IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-1342-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.

DEFENDANTS' RESPONSE TO
PLAINTIFFS' OBJECTIONS TO RECOMMENDATION

Defendants Mountain Coal Company and Arch Resources Inc., through undersigned counsel, respectfully file this Response to Plaintiffs' Objections to Recommendation (ECF # 75) ("Objection").

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INTRODUCTION

In response to Defendants' Motion, Plaintiffs dropped any part of their first claim predating January 2020 and disavowed any claim under potentially applicable regulations other than 5 C.C.R. 1001-5:3D.II.A.25.c ("Minor Source Regulation"). Pls.' Opp'n to Defs.' Mot. to Dismiss ("Response"), 2, 14 [ECF # 32, 7, 19]. As a result, the sole issue in dispute on Plaintiffs' first claim is whether the Complaint states a claim for breach of the Minor Source Regulation. The Recommendation correctly determined that it does not. Recommendation of United States Magistrate Judge ("Recommendation"), 6-11 [ECF # 70, 6-11]. Based on the facts alleged in the Complaint, the West Elk Mine qualifies as a major source, but the Minor Source Regulation applies only to "a stationary source not otherwise qualifying as a major stationary source." *Id.* at 8, 11 (quoting Minor Source Regulation). Hence, the Complaint fails to state a claim for a violation of the Minor Source Regulation.

Plaintiffs agree the five year statute of limitations in 28 U.S.C. § 2462 governs their second claim for the West Elk Mine's alleged lack of a Clean Air Act ("CAA") Title V operating permit. Response, 11 [ECF # 32, 16]. The Tenth Circuit holds that for an alleged lack of a CAA permit "the clock under § 2462 begins only once, when a claim first accrues." *Sierra Club v. Oklahoma Gas & Elec. Co.*, 816 F.3d 666, 673–74 (10th Cir. 2016). The Recommendation therefore correctly determined that Plaintiffs' second claim, which alleges that the West Elk Mine has operated for decades without a required Title V operating permit, is time-barred. Recommendation, 11-17 [ECF # 70, 11-17].

STANDARD OF REVIEW

The Tenth Circuit has "a firm waiver rule" whereby any objection to a Magistrate's recommendation must be timely and "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents, Known as: 2121 E. 30th St., Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). General objections are insufficient. *Id.* "Where Plaintiff does not object to the Magistrate Judge's findings, the Court reviews those findings under a 'clearly erroneous' standard of review." *Cheavens v. Pub. Serv. Corp. of Colorado*, 176 F. Supp. 3d 1088, 1094 (D. Colo. 2016). "Furthermore, arguments not raised before the magistrate judge need not be considered by this Court." *Aurzadniczek v. Humana Health Plan, Inc.*, 15-CV-00146-RM-KMT, 2016 WL 1266972, at *2 (D. Colo. Apr. 1, 2016) (citing *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.")).

"While it might be appropriate for a court to consider additional facts or legal theories asserted in a response brief to a motion to dismiss if they were consistent with the facts and theories advanced in the complaint, a court may not consider allegations or theories that are inconsistent with those pleaded in the complaint." *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001) (citations omitted).

ANALYSIS

I. Plaintiffs' first claim fails to state a claim because the regulation Plaintiffs allege the West Elk Mine violated does not apply to the facts here.

Plaintiffs attempt to avoid the recommendation to dismiss their first claim by incorrectly arguing that Defendants did not move to dismiss this claim for failure to state a claim. Objection,

5 n.4 [ECF # 75, 9]. In their Complaint, Plaintiffs allege that "Mountain Coal is not operating in compliance with the terms and conditions that would be imposed by a PSD construction permit for *any aspect* of the Mine's operations," Compl., ¶ 80 [ECF # 1, 26] (emphasis added), and that "[e]ach and every day Mountain Coal is constructing the Mine without a PSD construction permit is a separate and distinct violation," *id.* at ¶ 81. Defendants moved for summary judgment on the statute of limitations for this claim because the West Elk Mine was constructed in the early 1980s—decades outside the five year limitations period.[1] Mot. to Dismiss the Compl. Pursuant to F.R.C.P. 12(b)(6) Based on the Statute of Limitations ("Motion"), 2 [ECF # 18, 2].

Intertwined with the time-barred claim for the West Elk Mine as a whole, Plaintiffs scattered a few allegations about an alleged expansion in January 2020. *See, e.g.*, Compl. ¶ 79. Although there was no clear separate claim for the alleged expansion in the Complaint, Defendants sought dismissal of any such claim "[s]hould Plaintiffs nevertheless argue that their disparate 'expansion' allegations sufficiently assert an unpled third claim." Mot., 11 [ECF # 18, 11].

Defendants expressly argued that any PSD construction permit claim for the alleged expansion fails because the Minor Modification Regulation applies only to a "source not otherwise qualifying as a major stationary source," and Plaintiffs allege the West Elk Mine was major. *Id.*

> The Complaint alleges that the West Elk Mine's 2019 "pre-expansion" emissions "exceed[] the major source PSD 250 tons-per-year threshold." Likewise, the Complaint alleges that the West Elk Mine's highest emissions were in 2011-14. The Court must therefore assume that it is true that the West Elk Mine emitted sufficient VOCs before the alleged "expansion" to be a major source.

Id. at 11-12 (citations omitted). The issue was and is therefore properly before the Court.

[1] Plaintiffs abandoned the claim as it relates to "any aspect" of the West Elk Mine in favor of a claim for only the alleged expansion in an attempt to avoid dismissal. Response, 2 [ECF # 32, 7].

A. The plain language of the Minor Source Regulation provides that it does not apply to a mine that has the potential to emit more than 250 tons of VOCs.

By its express terms, the Minor Source Regulation applies solely to "a stationary source not otherwise qualifying as a major stationary source." 5 C.C.R. § 1001-5:3D.II.A.25.c. Plaintiffs acknowledge that with respect to volatile organic compounds ("VOCs") "[m]ajor stationary source means 'any stationary source that emits, or has the potential to emit, two hundred and fifty tons per year.'" Compl. ¶ 78 [ECF # 1, 25] (quoting 5 C.C.R. § 1001-5:3D.II.A.25.a(ii)); *see also* Resp., 4 [ECF # 32, 9] ("Major sources are 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)."). Inserting the regulatory definition of "major stationary source" where the term is used in the Minor Source Regulation makes it is even clearer that the Minor Source Regulation applies solely to "a stationary source not otherwise qualifying as a [source that emits, or has the potential to emit, two hundred and fifty tons per year]."[2] 5 C.C.R. § 1001-5:3D.II.A.25.a(ii); 5 C.C.R. § 1001-5:3D.II.A.25.c.

1) Permitting status is irrelevant because it is not referenced in the Minor Source Regulation.

Plaintiffs cite no law to support their recent argument that permitting status is also a factor in determining major source status. It is not. Letter from EPA to Div. of Air Pollution Control, Ohio Environmental Protection Agency, 1 (January 22, 1998).[3] (Rejecting that a source's prior synthetic minor permit makes it a minor source, and instead deciding that the agency must

[2] Defendants elaborated on this point in the Motion [ECF # 18, 11-12]; in the Reply [ECF # 39, 6-7]; at oral argument, Exhibit 1, 12:17, 13:3-9; and in Defendants' supplemental brief [ECF # 64, 3]. To avoid unnecessary duplication, Defendants do not repeat those points here except to the extent necessary to respond to the issues raised in the Objection.

[3] Available at https://www.epa.gov/sites/production/files/2015-07/documents/protec98.pdf.

"determine whether or not the entire existing source is major, that is, equal or exceeding 250 tons per year (tpy) of actual or potential emissions."); *see also*, Exhibit 1 (Transcript of December 16, 2020 oral argument on the Motion), 47:16-19 (Amicus, the Colorado Air Pollution Control Division, explaining that "whether it was a minor source or a major stationary source at the time of the expansion, and that depends on what the emissions associated with the expansion were . . . ."). Simply, "[i]ssues related to the past permitting of this unit are not relevant" in determining which regulation applies to a modification because major source status is determined by the source's real potential to emit more than the 250 tons threshold—not what it is permitted to emit. Letter from EPA to Div. of Air Pollution Control, Ohio Environmental Protection Agency, 2 (January 22, 1998).

When permitting status is a factor in applying CAA regulations, it is clearly stated. *See, e.g.*, 5 C.C.R. § 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); *see also* Def's Supp. Br. in Support of Mot. to Dismiss, 3 [ECF # 64, 3] (elaborating on and providing further examples for this point). Hence, the Minor Source Regulation, which does not reference permitting status, does not depend on permitting status.

2) *Plaintiffs' attempt to ascribe new meaning to the word "qualifying" in the Minor Source Regulation turns the meaning of that term on its head.*

Plaintiffs argue the Minor Source Regulation's reference to "a stationary source not otherwise qualifying as a major stationary source" means all minor and some major sources by asserting the word "qualifying" (or phrase "not otherwise qualifying") modifies "major stationary source." Objection, 15-17 [ECF # 75, 19-21]. Linguistically, the argument is baseless. The word "qualifying" serves "to limit or modify the meaning of" something. Qualify, *Merriam*

Webster.com Dictionary.[4] In the Minor Source Regulation "not otherwise qualifying" limits the meaning of the preceding reference to "a stationary source" by the insertion thereafter of "as a major stationary source." Plaintiffs' argument that "not otherwise qualifying" limits the meaning of "major stationary source" turns the sentence on its head, and the regulation would then omit the crucial information of how "major stationary source" is qualified. The Court should therefore reject Plaintiffs' contorted and linguistically incorrect interpretation.

3) *Plaintiffs' references to the limitations in the definition of major stationary source and to the applicability of major source rules are misplaced and inapplicable to the alleged facts.*

After turning the qualifier in the Minor Source Regulation on its head and thereby removing any explanation of how any term therein is limited by the qualifier, Plaintiffs attempt to incorporate other qualifiers from other parts of the CAA regulations that are not referenced in the Minor Source Regulation. Objection, 16 [ECF # 75, 20]. For example, the exclusion of fugitive emissions from major source thresholds and limitations in synthetic minor source permits. None apply to the facts at issue.

In addition to not being referenced in the Minor Source Regulation, the fact that "fugitive" emissions do not count towards either Title V or PSD major source thresholds for underground coal mines is already accounted for in the definition of "major stationary source." 5 C.C.R. § 1001-5:3D.II.A.25.e; 5 C.C.R. § 1001-5:3A.I.B.25.b.[5] Hence, adding it as a qualifier in the Minor Source Regulation would be redundant because fugitive emissions are already excluded.

[4] Available at https://www.merriam-webster.com/dictionary/qualifying.

[5] This qualifier has its own exceptions whereby certain categories of sources nevertheless have to count fugitive emissions. Coal mines do not fall within this exception.

Even if this qualifier had been incorporated into the Minor Source Regulation, rather than the definition of major stationary source, it does not support Plaintiffs' argument that permitting status is relevant. This qualifier merely limits the types of emissions to be counted towards the 250 tons per year threshold.

Finally, fugitive emissions are irrelevant here. Plaintiffs have made no allegation that some or all of the West Elk Mine's alleged emissions are fugitive and therefore do not count. Nor could they make such allegation because it would defeat their claims on the merits if the West Elk Mine's emissions did not count. Def.'s Resp. to Pl.'s Mot. to Dismiss 8-9 [ECF # 68, 10-11] (explaining how Plaintiffs' claims fail on the merits precisely because Plaintiffs' claims depend on the unsupported presumption that the West Elk Mine' emissions are non-fugitive).

Similarly, Plaintiffs' reference to limitations that could be imposed in a synthetic minor source permit also affects what potential emissions count, not whether the existence of a minor source permit is itself a factor, in determining major source status. Even the case Plaintiffs cite agrees. Objection, 5 [ECF # 75, 20] (citing *WildEarth Guardians v. Extraction Oil & Gas, Inc.*, 457 F. Supp. 3d 936, 942 (D. Colo. 2020)). "Whether a facility is a major source depends on its emissions levels." *WildEarth Guardians*, 457 F. Supp. 3d at 942. Further, Plaintiffs allege that the West Elk Mine's synthetic minor source permit "does not apply to VOC emissions" so there are no synthetic minor source limitations on VOCs at issue in this case.[6] Compl. ¶ 57 [ECF # 1, 19]. Plaintiffs' permit argument is therefore both legally and factually a red herring.

[6] Accordingly, Amicus' statement in its supplemental brief that permits may be relevant to the extent they impose emissions limits and the actual emissions do not exceed those limits does not come into play here. Supp. Br. of Amicus Curiae Colo. Dep. of Pub. Health and Env., Air Pollution Control Div., 2 [ECF # 65, 2].

B. The Complaint consistently alleges the West Elk Mine emitted over 250 tons of VOCs, and it contains no alternative allegations to the contrary.

The Recommendation correctly determined that the Complaint consistently alleges the West Elk Mine was a major source at all relevant times.

> 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.

Recommendation, 9 n.7 [ECF # 70, 9]. This determination is wholly supported by Plaintiffs' allegations of fact.

Plaintiffs allege several times that the West Elk Mine's emissions exceed the major source threshold. *See, e.g.,* Compl. ¶ 67 [ECF # 1, 22] ("Using 2019 actual emissions . . . the Mine's potential-to-emit would be approximately 299.382 tons-per-year . . . . This amount exceeds the major source PSD 250 tons-per-year threshold"); *id.* at ¶ 68 ("The Mine's VOC potential-to-emit exceeds 250 tons-per-year."); *id.* at ¶ 69 [ECF # 1, 23] ("VOC emissions of 1,122.1 tons" in 2011); *id.* at ¶ 70 ("The Mine's potential-to-emit VOCs exceeds 250 tons-per-year"). Nowhere do Plaintiffs allege that the West Elk Mine's emissions were below the major source threshold of 250 tons per year.

Plaintiffs allege several times that the West Elk Mine's minor source permit is inapplicable to the VOC emissions at issue here. *Id.* at ¶ 57 [ECF # 1, 19] ("The permit does not apply to VOC emissions."); *id.* [ECF # 1, 20] ("The permit does not cover VOC emissions."). Nowhere do Plaintiffs allege that the West Elk Mine was correctly issued a minor source permit based on VOC emissions being below the major source threshold. *See id.* at ¶ 61 [ECF # 1, 21] ("APCD has not

issued Mountain Coal a minor source construction permit covering the Mine's VOC emissions."); *see also* Objection, 4 [ECF # 75, 8] (the permit "ignores VOC emissions entirely.").

Plaintiffs allege several times that the West Elk Mine's emissions have generally declined in recent years. Compl. ¶ 73 [ECF # 1, 24] (alleging emissions were the highest between 2011-2014); *see also id.* at Ex. 1, 7 [ECF # 1, 37] (Table 1 showing alleged VOC emissions in 2011 (1,122 tons), 2012 (838 tons), 2013 (683 tons), 2014 (592 tons), 2015 (441 tons), 2016 (366 tons), 2017 (401 tons), 2018 (265 tons)). Nowhere do Plaintiffs allege that emissions have increased since the alleged expansion.

The Complaint does not contain alternative allegations. Rather, the Complaint consistently alleges that the West Elk Mine was a major source for years to thereby allege that it will remain a major source when mining crosses the lease line into what Plaintiffs call the expansion area. Exhibit 1, 34:15-24 (counsel for Plaintiffs explaining that Plaintiffs alleged the West Elk Mine emitted over 250 tons of VOCs before the expansion to demonstrate that it will also emit over 250 after the expansion); *see also id.* at 44:4-7 (Magistrate Judge Varholak stating that "while the mine was permitted as a minor source, it was in fact, according to the complaint, emitting at least [since] 2011, major source emissions."). That is, the Complaint alleges the West Elk Mine has at all relevant times been a major source, and that it was improper for the West Elk Mine to have only a minor source permit that did not cover VOCs.

C. Plaintiffs have not pointed to any alternative facts in the Complaint and may not argue facts or theories that are inconsistent with the Complaint.

While Plaintiffs do their best to argue the Complaint contains alternative facts to avoid dismissal, it does not. Instead of pointing to an allegation in the Complaint that the West Elk Mine emitted less than 250 tons of VOCs before the 2020 expansion, which is the central issue, Plaintiffs

point to three allegations that the West Elk Mine failed to report or underreported its VOC emissions. Objection, 18 [ECF # 75, 22]. That is insufficient to show that there were any allegations made in the alternative when the Complaint unambiguously and repeatedly alleges that the West Elk Mine emitted more than 250 tons of VOCs per year.

For the first of Plaintiffs' purported alternative facts, Plaintiffs point to the mention of the existing 2010 minor source permit in paragraphs 57-58 and 79 of the Complaint, but they admit that the "the Mine's 2010 renewed minor-source permit makes no mention of any VOC emissions." *Id.* "No mention" is not an allegation that VOC emissions were less than 250 tons. At oral argument, Plaintiffs' counsel summed up Plaintiffs' argument that the Court should consider their minor source permit allegation an allegation that the West Elk Mine is in fact a minor source: "If it was a major source it would have a major source permit." Exhibit 1, 38:8-9. That summation highlights the fallacy in Plaintiffs' argument. It is based on the false premise that all major sources have major source permits. If Plaintiffs' premise were true, all of Plaintiffs' claims would fail on that basis alone. If the West Elk Mine was a major source that needed a major source permit, it would already have one by Plaintiffs' logic.

In their Objection, Plaintiffs also assert, without citation to any facts or legal authority, that "[h]ad 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." Objection, 14 [ECF # 75, 18]. During oral argument, the Air Division explained why Plaintiffs are wrong. Exhibit 1, 49:13-16. "[I]f you had a source that was permitted as a minor source, assuming that it was properly permitted at its initial round, you know, it could grow over time and become a major source without violating any permit requirements." *Id.*; *see also id* at 49:22–50:18 (Magistrate

Judge Varholak posing the hypothetical of a source that had a prior minor source permit but later emitted at a major source level and then did a modification that itself was a major source but did not increase emissions, and the Air Division responding "that modification may not have had to go through PSD review."). It is therefore possible for the West Elk Mine to continue to have a minor source permit even if it became a major source. Hence, an allegation that it has a minor source permit does not implicitly, or otherwise, allege that it is a minor source.

For the second of Plaintiffs' purported alternative facts, Plaintiffs point to the reference to the West Elk Mine's APEN in paragraph 60 of the Complaint, Objection, 18 [ECF # 75, 22], but they admit that the APEN "did not include the volume of VOCs released," Compl. ¶ 60 [ECF # 1, 20]. Again, Plaintiffs refer to lack of information in Defendants' documents—not an actual allegation by Plaintiffs that the West Elk Mine emitted less than 250 tons of VOCs per year.

Moreover, in support of their APEN argument, Plaintiffs cite documents attached to their later motion for summary judgment rather than documents submitted to Magistrate Judge Varholak for consideration of the present Motion. Objection, 18 n.19 [ECF # 75, 22] (citing exhibits to their own motion for summary judgment filed at ECF ## 66-2 and 66-3). Any argument based thereon has been waived. *Aurzadniczek*, 2016 WL 1266972, at *2. Even if the Court could consider them, the cited standard-form APENs are blank in the VOC field. Plaintiffs again rely on the lack of information about VOCs in documents referenced with disapproval in the Complaint as an allegation by Plaintiffs, in the alternative to the clear allegations to the contrary, that there were no VOC emissions. That is insufficient.

For the third of Plaintiffs' purported alternative facts, Plaintiffs point to the allegations in paragraphs 61, 64, and 76 of the Complaint that reference the West Elk Mine's 2020 permit

applications' statements that actual emissions were 213 tpy.[7] Objection, 18 [ECF # 75, 22]. First, the entire premise of Plaintiffs' Complaint is that the West Elk Mine's permit application was improper precisely because Plaintiffs allege the West Elk Mine is a major source and should have applied for a major source permit instead. Second, the major source threshold is triggered by potential to emit, not just actual emissions, and the Complaint continued by alleging in the following paragraphs that these actual emissions in 2019 demonstrated that "the Mine's potential-to-emit VOCs would be approximately 299.382 tons per year" as of 2019. Compl. ¶ 67 [ECF # 1, 22]. Accordingly, there is no support in the Complaint for Plaintiffs' argument that they alleged alternative facts to show the West Elk Mine was in fact a minor source.

D. Even if Plaintiffs had alleged, in the alternative, that the West Elk Mine emitted less than 250 tons of VOCs, it would be irreconcilable with Plaintiffs' contrary allegations they admit were made to satisfy a different element of the same claim.

While pleading in the alternative is generally permitted to assert a claim on two different theories, a plaintiff cannot rely on alternative "allegations which are at odds with each other in order for it to make out all the elements of an individual claim." *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 585 (2d Cir. 2005); *see also Apodaca v. Allstate Ins. Co.*, CIVA 06CV00952 MSKME, 2007 WL 678625, at *4 (D. Colo. Feb. 28, 2007) (recognizing the same distinction between permissible inconsistent allegations of fact in support of different claims and impermissible inconsistent allegations within the same claim).

Here, Plaintiffs assert their claim has three elements: (1) a physical change, (2) a source not otherwise qualifying as a major stationary source, and (3) the change is a major source by

[7] The Court should reject Plaintiffs' argument based on updates to these applications that post-date the Complaint. As a matter of logic, such future documents could not have been incorporated into the Complaint or otherwise provided any notice of or a basis for the allegations therein.

itself. Pls.' Supp. Br. on Defs.' Mot to Dismiss, 1 [ECF # 66, 2]; Exhibit 1, 33:24-34:11. Plaintiffs argue that "the Complaint alleges that Mountain Coal had a minor-source permit for the Mine" to show the West Elk Mine emitted less than 250 tons of VOCs and thereby satisfies the second element. Objection, 14 [ECF # 75, 18]. Plaintiffs, however, admit they alleged the mine emitted more than 250 tons per year to satisfy the third element:

> And when it comes to the concern or the issue that was raised by the Court about, well hey, you have all these allegations suggesting that the -- the mine was emitting above two hundred and fifty tons per year. That was because we were attempting to satisfy the third element, that the physical change is going to result in two hundred and fifty tons per year.

Exhibit 1, 34:15-23; *see also* Objection, 14 n.15 [ECF # 75, 18]. Because the alternative allegations that the West Elk Mine emitted more than 250 tons and that it emitted less than 250 tons of VOCs cannot both be true, Plaintiffs cannot prove all elements of their first claim on either set of alternative facts. Hence, even if Plaintiffs had made an alternative allegation—and they have not—they could not rely thereon to save their claim. *Aetna Cas. & Sur. Co.*, 404 F.3d at 585.

"Thus, because the Complaint alleges that the Mine had the potential to emit (and indeed was emitting) 250 tons per year or more of VOCs . . . 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*.'" Recommendation, 9-10 (emphasis in original).

II. Plaintiffs' second claim alleging the West Elk Mine needed a Title V permit since an unidentified date decades ago is time-barred under the five year statute of limitations.

When Plaintiff Sierra Club previously attempted to argue that the lack of a CAA permit should be considered discrete repeated violations each day it continued, the Tenth Circuit disagreed and held that "it is best characterized as a continuing violation rather than a series of repeated violations." *Sierra Club*, 816 F.3d at 671. The Recommendation therefore correctly

rejected Plaintiffs' renewed argument here to the contrary because "Plaintiffs primarily rely upon out-of-circuit cases" and "this Court is bound by Tenth Circuit precedent 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." Recommendation, 16-17.

Controlling Tenth Circuit precedent undisputedly provides that claims for continuing violations of the CAA are barred if brought more than five years after the claim first accrues. *See* Objection, 10-11 [ECF # 75, 14-15] (acknowledging *Sierra Club* controls for continuing violations). It is also indisputable that Plaintiffs have alleged the West Elk Mine's "mining operations . . . are ongoing and continuing." Compl. ¶ 47 [ECF # 1, 16]; *see also id.* at ¶ 86 [ECF # 1, 27] ("These ongoing violations are enforceable under the Clean Air Act . . . ."). Whether Plaintiffs thereby admitted their claims are for continuing violations or not, the Tenth Circuit has determined, as a matter of law, that engaging in an activity that requires a CAA permit without having such permit "is best characterized as a single, ongoing act rather than a series of repeated violations." *Sierra Club,* 816 F.3d at 671; *Sec. & Exch. Comm'n v. Kokesh,* 884 F.3d 979, 984–85 (10th Cir. 2018) (distinguishing the "continuing omission to act in compliance with a duty, as in *Sierra Club* (failure to obtain a permit).").

Despite having expressly stated in their Complaint that the alleged violations are "ongoing and continuing," and despite controlling Tenth Circuit precedent to that effect, Plaintiffs still argue that this Court should follow inapposite[8] cases from other circuits to hold that each day of the

[8] All but two of Plaintiffs' cited cases supports a continuing violations theory rather than a repeated violations theory. Reply, 12-15 [ECF # 39, 12-15] (distinguishing Plaintiffs' cases). The two that support a repeated violations theory did not address operating permit claims. *Id.* at 13-14. Rather, they addressed construction permits. *Id.* As the Recommendation concluded, the Tenth Circuit rejected this line of cases. Recommendation, 16-17 n. 15 [ECF # 70, 16-17].

alleged violation is a separate, discrete violation. Objection, 6-7 [ECF # 75, 10-11]. But, even if the failure to have a CAA permit for ongoing construction or operations could be viewed as a series of repeated violations, that is insufficient to apply the repeated violations theory because each violation would not be "a discrete unlawful act." *Sierra Club,* 816 F.3d at 672. Rather, it would be "a series of separate acts that collectively constitute one unlawful act." *Id.*

Accordingly, even if each day the West Elk Mine continues to operate were deemed a separate act, these acts are insufficiently discrete and separate to apply the repeated violations theory instead of the continuing violations theory. *Id.* The Recommendation therefore correctly applied controlling Tenth Circuit precedent to recommend the Court dismiss Plaintiffs' second claim as a time-barred continuing violation that began outside the applicable limitations period.

A. Plaintiffs' argument that the West Elk Mine would be immunized from CAA requirements fails because the government can enforce, and is enforcing, the CAA.

Plaintiffs attempt to align this case with the few that have applied a repeated violations theory in other contexts by claiming that dismissing the Complaint would immunize the West Elk Mine from CAA requirements. Objection 7 [ECF # 75, 11]. Plaintiffs' argument fails because their premise that the West Elk Mine would be immunized if the Court dismisses the Complaint is wrong. The government would not be barred by the statute of limitations from seeking injunctive relief because the concurrent remedies doctrine that bars Plaintiffs' claim for injunctive relief does not apply to the federal government. *Sierra Club*, 816 F.3d at 676.

Not only can the government continue to seek injunctive relief, Amicus represented that it is actively investigating whether the West Elk Mine needs major source permits. Exhibit 1, 47:21-24 (Amicus stating "that is a question that we are currently evaluating as part of their permit application, because one question that the Air Division has to answer is did they apply for the right

permit?"). Moreover, any enforcement action under state law would be governed by the different state statute of limitations. Reply in Supp. of Mot. to Dismiss the Compl. Pursuant to F.R.C.P. 12(b)(6) Based on the Statute of Limitations ("Reply"), 15 [ECF # 39, 15]. Hence, adopting the Recommendation would not immunize the West Elk Mine from having to comply with the CAA.

B. The only case applying Tenth Circuit law to operations held, like other cases in similar circumstances, that such claims are barred five years after they first accrue.

Few cases across the country have dealt with the statute of limitations in the operating permit context. The Recommendation refers to *HEAL Utah v. PacifiCorp*, 375 F. Supp. 3d 1231 (D. Utah 2019) as instructive. Recommendation, 15 [ECF # 70, 15]. It applied the statute of limitations at issue here and the holding in *Sierra Club* to hold that claims for unpermitted discharges that required a Clean Water Act permit were time-barred five years after the initial discharge even if the discharged material unlawfully remained in the water to this day. *HEAL Utah*, 375 F. Supp. 3d at 1248.

The parties focused on *Grand Canyon Trust v. Energy Fuels Res.*, 269 F.Supp.3d 1173 (D. Utah 2017). *See* Mot., 6, 9 [ECF # 18, 6, 9]; Reply, 11-12, 14 [ECF # 39, 11-12, 14]. It was an operations case applying the statute of limitations at issue here in the CAA context. *Grand Canyon Trust*, 269 F.Supp.3d 1173. It held that *Sierra Club* is controlling in the operating context and applied the same reasoning. *Id.* at 1193-94. Plaintiffs' assertion that "Courts Have Unanimously Held That Claims Enforcing Unlawful Operations Under the CAA Are Not Wholly Barred By 28 U.S.C. § 2462" is therefore not accurate. In fact, the opposite is true within the Tenth Circuit.

Plaintiffs' assertion is also not supported by the cases they cite from other jurisdictions. Plaintiffs rely primarily on what one court has described as "the Sixth Circuit's divergent decision" in *National Parks Conservation Association, Inc. v. Tennessee Valley Authority*, 480 F.3d 410 (6th

Cir. 2007) ("*TVA*"). *Sierra Club v. PPL Montana LLC*, No. CV 13-32-BLG-DLC-JCL, 2014 WL 12814425, at *8 (D. Mont. May 22, 2014), *report and recommendation adopted*, No. CV 13-32-BLG-DLC-JCL, 2014 WL 12814426 (D. Mont. Aug. 13, 2014). But, there was no operating permit claim in *TVA*. 480 F.3d at 420 (Batchelder, J., dissenting) ("The TVA has an operating permit and no one in the present case has alleged any violation of it."). It was purely a PSD construction permit case. *Id.* In fact, none of the cases Plaintiffs cite concern an alleged lack of a Title V operating permit.[9]

If *TVA* is persuasive in resolving Plaintiffs' operating permit claim despite being a construction permit case, as Plaintiffs argue, then *Sierra Club* is controlling because it held that the same type of claim was barred by the statute of limitations if brought more than five years after plaintiff first "could have brought suit." *Sierra Club*, 816 F.3d at 673.

Here, Plaintiffs do not dispute that they had a present cause of action and could have brought their suit well over five years ago. *See* Objection, 7 n.8 [ECF # 75, 11] ("when exactly violations began . . . is irrelevant."). Their Title V claim is therefore time-barred, and it cannot be resurrected by the Sixth Circuit's reasoning in *TVA* when the Tenth Circuit expressly rejected that reasoning in the same context in *Sierra Club*. *Sierra Club*, 816 F.3d at 673.

C. Plaintiffs' frequency of violations argument is unavailing and unsupported by the alleged facts.

Finally, Plaintiffs appear to argue that "whether the Mine operates every day has not been established" to insinuate that the alleged violation is perhaps not continuing. But, the relevant

[9] *Sierra Club v. Portland Gen. Elec. Co.*, 663 F. Supp. 2d 983, 1000 (D. Or. 2009) is the closest as it includes claims that an operator violated an existing, valid Title V operating permit by failing to submit certain reports, but it does not address any alleged lack of an operating permit.

issue on a motion to dismiss is what is alleged in the Complaint—not arguments presented later to avoid dismissal. *Hayes*, 264 F.3d at 1025. In the Complaint, Plaintiffs allege that "[c]onstruction and mining operations in the Expansion area are ongoing and continuing." Compl. ¶ 47 [ECF # 1, 16]; *see also id.* at Ex. 1, 12 [ECF # 1, 42] ("It is our understanding and belief that the mine operates every day."). Thus, Plaintiffs' claim alleging that "[e]ach and every day" of unpermitted construction is a violation of the CAA, *id.* at ¶ 81 [ECF # 1, 26], is—in Plaintiffs' own words—an allegation of an "ongoing and continuing" violation.[10] *Id.* at ¶ 47 [ECF # 1, 16].

III. Plaintiffs waived the right to amend their Complaint and should not be given a fourth bite at the apple.

The Court has discretion to deny leave to amend a complaint after granting a motion to dismiss where plaintiffs had several chances to amend the complaint earlier. *Hayes*, 264 F.3d at 1027 ("we do not favor permitting a party to attempt to salvage a lost case by untimely suggestion of new theories of recovery."). In *Hayes*, the Tenth Circuit held that plaintiffs' attempt to amend the complaint shortly before the Article III judge's final ruling was too late because "[o]nly after the magistrate judge recommended ruling against them on their citizen-suit claim did they seek to amend." *Id.* at 1026. "In these circumstances, it was within the district court's discretion to deny leave to amend." *Id.* at 1027 (upholding denial of leave to amend even though "the district court relied solely on Plaintiffs' undue delay in seeking to amend their complaint.").

[10] To the extent Plaintiffs now want their allegations to be interpreted as not alleging a continuing violation and as not alleging violations occurred each and every day, the Complaint does not meet the pleading standard for specificity. Fed. R. Civ. P. 9 ("An allegation of time or place is material when testing the sufficiency of a pleading."). Unless the Complaint is read as alleging a continuing violation each and every day, it does not put Defendants on notice of the time of, or even how many, violations Plaintiffs allege. Regardless, this argument has been waived because it was not raised before Magistrate Judge Varholak. *Aurzadniczek.*, 2016 WL 1266972, at *2.

Here, Plaintiffs did not amend the Complaint by the October 1, 2020 deadline in the Amended Scheduling Order [ECF # 31, 8] despite the Motion being fully briefed by then. Plaintiffs did not amend the Complaint before filing their supplemental brief on the Motion despite Magistrate Judge Varholak suggesting he would grant leave for such amendment, but only if requested before the parties and the magistrate waste their time on supplemental briefing and issuing a recommendation that would be mooted by an amendment. Exhibit 1, 76:11-78:3. Plaintiffs also did not seek leave to amend the Complaint after the Recommendation but before the Court's ruling, as plaintiffs did in *Hayes.* Instead, Plaintiffs waited even longer by only conditionally seeking leave to amend the Complaint if and when the Court sustains the Recommendation. Objection, 20 [ECF # 75, 24]. At that point the case is over, and it is certainly too late to seek leave to amend the Complaint. *See Hayes*, 264 F.3d at 1027.

CONCLUSION

Magistrate Judge Varholak carefully considered the Motion, Plaintiffs' Response, and the filing by Amicus, he held a two hour oral argument thereon to explore additional questions about all parties' and Amicus' arguments, and he considered additional briefing from everyone thereafter. The well-considered Recommendation correctly found that Plaintiffs did not allege the alternative fact—that the West Elk Mine emitted less than 250 tons of VOCs per year—Plaintiffs now argue could have saved their first claim. Recommendation at 9 n. 7 [ECF # 70, 9]. It also correctly declined to apply Sixth Circuit precedent to the second claim when there is equally applicable, but contrary, Tenth Circuit precedent that establishes the claim is time-barred. *Id.* at 16. This Court should therefore adopt the Recommendation to apply controlling Tenth Circuit

precedent to the facts alleged rather than apply Sixth Circuit precedent to alternative, unpled facts as Plaintiffs suggest.

Respectfully submitted this 23rd day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2020, I caused a true and correct copy of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO RECOMMENDATION** to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorneys:

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