaint" [#66 at 3 n.3], the Court does not find the allegations "inconsistent" but rather finds that Plaintiffs consistently allege that the Mine had the potential to emit more than 250 tons per year of VOCs since at least 2011 and that Defendants' contentions to the contrary were inaccurate. Plaintiffs also make arguments based upon Mountain Coal's September 15, 2020 minor source permit application [#66 at 6], but no allegations relevant to that application are included in the Complaint and Plaintiff has not sought leave to amend the complaint to include such allegations. *See In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004) (finding that a plaintiff may not amend the complaint "by alleging new facts in their response to a motion to dismiss").

potential to emit (and indeed was emitting) 250 tons per year or more of VOCs as early as 2011 and continuing through the present, the Complaint alleges that the Mine qualified as a major stationary source as early as 2011. *See* 5 Colo. Code Regs. 1001-5:3D.II.A.25.a(ii). As a result, the Complaint does not plausibly allege that the Expansion was a physical change "at a stationary source *not otherwise qualifying as a major stationary source"* and, based upon the allegations in the Complaint, a PSD permit was not required for the Expansion. 5 Colo. Code Regs. 1001-5:3D.II.A.25.c (emphasis added).

Plaintiffs nonetheless argue that the Mine was not a major source because it was permitted as a minor source. [#66 at 2-3] The regulations at issue here, however, make no mention of the source's permit status but instead refer only to the source's potential emissions. *See* 5 Colo. Code Regs. 1001-5:3D.II.A.25.a(ii), c. Notably, If the regulatory agencies had intended these regulations' applicability or enforcement to depend on the source's permitting status, the regulations presumably would have specifically said so. *See, e.g.*, 5 Colo. Code Regs. 1001-5:3D.VI.B.1.c. (exempting listed sources from certain PSD requirements, including "a portable stationary source that *has previously received a permit*" (emphasis added)); 5 Colo. Code Regs. 1001-5:3D.VI.B.3.e. (granting CDPHE discretion to exempt sources from certain PSD requirements, if, among other things, "*the owner or operator submitted an application for a permit*" (emphasis added)). In spite of the regulations' reference to permitting status in other provisions, the provisions defining major source at issue here clearly refer only to the source's potential emissions. The Court cannot ignore this plain language.[8]

[8] Notably, the CDPHE "agrees . . . that the source's permit is not conclusive" of whether PSD permitting is required. [#65 at 2]

Plaintiffs argue that this interpretation renders the term "qualifying" in 5 Colo. Code Regs. 1001-5:3D.II.A.25.c meaningless. [#66 at 4] Not so. Qualifying simply refers to those stationary sources that have the potential to emit enough pollutants to qualify them as a major source "under Sections II.A.25.a and II.A.25.b." Once again, this has nothing to do with how a mine is permitted, but only concerns the amount of potential pollutants a mine can emit. The parties agree that, pursuant to Section 1001-5:3D.II.A.25.a(ii) a "major stationary source" is a stationary source that emits or has the potential to emit 250 tons per year or more of VOCs. [#32 at 9; #64 at 2] Accordingly, because the Complaint alleges that the Mine had the potential to emit (and was indeed emitting) more than 250 tons per year of VOCs since at least 2011, the Complaint does not plausibly allege that a PSD permit was required for the Expansion.[9] As a result, the Court respectfully RECOMMENDS that the Motion be GRANTED with respect to Claim One.

B. Claim Two

Pursuant to Title V of the CAA, "it shall be unlawful for any person . . . to operate . . . a major source . . . except in compliance with a permit issued by a permitting authority under this subchapter." 42 U.S.C. § 7661a(a); *see also* 5 Colo. Code Regs. 1001-5:3C.II.A.1(stating that "no person shall operate [a major source] without first

[9] The Court emphasizes that its decision is based entirely upon the allegations in Plaintiffs' Complaint, which the Court must accept as true at this stage of the proceedings. The Court understands that the CDPHE "is currently investigating, and has not made a determination at this time, whether the Expansion is a modification of the Mine, and, if it is, whether the Expansion has a potential to emit VOC emissions above the 'major stationary source' threshold triggering PSD review." [#38 at 8] The Court offers no opinion with regard to whether the Expansion does or does not trigger PSD review but instead finds only that the allegations in Plaintiffs' Complaint do not plausibly allege that the Mine was "a stationary source not otherwise qualifying as a major stationary source" at the time of the Expansion.

obtaining an operating permit"). A major source for purposes of Title V is defined to include "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant," including VOCs. 42 U.S.C. §§ 7602(j), 7661(2); *see also* 5 Colo. Code Regs. 1001-5:3A.I.B.25. A stationary source must obtain a Title V permit "not later than 12 months after the date on which the source becomes" a major source. 42 U.S.C. § 7661b(c). "Title V permits do not generally impose any new emission limits, but are intended to incorporate into a single document all of the Clean Air Act requirements applicable to a particular facility and to provide for monitoring and other compliance measures." *United States v. Cemex, Inc.*, 864 F. Supp. 2d 1040, 1045 (D. Colo. 2012) (quotation omitted).

Claim Two alleges that Defendants are violating Title V of the CAA by operating the Mine, which the Complaint alleges is a major source for emitting VOCs, without a Title V operating permit. [#1, ¶¶ 82-86] Defendants argue that Claim Two is barred by the five-year statute of limitations, because Claim Two "first accrued two decades ago when the [Title V] regulations requiring such permit became effective on October 16, 2000."[10] [#39 at 8] Plaintiffs do not dispute that Defendants first violated the Title V permitting requirement more than five years ago—indeed, Plaintiffs seek "civil penalties

[10] In the Motion, Defendants argued that Plaintiffs' "claims, as pled, first accrued when the [Mine] was constructed and began operations in 1981-82." [#18 at 6] Plaintiff responded that Defendants' contention that Claim Two accrued in 1982 "cannot be true because Congress enacted the Title V provisions several years later in 1990 and Colorado's program was only approved by EPA in 2000." [#32 at 22-23 n.15] Plaintiffs do not specify when they believe Defendants first violated the Title V permitting requirements but rather clarify that they "intend to enforce Mountain Coal's repeated violations dating back five years plus sixty days." [*Id.*] It thus is clear that Plaintiffs allege that Defendants first started operating the Mine in violation of Title V more than 5 years and 60 days ago.

tied to this claim . . . [for] the past five years plus sixty days."[11] [#32 at 22 n.13] Instead, Plaintiffs argue that "each day the Mine operates without a permit is a discrete violation" and thus Plaintiffs' Claim Two is timely pursuant to the repeated violations doctrine. [*Id.* at 22]

"[T]he repeated violations doctrine *divides* what might otherwise represent a single, time-barred cause of action into several separate claims, at least one of which accrues within the limitations period prior to suit." *Hamer v. City of Trinidad*, 924 F.3d 1093, 1100 (10th Cir. 2019) (quotation omitted). "That division, in turn, allows recovery for only that part of the injury the plaintiff suffered during the limitations period; recovery for the part of the injury suffered outside of the limitations period, however, remains unavailable." *Id.* (quotation omitted). The Tenth Circuit has held that the repeated violations doctrine does not apply where "[a] single violation continues over an extended period of time when the plaintiff's claim seeks redress for injuries resulting from a series of separate acts that collectively constitute one unlawful act, as opposed to conduct that is a discrete unlawful act." *Sierra Club*, 816 F.3d at 672 (quotation omitted). "In other words, one violation continues when the conduct as a whole can be considered as a single course of conduct." *Id.* (quotation omitted). "The violation must involve some affirmative conduct within the limitations period and not merely the abatable but unabated inertial consequences of some pre-limitations action." *Id.* (quotation omitted).

[11] Plaintiffs note in their response to the Motion that Mountain Coal "believes that the Mine became subject to the Title V permit requirement in 2019, due to 2019 emissions monitoring." [#32 at 15] Plaintiffs' representation of Mountain Coal's belief that Title V did not apply to the Mine until 2019, however, is not alleged in the Complaint and Plaintiff may not amend the Complaint through its response to the Motion. Regardless, the allegations in the Complaint—and the relief sought by Plaintiffs—make clear that Plaintiffs dispute Mountain Coal's alleged contention that Title V did not apply until 2019 and, for purposes of the instant Motion, the Court must accept as true the allegations in the Complaint.

Claim Two alleges that Mountain Coal was required to obtain a Title V operating permit at some point in time outside of the statute of limitations period—*e.g.*, when Colorado's Title V program was approved by EPA in 2000 [#32 at 22-23 n.15]—and that Mountain Coal failed to do so. [#1, ¶¶ 82-86] Thus, Claim Two alleges that Mountain Coal was engaged in "a continuing omission to act in compliance with a duty." *SEC v. Kokesh*, 884 F.3d 979, 985 (10th Cir. 2018). In these situations, the Tenth Circuit has held that the claim accrues when the non-compliance begins and does not constitute a separate, discrete violation for each day of non-compliance. *Id.* (citing *Sierra Club*).

In *Sierra Club*, for example, the Tenth Circuit held that the plaintiff's claim based upon the defendant's failure to obtain a PSD permit for the modification of a boiler at a power plant first accrued on the first day of the construction of the modification. 816 F.3d at 670, 672. The Court reasoned that the term "'construct' should not be read to encompass a disjointed series of discrete acts of construction" but rather that "[t]o 'construct' is an ongoing project." *Id.* at 672. As a result, the construction "must be characterized as a single, ongoing violation." *Id.* The Tenth Circuit further emphasized that "the clock under § 2462 begins only once, when a claim *first accrues*."[12] [*Id.* at 673-74 (emphasis in original)] The Court thus rejected the plaintiff's argument that the claim reaccrued on each day of a continuing violation because the statute provided that a penalty may be assessed for each day of the violation, explaining that "whether the claim reaccrues does not answer or even address when it *first* accrues." [*Id.* at 673]

[12] Pursuant to 28 U.S.C. § 2462, which is also the statute of limitations that applies here, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date *when the claim first accrued*" (emphasis added).

The Court recognized "a difference between the availability of a statutory penalty and the initial accrual of the violation giving rise to penalties." *Id.*

The analysis set out by the Tenth Circuit in *Sierra Club* applies equally here. The term "operate" cannot be read to encompass a disjointed series of discrete acts of operation but, instead, the operation of a mine is an ongoing project.[13] And, as in *Sierra Club*, Plaintiffs "could have brought suit for the [operation] violation on the first day of the [violation]." *Id.* at 673. "Even one day of unpermitted [operation] would have presented a 'complete and present' violation of the statute." *Id.* "If the limitations period under § 2462 reset each day," as proposed by Plaintiffs, "the statutory term 'first' would have no operative force." *Id.* at 674.

HEAL Utah v. PacifiCorp is also instructive. 375 F. Supp. 3d 1231 (D. Utah 2019). There, the plaintiffs argued that the defendant violated the Clean Water Act ("CWA") between November 2007 and January 2008 when it installed a collection system that the plaintiffs claimed required a permit which the defendant did not obtain. *Id.* at 1238. The plaintiffs argued that the collection system violated the CWA, in part, by placing fill material in a ditch essentially creating a dam so water would no longer flow to Huntington Creek. *Id.* Though the plaintiffs filed suit more than five years after the collection system was built, they nonetheless argued that the claim was not barred by Section 2462's five-year statute of limitations because "th[e] violation continues each

[13] The CDPHE contends that it "considers a source's operation in violation of [Title V] requirements a recurring violation, which renews each day a source operates out of compliance—*i.e.* each day a major source operates without a Title V permit" and that this interpretation "should be given deference." [#38 at 13] The CDPHE, however, fails to cite to any official policy or regulation supporting this interpretation and "[a] position taken by an agency during litigation . . . is not sufficiently formal that it is deserving of . . . deference." *S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000).

day the fill material remains in place."[14] *Id.* at 1248. After acknowledging that "the violation [wa]s 'continuing' in one sense," the court nonetheless concluded that the claim was time-barred. *Id.* Relying heavily on *Sierra Club*, the Court concluded that defendant's "addition of fill materials to jurisdictional waters during the installation of the collection system gave rise to a claim that first accrued outside the statutory period, even if its effects continued." *Id.* at 1249. And the "enduring presence of the fill material" did not reset the statutory clock. *Id.* The same is true here—the enduring presence of the permit violation does not reset the statutory clock, because the claim *first* accrued outside of the limitations period, even if its effects continue.

In support of their repeated violation theory, Plaintiffs primarily rely upon out-of-circuit cases.[15] [#32 at 21-25] But this Court is bound by Tenth Circuit precedent

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[14] Unlike the repeated violation doctrine which divides what might otherwise represent a single, time-barred cause of action into several separate claims, the continuing violation doctrine "tethers conduct from both inside and outside the limitations period into one single violation that, taken as a whole, satisfies the applicable statute of limitations." *Hamer*, 924 F.3d at 1100. With the continuing violation doctrine, all of the conduct including the conduct outside the limitations period becomes a single claim. *Id.* With the repeated violation doctrine, recovery is available only for that conduct included within the limitations period. *Id.* As the Tenth Circuit explained in *Sierra Club*, however, "a single, continuing violation [does] not extend the limitations period of § 2462 because the statute would begin to run as soon as that violation *first* accrued and would not reset thereafter." 816 F.3d at 671 n.5 (emphasis in original).

[15] Plaintiffs contend that "[w]hereas courts, including the Tenth Circuit, view illegal construction as a singular act and a singular violation . . ., operating without a Title V permit (or any other prerequisite to operations) is considered a series of repeated discrete acts." [#32 at 21] Plaintiffs fail to cite to any court in the Tenth Circuit, however, that has recognized this alleged distinction. Instead, Plaintiffs primarily rely upon *National Parks Conservation Association, Inc. v. Tennessee Valley Authority*, 480 F.3d 410 (6th Cir. 2007) ("*TVA*"). The plaintiffs in *TVA* did not bring a claim based upon a failure to obtain a Title V operating permit, but instead "[t]he essence of their complaint [wa]s that TVA violated the CAA and the Tennessee [regulations] by failing to obtain a PSD permit before it modified the Bull Run plant in 1988, and by continuing to operate the plant without such a permit." *TVA*, 480 F.3d at 414. The Sixth Circuit held that "TVA violated its ongoing requirement to obtain the appropriate [PSD] construction permit after completing construction" and that "this alleged violation manifests itself

which, as detailed above, compels the conclusion that the statute of limitations began to run when the Mine first operated in violation of a permit, and does not repeat again anew each day.[16] Because suit was not filed within five years and sixty days of that date, and Plaintiffs' repeated violation argument does not apply to Claim Two, the Court respectfully RECOMMENDS that the Motion be GRANTED with respect to Claim Two.

IV. CONCLUSION

For the foregoing reasons, this Court respectfully **RECOMMENDS** that Defendants' Motion to Dismiss [#18] be **GRANTED**.[17]

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each day the plan[t] operates." *Id.* at 419. The Sixth Circuit's finding that the failure to obtain a PSD construction permit "presents a series of discrete violations rather than a single violation that may or may not be 'continuing' in nature," *id.* at 417, thus is in tension with the Tenth Circuit's subsequent decision in *Sierra Club* finding that "if any form of violation exists [for the failure to obtain a PSD construction permit] beyond the first day of unpermitted modification, it is best characterized as a continuing violation rather than a series of repeated violations," 816 F.3d at 671.

[16] Although Plaintiffs and the CDPHE argue that the Tenth Circuit's decision in *Kokesh* supports the application of the repeated violations doctrine [#32 at 21-22; #65 at 4-5], the Court finds that case distinguishable. In *Kokesh*, the Tenth Circuit held that each of the alleged misappropriations of funds "constituted a series of repeated violations of an identical nature, . . . with each unlawful taking being actionable for five years after its occurrence." 884 F.3d at 985 (quotation omitted). The Court finds a significant—and determinative—distinction between individual but repeated acts of conversion and the continuous operation of a mine without a permit alleged here. Indeed, the Tenth Circuit in *Kokesh* reaffirmed the applicability of the holding in *Sierra Club* when the alleged misconduct constitutes "a continuing omission to act in compliance with a duty" and, notably, expressly described the conduct at issue in *Sierra Club* as the "failure to obtain a permit." *Id.* The CDPHE's reliance on *Colorado Dep't of Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States*, also is misplaced. [#38 at 15 (citing 381 F. Supp. 3d 1300 (D. Colo. 2019)] Although the CDPHE contends that the court there "evaluat[ed] the defendants' theory of the case under the analysis in the *Sierra Club* case" [#38 at 15], that court actually found that "the statute at issue in *Sierra Club* uses critically different language than" the Colorado statute of limitations it was interpreting, 381 F. Supp. 3d at 1310. Moreover, the court expressly observed that "[i]f the issue in [that] case were when Plaintiff's cause of action . . . *first accrued*," which is the determinative issue here, the statute of limitations may have expired. *Id.* at 1311.

[17] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for

DATED: January 26, 2021

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

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the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).