IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

WILDEARTH GUARDIANS, *et al.*,

Plaintiffs,

v.

MOUNTAIN COAL COMPANY, *et al.*,

Defendants.

PLAINTIFFS' OBJECTIONS TO RECOMMENDATION (ECF DOC. 70)

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INTRODUCTION

This case concerns unregulated air pollution—emissions of volatile organic compounds (causing smog) and methane (contributing to climate change)—from an underground coal mine, known as the West Elk mine (Mine). The Clean Air Act (CAA) requires permits for the Mine to operate and construct its 2020 expansion (Expansion), two permits which Defendants Mountain Coal Company and Arch Resources (collectively, Mountain Coal) do not have. Plaintiffs seek to enforce the CAA's permitting requirements against Mountain Coal, ensuring the Mine's volatile organic compounds (VOC) emissions are reduced through available technologies, do not cause exceedances of the VOC ambient air standard, and are regularly monitored and publicly reported. The Magistrate Judge recommended granting Mountain Coal's Rule 12(b)(6) motion to dismiss, finding Plaintiffs' First Claim fails to allege sufficient facts and the Second Claim is barred entirely by the statute of limitations. Plaintiffs object to the Recommendation.

LEGAL AND FACTUAL BACKGROUND

I. **The Clean Air Act**: Congress passed the CAA "to protect and enhance" the Nation's air quality. 42 U.S.C. § 7401(b)(1). To address smog, the U.S. Environmental Protection Agency (EPA) promulgated a national air quality standard for ground-level ozone, which is caused by VOC emissions. *Id*. § 7409; 40 C.F.R. § 50.19.[1] Regions meeting the ozone standard are "attainment" areas, 42 U.S.C. § 7407(d)(1)(A)(ii), in which new and modified pollution sources are subject to the Prevention of Significant Deterioration (PSD) program, *id*. §§ 7470-7492.

"Major sources" of VOC emissions must obtain CAA permits to construct and operate. 42 U.S.C. §§ 7475(a)(1), 7661a(a); 5 C.C.R. §§ 1001-5:3D.I(A)(1), 1001-5:3C.II(A)(1). Through a PSD construction permit, a source must use the "best available control technology" (BACT) to limit its VOC emissions and assess the emissions' effect on achieving the ozone standard. 42 U.S.C. § 7475(a)(3) & (4); 5 C.C.R. § 1001-5:3D.VI(A)(1), (A)(2). Title V operating permits consolidate all emission limits for a source's operations, such as those imposed through a PSD permit, *Sierra Club v. EPA*, 964 F.3d 882, 886 (10th Cir. 2020), while also including "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions," 42 U.S.C. § 7661c(c).

States assist EPA in achieving the ozone standard by adopting and administering state implementation plans (SIP). *Id*. §§ 7407(a), 7410(a). EPA-approved SIPs are federal law, enforceable in federal courts. *U.S. Magnesium v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012). The Air Pollution Control Division (Air Division), within Colorado's Department of Public Health and Environment, administers the state's air program. Colo. Rev. Stat. § 25-7-111. EPA

[1] VOCs include a wide-range of hydrocarbons. 40 C.F.R. § 51.100(s). Though a VOC, methane is not regulated as one because it contributes minimally to ozone pollution. *Id*. § 51.100(s)(1).

has approved Colorado's PSD and Title V programs as components of the state's SIP. 81 Fed. Reg. 3963 (Jan. 25, 2016); 79 Fed. Reg. 8632 (Feb. 13, 2014); 65 Fed. Reg. 49,919 (Aug. 16, 2000); *see* 5 C.C.R. §§ 1001-5:3C, 1001-5:3D. Colorado's SIP prohibits construction of major sources under the PSD program and operation of major sources under the Title V program absent permits. 5 C.C.R. §§ 1001-5:3D.I(A)(1), 1001-5:3C.II(A)(1).

The public can enforce CAA violations, like the unpermitted construction and operation of a major source. 42 U.S.C. §§ 7604(a)(1) & (a)(3), 7604(f)(4). The citizen suit provision authorizes district courts to impose civil penalties against polluters, *id*. § 7604(a), and injunctive relief to address illegal emissions and conduct, *id*. Congress authorized citizen suits to help achieve the CAA's remedial goals and because EPA and states do not always enforce the law when needed. *Sierra Club v. Pub. Serv. of Colo.*, 894 F.Supp. 1455, 1459 (D. Colo. 1995).[2]

II. **The Statute of Limitations**: The CAA does not contain a statute of limitations. Thus, 28 U.S.C. § 2462 applies and provides that "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."

III. **The Mine and Its Air Emissions**: Mountain Coal owns and operates the Mine. ECF Doc. 1, ¶¶ 24-25. The Mine is located in Gunnison County, an attainment area for ozone pollution. *Id*. ¶ 39. The Mine's coal is federally owned and lies primarily beneath National Forest lands, *id*. ¶ 40, which requires Mountain Coal to obtain coal leases and mining permits from federal and state agencies, *id*.[3]

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[2] *See also Adkins v. VIM Recycling*, 644 F.3d 483, 501 (7th Cir. 2011); *Black Warrior Riverkeeper v. Cherokee Mining*, 548 F.3d 986, 992 (11th Cir. 2008).

[3] Mountain Coal had secured seven coal leases from the U.S. Bureau of Land Management and the U.S. Forest Service. ECF Doc. 1, ¶ 40. The company also obtained two other approvals from the U.S. Office of Surface Mining, Reclamation and Enforcement and Colorado's Division of

When mining coal, VOCs and methane are emitted from the Mine's ventilation shafts and vertical methane wells. *Id*. ¶ 54. The Mine's VOC emissions have never been permitted under the CAA. A 2001 minor-source permit for the Mine, which was reissued in 2010, covers the ventilation shafts, but ignores VOC emissions entirely and omits the methane wells. *Id*.¶¶ 57-58.

Mountain Coal secured federal agency approval for its Expansion on January 13, 2020. *Id*. ¶¶ 46-47. The Expansion extends the Mine's footprint southward onto 1,720 additional acres of the National Forest, *id*. ¶ 46, authorizes Mountain Coal to drill thirty-nine new drainage wells, lay concrete for new wells pads, construct additional access roads, mine an area that had previously been off-limits for environmental protection reasons, *id*. ¶¶ 46, 55, and provides access to 10 million tons of additional coal, *id*. ¶ 47. Mountain Coal began constructing and mining the Expansion in January 2020. *Id*. ¶¶ 47, 61, 80; *WildEarth Guardians v. Bernhardt*, 423 F.Supp.3d 1083, 1090 (D. Colo. 2019) ("Mining is scheduled to begin in January of 2020.").

IV. <u>This Litigation and The Recommendation</u>: Plaintiffs sent Mountain Coal a 60-Day Notice Letter on December 17, 2019, ECF Doc. 1, Exh. 1, and filed suit on May 12, 2020, ECF Doc. 1. In their First Claim, Plaintiffs allege Mountain Coal started constructing the Expansion without a PSD permit. *Id*. ¶¶ 77-81. The Second Claim alleges Mountain Coal is operating the Mine without the required Title V permit. *Id*. ¶¶ 82-86. Between the time of Plaintiffs' Notice Letter and Complaint, Mountain Coal applied for a "minor-source" construction permit (January 16, 2020), *id*. ¶ 61, and a Title V operating permit (March 31, 2020), *id*. ¶ 76. Neither has been granted and neither resolves the dispute because Mountain Coal continues to violate the prohibitions against constructing and operating without the required permits.

Reclamation, Mining and Safety. *Id*. Each approval triggered an environmental review under the National Environmental Policy Act, 42 U.S.C. §§ 4331 *et seq*.

Mountain Coal moved to dismiss Plaintiffs' two claims under Federal Rule of Civil Procedure 12(b)(6) as time barred. The Magistrate Judge recommended dismissal of the Second Claim on limitations grounds and the First Claim due to insufficient factual allegations.[4]

STANDARD OF REVIEW

When timely objections are filed, review of a Magistrate's Recommendation is *de novo*. *Colo. Dept. of Public Health and Envt. v. U.S.*, 381 F.Supp.3d 1300, 1304 (D. Colo. 2019).

Granting a Rule 12(b)(6) motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009). A claim is plausible if pleaded facts "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544, 563 (2007) (requiring "enough facts to state a claim for relief that is plausible on its face"). Courts "must consider the complaint in its entirety," such as "documents incorporated into the complaint by reference and matters of which a court may take judicial notice," including public documents. *Tellabs v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007); *WildEarth Guardians v. Extraction Oil*, 457 F.Supp.3d 936, 945 (D. Colo. 2020). Dismissing claims based on a limitations bar is available only if the face of the complaint reveals the claims are untimely. *Aldrich v. McCulloch Props.*, 627 F.2d 1036, 1041 n.4 (10th Cir.1980).

[4] Mountain Coal did not move to dismiss the First Claim based on defective allegations, but the Magistrate found the issue was raised in Mountain Coal's briefing and invited further briefing on the issue after a December 16, 2020 hearing. ECF Doc. 58; *see* ECF Doc. 64-66.

ARGUMENT

I. The Statute Of Limitations Does Not Bar The Operations-Without-A-Permit Claim.

The Recommendation erred in concluding that Plaintiffs' Second Claim is barred by 28 U.S.C. § 2462. ECF Doc. 70 at 11-17.[5] This claim seeks enforcement of Mountain Coal's unpermitted operations of the Mine. ECF Doc. 1, ¶¶ 83-86. The CAA and Colorado's SIP prohibit operating a major source (100 tons-per-year of VOCs) absent a Title V permit. 42 U.S.C. § 7661a(a); 5 C.C.R. § 1001-5:3C.II(A)(1). As alleged, "[e]ach and every day Mountain Coal operates the Mine without a Title V operating permit is a separate and distinct violation of the Clean Air Act and Colorado's EPA-approved air quality regulations." ECF Doc. 1, ¶ 86; *see also* 42 U.S.C. §§ 7604(a)(1), 7604(f)(4) (citizens may enforce unpermitted operations).[6]

The Tenth Circuit has endorsed the "repeated-violations doctrine" when evaluating a limitations defense. *Hamer v. City of Trinidad*, 924 F.3d 1093 (10th Cir. 2019), *cert. denied sub nom. City of Trinidad v. Hamer*, 140 S.Ct. 644 (2019). It "*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." *Id*. at 1100 (emphasis in original). The statute

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[5] The Recommendation finds Plaintiffs filed their First Claim within the limitations period. ECF Doc. 70 at 7. This claim challenges Mountain Coal's unpermitted construction of the Expansion, which began in January 2020. ECF Doc. 1, ¶¶ 47, 79-80. Unlawful construction claims under the CAA must be initiated no more than five years after a defendant begins constructing. *Sierra Club v. Okla. Gas & Elec.*, 816 F.3d 666, 671-73 (10th Cir. 2016). Construction, the Tenth Circuit held, "is best characterized as a single, ongoing act," even if that act continues for a certain period of time. *Id*. at 672. Plaintiffs filed this claim a few months after Mountain Coal's unpermitted construction began. This part of the Recommendation should be accepted.

[6] Plaintiffs object to the Recommendation's mischaracterization of Plaintiffs' Second Claim as a failure-to-act claim. ECF Doc. 70 at 14 ("Thus, Claim Two alleges that Mountain Coal was engaged in 'a continuing omission to act in compliance with a duty.'"); *id*. at 16 n.15 (trying to distinguish *NPCA* because it did not involve "a failure to obtain a Title V operating permit"); *id*. at 17 n.16 (seeking to distinguish *Kokesh*). This claim is about illegal actions—the Mine's operations. The Recommendation erred.

of limitations still has force under this theory, however, as only violations occurring within five years of a complaint's filing can be enforced. *Id*. at 1108.[7] Applied here, the Second Claim is not untimely. Mountain Coal's unpermitted operations are discrete and repeated violations that accrue anew each day such that those occurring within the limitations period can be enforced.[8] The Air Division agrees; it "considers a source's operation in violation of these 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." ECF Doc. 36-1 at 13.

To treat a challenge to repeated illegal operations as completely time barred would provide Mountain Coal with an undeserved windfall, a result denounced by the Tenth Circuit. In *Kokesh v. S.E.C.*, the court reasoned that to find "defendants' misappropriations constituted only one continuing violation…would confer immunity for ongoing repeated misconduct" and allow violations to continue indefinitely. 884 F.3d 979, 985 (10th Cir. 2018) ("We cannot countenance such a result, nor do we think that a proper interpretation of § 2462 requires us to."); *see Hamer*, 924 F.3d at 1107 (rejecting construction that immunizes public entity from complying with remedial statutes "forever").[9] Such a result undermines the CAA, a remedial statute enacted "to protect and enhance" air quality." 42 U.S.C. § 7401(b)(1); *Wisc. Elec. Power v. Reilly*, 893 F.2d 901, 909 (7th Cir. 1990) (CAA's purpose is to "speed up, expand, and intensify the war against

[7] This rule applies to CAA and Clean Water Act enforcement cases, while adding sixty days to account for the notice-letter period. *Nat'l Parks Conservation Ass'n [NPCA] v. TVA*, 480 F.3d 410, 419 (6th Cir. 2007); *Sierra Club v. Portland General Elect.* 663 F.Supp.2d 983, 994 (D. Or. 2009); *Sierra Club v. El Paso Gold Mines*, 2003 WL 25265873, at *6 (D. Colo. Feb. 10, 2003).
[8] Under the repeated violations doctrine, when exactly violations began (ECF Doc. 70 at 12 n.10) is irrelevant because only those within the limitations period may be enforced.
[9] *U.S. v. Spectrum Brands*, 924 F.3d 337, 350 (7th Cir. 2019); *Birkelbach v. SEC*, 751 F.3d 472, 479 (7th Cir. 2014); *Poster Exchange v. Nat'l Screen*, 517 F.2d 117, 127-28 (5th Cir. 1975).

air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.").

A. Courts Have Unanimously Held That Claims Enforcing Unlawful Operations Under The CAA Are Not Wholly Barred By 28 U.S.C. § 2462.

As a matter of law, unlawful operations are discrete violations that accrue anew each day. The specific reason that operations may be illegal—lacking a Title V operating permit (as here) or violating any other operating condition found in an applicable SIP—does not change the outcome. What matters for limitations purposes is the conduct, not the condition imposed. Every court has held operating violations within the limitations period may be enforced.

In *NPCA*, the Sixth Circuit held that illegal operations at a power plant "presents a series of discrete violations rather than a single violation." 480 F.3d at 417. Looking to "the precise conduct prohibited," *id*. at 418, in specific provisions of Tennessee's SIP, the court identified two conditions for lawful operation of the plant: "to apply BACT," *id*., and to "obtain a construction permit containing the proper emissions controls…even *post*-construction," *id*. at 419 (emphasis in original). The court determined that daily *operations* without applying BACT or the required construction permit allow for "cause[s] of action [that] manifest[]… anew each day a plant operates." *Id*. The court held that "insofar as the plaintiffs seek assessment of penalties for violations occurring prior to [the limitations period], their actions are time-barred" but that "[i]nsofar as they seek penalties for later violations, their claims are timely." *Id.* at 419.

Several district courts have ruled the same. The court in *Sierra Club v. PPL Montana* denied a motion to dismiss because defendants were allegedly operating the Colstrip power plant without the requisite Montana Air Quality Permit (MAQP). 2014 WL 12814425 (D. Mont. May 22, 2014), *report and recommendation adopted*, 2014 WL 12814426 (D. Mont. Aug. 13, 2014). The court found that, under Montana's SIP, a MAQP construction permit and implementing

emission controls typical of that permit are operating conditions. *Id*. at *11. Because the unlawful conduct was operations, the court "conclude[d] each day that a modified source *operates* without the requisite MAQP and the BACT emission limitations that come with it constitutes a new and discrete violation of Montana's SIP." *Id*. at *13 (emphasis added). The court therefore held that "Plaintiffs have alleged a series [of] discrete violations potentially allowing them to recover civil penalties for each violation occurring within the five-year limitations period." *Id*.

Sierra Club v. Portland General Electric involved a CAA enforcement action against defendants' Boardman power plant for operating "without a PSD permit and without installing BACT." 663 F.Supp.2d at 991.[10] The court assessed Oregon's SIP and held these requirements apply to "operation of a major source," *id*. at 992, and then concluded that "each day a facility operates absent a PSD permit and absent BACT constitutes a discrete violation of the CAA [the Act]," *id*. at 994; *see also U.S. v. Blue Lake Power*, 215 F.Supp.3d 838, 842-43 (N.D. Cal. 2016) (ruling Authority to Construct permit was also condition of operations under California SIP provision and recognizing distinction between "one-time" construction claims and "repeating" operating claims); *U.S. v. E. Kentucky Power Co-op.*, 498 F.Supp.2d 970, 972-75 (E.D. Ky. 2007) (applying *NPCA* to hold Kentucky's SIP imposes operating conditions and operating violation "manifests itself each day the plant operates").

These cases all concern claims to enforce violations for illegal operations. None were dismissed as untimely because the conduct at issue involved illegal operations that repeat each day they occur. True enough, these cases involve questions of whether a specific SIP

[10] Notably, defendants agreed that a Title V permit is a prerequisite to operations. *Portland General Electric*, 663 F.Supp.2d at 992 (urging "only Oregon's Title V program applies to the operation of Boardman").

requirement is a condition of operations or construction. But they each still stand for the undisputed rule that unlawful operations within the five-year limitations period are not time barred. In any case, in contrast to those cases, the inquiry here is far simpler because the mandatory condition for operating the Mine is obtaining a Title V *operating permit*.

Even courts that have barred unlawful *construction* claims recognize that operating and constructing are distinct types of conduct, conceding their rulings would have been different had the claim involved unlawful operations. Consider *U.S. v. EME Homer City Generation*, where EPA sought enforcement of PSD permitting requirements. 727 F.3d 274 (7th 2013). The Third Circuit asked whether the "PSD program prohibit[s] operating a facility without BACT or a PSD permit." *Id*. at 284. The court answered no, but recognized that "if, as the EPA urges, the PSD program imposes operating duties, then a new violation occurs each day that the Current Owners operate the Plants without BACT or a PSD permit." *Id*. The Seventh, Eighth, and Eleventh Circuits also acknowledge the distinction. *U.S. v. Midwest Generation*, 720 F.3d 644, 647 (7th Cir. 2013) (agreeing operations may give rise to discrete repeated violations, but holding construction-related claims do not); *Sierra Club v. Otter Tail*, 615 F.3d 1008, 1014 (8th Cir. 2010) ("If they [PSD permit and BACT requirements] apply only to construction and modification, Sierra Club's PSD civil penalty claims are time barred. If they impose operational requirements, however, the PSD claims would still be viable."); *Nat'l Parks Conservation Ass'n v. TVA*, 502 F.3d 1316, 1324 (11th Cir. 2007) ("[T]he obligation to apply [BACT]…was solely a prerequisite for approval of the modification, not a condition of Unit 5's lawful operation.").

The Recommendation ignores the universal holding of every court to consider the issue, finding the Tenth Circuit's opinion in *Sierra Club v. Oklahoma Gas & Electric* controls. ECF Doc. 70 at 14-17. But that case addressed unpermitted *construction*, not *operations*. *Okla. Gas*,

816 F.3d at 671-72. It held that construction is a singular act such that constructing without a PSD construction permit is a single, albeit continuing, violation. *Id*. The court, however, *did not* rule that the act of illegally operating a source is a singular act. Consequently, there is no "tension" between *Oklahoma Gas* and the Sixth Circuit's *NPCA* case, (ECF Doc. 70 at 16 n.15), as *NPCA* involved a challenge to illegal operations—not construction. The Recommendation's conclusion that *Oklahoma Gas* controls is incorrect.[11]

The Recommendation's reliance on a Utah district court case, *HEAL Utah v. PacifiCorp*., 375 F.Supp.3d 1231 (D. Utah. 2019), is misplaced. ECF Doc. 70 at 15-16. *HEAL Utah* involved an attempt to enforce the Clean Water Act's prohibition against discharging "fill" material without a permit (33 U.S.C. §§ 1311(a), 1362(6), 1344(a)). This case is inapposite because the prohibited act—discharges associated with building a water collection system—occurred entirely outside the statute of limitations period and there were no continuing affirmative illegal acts. *Id*. at 1248-49.[12] Further, the court found the act of installing the collection system was a singular act, of short duration, analogous to the act of construction at issue in *Oklahoma Gas*. *Id*. *HEAL Utah* did not involve operating.[13]

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[11] Both the Seventh and Eighth Circuits approved of the Sixth Circuit's conclusion in *NPCA v. TVA*. *Otter Tail*, 615 F.3d at 1017 (noting Sixth Circuit's *NPCA v. TVA* decision "made sense"); *EME Homer*, 727 F.3d at 290 (explaining *NPCA v. TVA* decided differently because "Tennessee SIP's unique language" required construction permits as an operating condition).

[12] Because the prohibited act of discharging had ceased before the limitations period, the *HEAL Utah* plaintiffs tried to save their claim by focusing on the *effects* of the discharge and remaining pollution. *HEAL Utah*, 375 F.Supp.3d at 1249. Here, in contrast, the affirmative and prohibited act of unpermitted operations have been repeatedly occurring during the limitations period.

[13] Like CAA operating claims, Clean Water Act claims involving the repeated discharge of polluted "effluent" without a permit (or in violation of a permit) are *not* wholly barred by the statute of limitations. *El Paso Gold Mines*, 2003 WL 25265873, at *6; *Cox v. Bd. of Cty. Commissioners of Franklin Cty.*, 436 F.Supp.3d 1070, 1086 (S.D. Ohio 2020); *Wisc. Res. Prot. Council v. Flambeau Min.*, 903 F.Supp.2d 690, 721 (W.D. Wis. 2012), *rev'd on other grounds Wisc. Res. Prot. Council v. Flambeau Min.*, 727 F.3d 700 (7th Cir. 2013).

B. The Existence Of Numerous Violations Does Not Change The Result.

Application of the repeated-violations doctrine does not waiver due to the violations' frequency. Discrete violations can occur daily or in some lesser amount. In *Hamer*, the court ruled a "public entity repeatedly violates [the Americans with Disabilities Act and Rehabilitation Act] each day it fails to remedy a non-compliant service, program, or activity." 924 F.3d at 1103. In *Kokesh*, the violations did not occur daily, but whenever defendant misappropriated funds. 884 F.3d at 984; *see also Figueroa v. D.C. Metropolitan Police Dept.*, 633 F.3d 1129, 1135 (D.C. Cir. 2011) (finding violations repeated each time city failed to pay overtime). In either scenario, those repeated violations occurring within the limitations period are not precluded. *Kokesh*, 884 F.3d at 984. Just because a defendant "engage[d] in misconduct over an extended period of time, it does not follow that the person had engaged in a singular continuing violation, as opposed to a series of repeated violations, for limitations purposes." *Id*. at 983.

As discussed, courts have held unanimously that unlawful operations are series of discrete wrongs. Each day of operations is an enforceable violation, whether the polluting source operates one day or every day, just on the weekdays, or only when market prices are sufficiently high. As a factual matter, whether the Mine operates every day has not been established. Thus, the Recommendation makes a factual error when stating the Mine operates "continuous[ly]" in an effort to distinguish *Kokesh*. ECF Doc. 70 at 17 n.16. Regardless, the frequency of violations within the limitations period is irrelevant under the repeated-violations doctrine.

II. Plaintiffs Sufficiently Pled Their Unpermitted-Construction Claim.

Built in the 1980s, Mountain Coal has avoided PSD permitting and installing new pollution controls that limit VOC emissions at the Mine. But when older sources, like the Mine, undergo a "physical change," the PSD program kicks in. The program is designed to "impose[]

less stringent regulations on existing regulated facilities, which are essentially 'grandfathered' into less exacting standards, while newer facilities, or those making major changes, are required to implement measures to reduce pollution emissions." *U.S. v. Cemex*, 864 F.Supp.2d 1040, 1044 (D. Colo. 2012). This accommodation is a recognition "of the expense of retrofitting pollution-control equipment." *U.S. v. Cinergy*, 458 F.3d 705, 709 (7th Cir. 2006).

However, "Congress did not permanently exempt existing plants from these requirements." *Reilly*, 893 F.2d at 909. In two scenarios, sources undergoing a physical change require a PSD permit. The first one, at issue here, is when an existing source "not otherwise qualifying as a major stationary source" initiates a physical change that itself has the potential-to-emit[14] over 250 tons per year (tpy). 5 C.C.R. § 1001-5:3.D.II(A)(25)(c) (Subsection (25)(c)). The second, known as a "major modification," applies when an existing "major stationary source" undergoes a physical change causing an "significant emission increase." *Id*. § 1001-5:3D.II(A)(23). In either circumstance, construction is prohibited absent a PSD permit. *Id*. § 1001-5:3D.I(A)(1); 42 U.S.C. § 7475(a)(1).

Plaintiffs' First Claim relies on Subsection (25)(c) to challenge Mountain Coal's construction of the Expansion without a major source PSD permit. ECF Doc. 1, ¶¶ 78-81. For the purpose of the Motion, the parties agree that the Complaint alleges the Expansion is a physical change that alone has the potential-to-emit over 250 tpy, the Mine had a minor-source permit before the Expansion, and that construction of the Expansion began in January 2020 without a PSD permit. *Id*. ¶¶ 57-58, 79-80.

[14] "Potential to emit" means "maximum capacity of a stationary source to emit a pollutant under its physical and operational design." 40 C.F.R. § 51.166(b)(4); 5 C.C.R. § 1001-5:3A.I(B)(37).

The dispute centers on the "not otherwise qualifying as a major stationary source" element in Subsection (25)(c). To plead this element, the Complaint alleges that Mountain Coal had a minor-source permit for the Mine at the time of the Expansion. ECF Doc. 1, ¶ 79 ("Mountain Coal does not have a major source PSD permit for the Mine."); *id*. ¶ 57 ("The permit is neither a major source PSD permit nor a Title V permit."); *id*. ¶ 58 ("The 2010 Permit is a 'synthetic' minor source permit…"). There is no better evidence that the Mine did not qualify as a major stationary source than its minor-source permit. Issued in 2001 to address the construction of the Mine's ventilation shafts and renewed in 2010, ECF Doc. 66-1; ECF Doc. 54 at 122-32 (Ex. 12), Mountain Coal's minor-source permit is the ultimate acknowledgment of this fact. Had the Mine qualified as major because its VOC emissions exceeded the major-source threshold, the Air Division would not have issued a minor-source permit. Consequently, the Complaint alleges sufficient facts to state a plausible claim that Mountain Coal is violating the CAA by constructing the Expansion absent a PSD permit.

Yet the Recommendation concludes the First Claim is not plausible because the Complaint also alleges that the Mine had the potential-to-emit VOCs over the major source threshold. ECF Doc. 70 at 8-10.[15] It dismisses allegations about the minor-source permit, finding only emissions matter. *Id*. at 10-11. The Recommendation erred.

[15] Subsection (25)(c) requires that Plaintiffs also allege the Expansion "would constitute a major stationary source by itself." To do so, the Complaint includes allegations about the Expansion's emissions based on the Mine's potential-to-emit VOCs from prior years. This projection about potential emissions was calculated using (a) a VOC-methane emission ratio for coal mine air emissions and (b) the Mine's self-reported methane emissions. ECF Doc. 1, ¶ 68-69. This projection is not based on actual VOC emissions. At the time of the Complaint, Plaintiffs offered these potential emissions because VOC monitoring data had not been made publicly available—monitoring only began in June 2019. It is these allegations, taken out of context and without regard to the minor-source permit, that the Recommendation identifies to rule the First Claim is not plausible. These allegations were intended to satisfy a different element in Subsection (25)(c).

A. The Minor-Source Permit Is Relevant For Determining If The Mine Did or Did Not Qualify As A Major Stationary Source.

The renewed 2010 minor-source permit is a relevant factor when deciding if the Mine "qualified" as a major source or not before the Expansion. As with any permit, Mountain Coal must disclose all VOC emissions from the Mine. *See* 5 C.C.R. §§ 1001-5:3.B.III(B)(3) ("The applicant shall furnish all information and data required by the Division to evaluate the permit application"); 1001-5:3.B.III(B)(2) (requiring Air Pollution Emission Notice (APEN)); 1001-5:3.A.II(A)(1) (APEN requiring "an estimate of the quantity and composition of the expected emission"). By applying for a minor-source permit, Mountain Coal believed the Mine did not qualify as a major source for VOCs. By issuing that permit, the Air Division determined VOC levels did not qualify the Mine as a major source. Neither Mountain Coal nor the Air Division has indicated the permit was wrongly issued, or that VOC emission volumes have changed.

The Air Division agrees that permits are relevant. Its Supplemental Brief on the issue reads: "The Division agrees with the Defendants that the source's permit is not conclusive, *but also agrees with Plaintiffs that the source's permit is relevant and informative.*" ECF Doc. 65 at 2 (emphasis added) (explaining "[p]ermits can contain limitations upon a source's potential to emit (e.g. a synthetic minor source permit), so permits are relevant").[16] According to the regulators, both a minor source permit and emission data will help determine if the Mine qualified as a major source before the Expansion.

The regulatory definition of "minor source" supports the permit's relevance. A minor source is "[a]ny stationary source that does not qualify as a major source." 5 C.C.R. § 1001-

[16] The Recommendation oddly plucks a partial quote from the Air Division to dismiss the relevance of Mountain Coal's minor-source permit. *See* ECF Doc. 70 at 10 n.8.

5:3A.I(B)(26). Thus, a source qualifying as a minor source—documented with a minor-source permit—cannot simultaneously be a source that qualifies as a major source.

Contrary to the Recommendation's conclusion, Subsection (25)(c)'s text does not support a finding that only emission levels count and the Mine's minor-source permit is irrelevant. The Recommendation reasons "[t]he regulations at issue here, however, make no mention of the source's permit status but instead refer only to the source's potential emissions." ECF Doc. 70 at 10. In fact, the relevant clause refers to neither. Subsection (25)(c) reads, in relevant part, an existing "stationary source not otherwise qualifying as a major stationary source." 5 C.C.R. § 1001-5:3.D.II(A)(25)(c); 40 C.F.R. § 51.166(b)(1)(i)(C) (same). It says nothing about permits or emissions. And it certainly does not refer to emissions to the exclusion of permits.

Had the state or EPA intended for only emissions to matter, this element of Subsection (25)(c) would simply say an existing "stationary source emitting above applicable levels of a pollutant." But, instead, it asks whether a source qualified as a major source or not. Under the CAA, "qualifying" involves factors beyond just potential emissions. A source, though having the potential-to-emit above major source thresholds, does not "qualify" as major if it agrees to include federally enforceable emission limits in a "synthetic" minor source permit. *Extraction Oil & Gas*, 457 F.Supp.3d at 942 ("[A] facility with uncontrolled PTE over major-source thresholds can be considered a minor source if its controlled PTE is below major-source thresholds."); *see also* ECF Doc. 65 at 2. Similarly, a source may emit or have the potential to emit above 250 tpy, but if those emissions "fugitive," they are not counted. 5 C.C.R. § 1001-5:3D.II(A)(25)(e). Accordingly, although emission volumes are a factor, they alone are not controlling for determining if a source "qualifies" as major under Subsection (25)(c).

The drafters acted intentionally by including the word qualifying. Unlike Subsection (25)(c), the "major modification" definition—the counterpart to Subsection (25)(c) for PSD permitting purposes—contains no requirement that the existing source "qualify" as a major. 5 C.C.R. § 1001-5:3D.II(A)(23). It just asks whether an existing source is a "major stationary source"—*e.g.*, whether the Mine emits 250 tpy or more of VOCs. *Id*. Accordingly, under traditional rules of statutory and regulatory construction., qualifying as used in Subsection (25)(c) must be given some meaning. *See Russello v. U.S.*, 464 U.S. 16, 23 (1983); *Lamb v. Thompson,* 265 F.3d 1038, 1051 (10th Cir. 2001). And the Air Division's minor-source permit provides an agency imprimatur that a source does not qualify as a major.

Accordingly, allegations about Mountain Coal's minor-source permit are relevant and sufficient, *see Twombly*, 550 U.S. at 556 ("Factual allegations must be enough to raise right to relief above speculative level."), and provide "some relevant information" that the First Claim is plausible, *see Bekkem v. Wilkie*, 915 F.3d 1258, 1275 (10th Cir. 2019); *see also* Fed.R.Civ.P. 8(e) ("Pleadings must be construed so as to do justice."). The Recommendation should have accepted these facts at this stage, *see Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."), as opposed to weighing competing allegations or evidence, *see Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

B. The Recommendation Ignored The Complaint's Allegations And References Concerning The Mine's Claimed Emissions.

Even if only emissions—to the exclusion of permits— matter, Plaintiffs' allegations and the referenced public documents are sufficient to plead a plausible claim.[17]

[17] In resolving the Motion to Dismiss, the Court may consider documents incorporated by reference in the complaint, documents referred to in and central to the complaint where

First, as alleged, the Mine's 2010 renewed minor-source permit makes no mention of any VOC emissions, let alone that volumes exceed the major-source threshold. ECF Doc. 1, ¶¶ 57-58, 79. As noted above, all emissions data must part of the permitting process. *Second*, Plaintiffs alleged that Mountain Coal's APENs[18] do not show that the Mine's VOC emissions exceed 250 tpy. *Id*. ¶ 60. In its 2014 and 2019 APENs, Mountain Coal certified that no VOCs are emitted from the Mine's ventilation system (Emission Point 19) or drainage wells (Emission Point 26). *Id*.; ECF Doc. 66-2; ECF Doc. 66-3.[19] *Third*, Mountain Coal's January 16, 2020 minor-source construction permit and March 31, 2020 Title V operating permit applications reveal that actual VOC emissions in 2019 from the ventilation shafts and wells were 213 tpy, below the major-source threshold of 250 tpy. ECF Doc. 1, ¶¶ 61, 64, 76; ECF Doc. 53-5 (Ex. 2 at MCC003745), ECF Doc. 54 (Ex. 11 at WEG001077, WEG001089). Accordingly, as alleged in the Complaint and shown in referenced documents and public records, Plaintiffs sufficiently allege that the Mine did not qualify as a major source based on emissions. *See* Fed.R.Civ.P.

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authenticity is undisputed, and matters of which a court may take judicial notice, including public records. *See Tellabs*, 551 U.S. at 322 (2007); *Hodgson v. Farmington City*, 675 F.App'x 838, 840-41 (10th Cir. 2017); *Extraction Oil & Gas*, 457 F.Supp.3d at 945. Here, the Court may properly consider Mountain Coal's 2001 and 2010 minor source permits, the 2014 and 2019 APENs, the January and March 2020 permit applications, and the September 2020 updated application, as they are public records directly relating to the Mine and this case, available on the Air Division's website, and are public administrative documents of which the Court may take judicial notice. The 2010 permit, 2019 APEN, and January and March 2020 permit applications and their content are also referenced in the Complaint, are integral to Plaintiffs' claims, and their veracity, produced by Mountain Coal or by the Air Division, cannot be disputed.

[18] A source emitting 2 tpy of VOCs from any emission point must submit APENs to the state's Air Division every five years. 5 C.C.R. § 1001-5:3A.II(A) & (B). APENs must provide "an estimate of the quantity and composition of the expected emission." *Id*. § 1001-5:3.A.II(A)(1).

[19] When filing APENs, Mountain Coal "certif[ies] that all information contained herein and information submitted with this application is complete, true, and correct." *See* ECF Doc. 66-3 at 1, 6 (on "Form APCD-200, Air Pollutant Emission Notice (APEN) and Application for Construction Permit," source is required to certify by "signature of [a] legally authorized person (not a vendor or consultant)"); ECF Doc. 66-2 at 2 (same).

8(d)(2) ("If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.").

Post-complaint information provides further support. The day before filing its reply brief accepting that the Mine has been a major source, ECF Doc. 39 at 7, Mountain Coal submitted an updated application for a construction permit under Subsection (25)(c) that maintained the opposite. ECF Doc. 53-5.[20] The September 15, 2020 application explicitly "appli[ed] [Subsection (25)(c)] to the facts" of the Expansion. *Id*. (Ex. 3 at WEG004887).[21] In doing so, Mountain Coal concedes the Mine did *not* qualify as a major source, as Subsection (25)(c) applies only if the Mine had *not* otherwise qualified as major. Had the Mine's pre-Expansion VOC emissions been above 250 tpy, Mountain Coal would have evaluated the Expansion under the major-modification provision. *See* 5 C.C.R. § 1001-5:3D.II(A)(23). But Mountain Coal and the Air Division have never claimed that the Mine's VOC emissions, pre-Expansion, exceeded the major source threshold.

Plaintiffs have alleged that (1) the Mine did not have a "major source PSD permit," and had a minor-source permit, ECF Doc. 1, ¶¶ 57-58, 79, and (2) Mountain Coal's public filings reveal that VOC emissions never exceeded 250 tpy, *id.* ¶¶ 57-58, 60-61. For either or both reasons, the First Claim is plausible on its face. The Complaint's allegations and the referenced documents "give the court reason to believe" that Plaintiffs have "a reasonable likelihood of mustering factual support for" their First Claim, *see Ridge at Red Hawk v. Schneider*, 493 F.3d

[20] Plaintiffs' projections about the Expansion's VOC emissions are now less important to plead the claim. New information released with Mountain Coal's September 15, 2020 application shows the Expansion's emission potential is above 460 tpy. ECF Doc. 53-5 (Ex. 3 WEG004886).
[21] The Recommendation wrongfully refused to consider Mountain Coal's September 2020 application. ECF No. 70 at 9 n.7. The September 2020 application is an administrative document that is publicly available and directly related to the issue before the Court—the Mine's status before the Expansion.

1174, 1177 (10th Cir. 2007), and Mountain Coal has been provided with notice and the actual grounds of Plaintiffs' First Claim, especially since these emission allegations are derived from the company's public filings. The Recommendation should have construed these factual allegations in Plaintiffs' favor. Instead, it gives the Mine's minor-source permit zero weight—as if it does not exist—and allows Mountain Coal to tell the Air Division one thing about emissions while staking a different position with the Court. Should the Court nonetheless sustain the Recommendation on the First Claim, Plaintiffs request that dismissal be without prejudice so that Plaintiffs can amend and supplement the Complaint.

CONCLUSION

The Court should sustain Plaintiffs' Objections, reject the Recommendation, and deny Mountain Coal's Motion to Dismiss in its entirety.

Respectfully submitted on February 9, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2021, I electronically transmitted Plaintiffs' Objections to Recommendation to the Clerk's Office using the CM/ECF System for filing and service on all registered counsel.

/s/ Neil Levine
Neil Levine