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' REPLY IN SUPPORT OF OBJECTIONS TO RECOMMENDATION

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INTRODUCTION

Neither of Plaintiffs' two claims should be dismissed. First, the statute of limitations does not bar Plaintiffs from enforcing Defendants Mountain Coal and Arch Resources' (collectively, Mountain Coal) Clean Air Act (CAA) operating violations—namely, operating the West Elk coalmine (Mine) without a Title V operating permit—occurring within the limitations period. Under 28 U.S.C. § 2462, each day of unpermitted operations is a discrete and individual violation, unlike the unpermitted construction of the Mine's expansion that began in January 2020 (Expansion), which is a one-time act. Mountain Coal's limitations argument is predicated on ignoring applicable case law, misreading Tenth Circuit precedent, and conflating repeated illegal operations of a pollution source with the singular unlawful act of constructing a source.

Second, Plaintiffs' First Claim sufficiently alleges that Mountain Coal is violating the CAA's prohibition against constructing the Expansion without the required Prevention of Significant Deterioration (PSD) construction permit. In particular, the Complaint alleges that the Mine did "not qualify as a major stationary source" before the Expansion, through Mine's minor-

source permit and Mountain Coal's disclosures certifying that volatile organic compound (VOC) emissions never topped major-source levels. Accepting as true these material allegations and construing them in Plaintiffs' favor render the First Claim plausible.

ARGUMENT

I. PLAINTIFFS' CLAIM ENFORCING THE MINE'S UNPERMITTEED OPERATIONS IS NOT TIME BARRED.

A "major" source of pollution, which, under the Title V program, emits 100 tons per year (tpy) of VOCs, violates the CAA by operating without an operating permit. 42 U.S.C. § 7661a(a); 5 C.C.R. § 1001-5:3C.II(A)(1); *see* 42 U.S.C. § 7604(1)(a), (f)(4) (authorizing citizen enforcement of illegal operations). Each day of unpermitted operations is a discrete act and those within the limitations period are enforceable. *Nat'l Parks & Conservation Ass'n v. TVA*, 480 F.3d 410, 417-19 (6th Cir. 2007); *Nat'l R.R. Passenger v. Morgan*, 536 U.S. 101, 113 (2002) ("Each discriminatory act starts a new clock for filing charges against that act."); *Hamer v. City of Trinidad*, 924 F.3d 1093, 1100, 1103 (10th Cir. 2019) (holding "public entity repeatedly violates [statute] each day it fails to remedy a non-compliant service, program, or activity").

Mountain Coal's defense of the Recommendation relies on a misapprehension of statute of limitations case law. It attempts to conflate two distinct types of conduct under the CAA—operating a polluting source versus constructing a source—even though every court has found the distinction between the two to be dispositive for limitations purposes. Mountain Coal ignores the fact that the Tenth Circuit's holding in *Sierra Club v. Oklahoma Gas & Electric Company* was premised on finding that constructing a source—not operating it—is a singular act that first began outside the limitations period. 816 F.3d 666, 671-72 (10th Cir. 2016). The court offered no opinion about how 28 U.S.C. § 2462 applies to illegal operations, but did recognize that repeated illegal acts are not wholly time barred by the statute. *Id.* at 671 n.5. Mountain Coal

also wrongfully relies on two district court decisions that cite *Oklahoma Gas*, but which are inapplicable to Plaintiffs' Second Claim. Overall, Mountain Coal fails to grapple with the defects in the Recommendation that are detailed in Plaintiffs' Objections.

A. Mountain Coal and the Recommendation Misread and Misapply *Oklahoma Gas*.

Attempting to expand *Oklahoma Gas*' clear and limited ruling, Mountain Coal resorts to mischaracterizations of that case, the CAA, the nature of Plaintiffs' Second Claim, and the "continuing-violations doctrine."

Mountain Coal proclaims "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.'" ECF Doc. 76 at 16 (citing *Okla. Gas*, 816 F.3d at 671 [sic]); *id*. at 15. Here, Mountain Coal's use of the selected quote is blatantly misleading. The quoted Tenth Circuit text references the specific act of construction, not just any activity that requires a CAA permit. *Okla. Gas*, 816 F.3d at 672 ("*[C]onstructing*…a facility is best characterized as a single, ongoing act.") (emphasis added).

Similarly, Mountain Coal's assertion that *any* claim enforcing "the lack of a CAA permit" is controlled by *Oklahoma Gas*, ECF Doc. 76 at 15, is incorrect. It was the type of conduct (construction), not the lack of a PSD or any other CAA permit, that led to the Tenth Circuit's decision in *Oklahoma Gas*. 816 F.3d at 670-672. Mountain Coal fails to confront the fact that every court to consider the issue has held that operating, unlike construction, is not singular in nature and instead begins anew every day a source conducts operations. *See* ECF No. 75 (Plaintiffs' Objections) at 12-15. *Oklahoma Gas* did not hold otherwise.

In a further attempt to fit Plaintiffs' Second Claim under *Oklahoma Gas*, Mountain Coal characterizes the claim as one alleging continuing and ongoing violations that are time barred.

ECF Doc. 76 at 16; ECF Doc. 70 (Recommendation) at 17 n.16. Generally, the "continuing-violations doctrine" provides a means to toll a statute of limitations. *Havens Realty v. Coleman*, 455 U.S. 363, 380 (1982). Unfortunately, in applying this doctrine, courts have used the "continuing violation" label to describe a variety of different types of "continuing" scenarios, some of which do not survive a limitations defense and some of which do. *See U.S. v. Midwest Generation*, 720 F.3d 644, 646 (7th Cir. 2013) (explaining continuing violation "may mean any of at least three things: (1) ongoing discrete violations; (2) acts that add up to one violation only when repeated; and (3) lingering injury from a completed violation.").[1] Mountain Coal's argument is based on this ambiguity. *See Midwest Generation*, 720 F.3d at 646.

Nonetheless, there is no dispute that claims against a defendant who commits discrete and repeated violations—which, in the Tenth Circuit, is known as the "repeated-violations doctrine"—are not wholly barred by a statute of limitations. *Hamer*, 924 F.3d at 1100, 1103; *Okla. Gas*, 816 F.3d at 671, n.5 ("The distinction between a single, continuing violation and repeated, discrete violations is important because an entirely new violation would first accrue apart from the other violations in the series and would begin a new statutory clock.").[2] Although Mountain Coal conflates the various continuing scenarios, the Tenth Circuit has explained that "[j]ust because a person continued to engage 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

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[1] The continuing violation doctrine does not toll: (1) a one-time violation that entirely predates the limitations period; (2) illegal conduct that took place outside the limitations period, even if the "consequences" or effects of that conduct continue into the limitations period; and (3) a single illegal act that continues into the limitations period if 28 U.S.C. § 2462 applies. *Okla. Gas*, 816 F.3d at 672-673; *Turley v. Rednour*, 729 F.3d 645, 654 (7th Cir. 2013) (concurring opinion).

[2] Some courts refer to this application as the "modified continuing violations doctrine." *Hamer*, 924 F.3d at 1100 n.4. Others call it the "continuing violation doctrine." *Midwest Generation*, 720 F.3d at 646-47.

series of repeated violations, for limitations purposes." *SEC v. Kokesh*, 884 F.3d 979, 983 (10th Cir. 2018). Violations that occur within the limitations period and are repeated and "identical in nature," like Mountain Coal's unpermitted operations, are enforceable. *Id*. at 985; *see also* ECF Doc. 75 at 12-14 (detailing illegal operations cases). Significantly, the court in *Oklahoma Gas* did not find plaintiffs' claim untimely because the alleged violation was continuing, but instead because it determined that "construction" was a one-time event that began outside of the limitations period. *Okla. Gas*, 816 F.3d at 671-73. Mountain Coal's insistence that Plaintiffs' unpermitted-operations claim involves a continuing violation does not make it time barred.

B. The Two Utah District Court Cases Mountain Coal Cites Do Not Apply Here.

The outcome in *HEAL Utah v. PacifiCorp*, 375 F.Supp.3d 1231 (D. Utah 2019), was neither controlled by *Oklahoma Gas* nor is it "instructive" here. *See* ECF Doc. 76 at 16. Whereas in *Oklahoma Gas*, the unpermitted construction continued into the limitations period, in *HEAL Utah*, the prohibited act of discharging fill material under the under the Clean Water Act took place entirely outside the limitations period. 375 F.Supp.3d at 1248-49. Defendant PacifiCorp had constructed a collection system that resulted in unpermitted discharges in 2007-2008, but plaintiffs filed suit more than five years after this construction ceased. *Id*. at 1248. To the extent *Oklahoma Gas* was relied on in *HEAL Utah* at all, it was to reject the argument that the continuing "effects" of the previously constructed collection system could save an untimely claim. *Id*. at 1249.[3] In the present case, Mountain Coal's illegal operations are still occurring and distinct from construction, and their harmful effects are irrelevant to the limitations issue.

[3] The Recommendation's attempt to analogize "the enduring presence of the fill material" in *HEAL Utah* to "the enduring presence of the permit violation," ECF Doc. 70 at 16, does not make sense and reveals a misunderstanding the continuing-violations doctrine.

Although the Recommendation does not rely on *Grand Canyon Trust v. Energy Fuels Res.*, 269 F.Supp.3d 1173 (D. Utah 2017), Mountain Coal argues that case supports dismissal because it was an "operations case applying the statute of limitations at issue here in the CAA context." ECF Doc. 76 at 16. Mountain Coal is wrong. The prohibited act in *Grand Canyon Trust* involved illegal construction, not operation, of a uranium mill's waste impoundment in violation of CAA regulations. Plaintiffs were enforcing a regulatory provision that prohibits the act of *constructing* a new impoundment if two impoundments are already operating. *Grand Canyon Trust*, 269 F.Supp.3d at 1194 (explaining regulation "prohibits facilities…from building new tailings impoundments…unless those impoundments comply with certain requirements").[4]

C. Mountain Coal Fails To Distinguish Applicable Precedent.

Plaintiffs' Objections detail the long line of cases that unanimously treat unlawful operation claims under the CAA differently from unlawful construction claims for statute of limitations purposes and conclude unlawful operations are discrete, repeated violations that accrue anew each day they occur. ECF Doc. 75 ((Plaintiffs' Objections) at 12-15.

In response, Mountain Coal notes that none of these cases involved a missing Title V operating permit. ECF Doc. 76 at 18-19. That is true, but completely beside the point. As each ruling made clear, the relevant question is not what type of permit was required, but whether the illegal conduct involved operating a source without complying with an operating precondition.

Mountain Coal states the Air Division *can* enforce Mountain Coal's illegal operations, alleviating concerns about Mountain Coal's windfall. ECF Doc. 76 at 17-18. While the Air Division is cloaked with prosecutorial discretion, to-date and despite being notified by Plaintiffs

[4] The regulation provides: "no new conventional impoundment may be built [unless the following conditions are adhered to, including: t]he owner or operator shall have no more than two conventional impoundments…in operation at any one time." 40 C.F.R. § 61.252(a)(2)(i).

of the Mine's violations, the state is not enforcing CAA violations against Mountain Coal, *see* ECF Doc. 1 ¶ 6, and the Mine continues to operate without a Title V operating permit. Indeed, the Air Division's inaction is the very reason for the CAA's citizen suit provision. Recognizing that governmental agencies often lack the will or resources to enforce environmental laws, Congress empowered the public to bring citizen suits. *Sierra Club v. Pub. Serv. of Colo.*, 894 F.Supp. 1455, 1459 (D. Colo. 1995) ("The citizen enforcement provisions of the Act reflect congressional recognition that neither the federal nor state governments have the resources to ensure that generators of air pollutants are consistently in compliance with the Act."); *Adkins v. VIM Recycling*, 644 F.3d 483, 501 (7th Cir. 2011) (Congress "provided for citizen suits to enable affected citizens to push for vigorous law enforcement even when government agencies are more inclined to compromise or go slowly").[5] And while in certain circumstances, an agency lawsuit will preclude a citizen suit, 42 U.S.C. § 7604(b)(1)(B), that has not happened here.

II. PLAINTIFFS' UNPERMITTED-CONSTRUCTION CLAIM IS PLED SUFFICIENTLY.

One element in 5 C.C.R. § 1001-5:3.D.II(A)(25)(c) (Subsection (25)(c))—the regulatory provision at the heart of the First Claim—requires Plaintiffs to allege that the Mine did "not otherwise qualify[] as a major stationary source" before its 2020 Expansion.[6] The Recommendation concluded this element is not adequately pled and the claim should therefore

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[5] *See also Poster Exch. v. Nat'l Screen Serv.*, 517 F.2d 117, 127-28 (5th Cir. 1975) ("Employing the limitations statute additionally to immunize recent repetition or continuation of violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions.").

[6] Mountain Coal insists its Motion resulted in Plaintiffs abandoning any other theory for a PSD permit. ECF Doc. 76 at 1, 3 n.1. Yet, notwithstanding Mountain Coal's exuberance, Plaintiffs have never asserted their First Claim is based on anything other than Mountain Coal's illegal construction of the Expansion without a PSD permit as required by Subsection(25)(c).

be dismissed. Mountain Coal's response brief make three primary arguments to support the Recommendation: (1) allegations about the Mine's minor-source permit—or any permit—are irrelevant; (2) allegations asserting the Mine's VOC emissions were below the major-source threshold for PSD permitting should be ignored, even though they are based on Mountain Coal's own statements to the Air Division; and (3) only allegations relating to the Expansion's potential-to-emit above the major-source threshold should be considered. But applying motion to dismiss standards, Plaintiffs have alleged sufficient facts to render its First Claim plausible.

A. Permits Are Relevant To The Question Of Whether The Mine Qualified As A Major Source.

As alleged, Mountain Coal's minor-source permit establishes that the Mine did not qualify as a major source. ECF Doc. 1, ¶¶ 57, 58, 79. Allegations pertaining to this permit are relevant and sufficient to state a plausible claim and satisfy Subsection (25)(c). Mountain Coal contends, however, that permits are never relevant to the question of whether an existing source qualifies as a major source. ECF Doc. 76 at 6-7. For several reasons, this argument fails.

To conclude that permits are immaterial ignores the fundamental relationship between permits and emissions. CAA permits must reveal the nature and volume of a source's air emissions. 5 C.C.R. §§ 1001-5:3.A.II(A)(1), 1001-5:3.A.II(B)(2) & (3); *WildEarth Guardians v. Extraction Oil & Gas*, 457 F.Supp.3d 936, 941-42 (D. Colo. 2020) ("APENs [air pollution emission notices] provide information to determine what type of permit is required. Each APEN identifies the facility's emissions points and provides emissions data for each point."); *see* ECF Doc. 1, ¶ 58. Mountain Coal was legally obligated to reveal all VOC emissions from the Mine as part of the permitting process. By issuing a minor-source permit, the Air Division found that the Mine, based at least in part on emissions, qualified as a minor source, and not a major source.

Mountain Coal roots its position in the fact that Subsection (25)(c) does not use the word "permit." ECF Doc. 76 at 6. But nothing in the language of Subsection (25)(c) makes permits irrelevant. That provision asks whether the Mine "qualified as a major stationary source."[7] As the Air Division explained, whether a source qualifies as major is based on the full range of relevant, available information, including the source's permit status. ECF Doc. 65 at 2 (Air Division explaining "the source's permit is [also] relevant and informative").

To advance its argument, Mountain Coal notes that other regulatory provisions include the word "permit" and thus its omission from Subsection (25)(c) is telling. ECF No. 76 at 5 (citing 5 C.C.R. §§ 1001-5:3D.VI(B)(1)(c); 1001-5:3D.VI(B)(3)(e)); *see also* ECF Doc. 70 (Recommendation) at 10. But the two cited provisions have no relation whatsoever to whether a source must obtain a PSD permit, under Subsection (25)(c) or as a "major modification" under 5 C.C.R. § 1001-5:3D(II)(A)(23). These provisions concern which requirements can be avoided for a PSD-permitted source. Notably, within the same regulatory subsections, the word "emissions" is included, which means the omission of emissions in Subsection (25)(c) was intentional and Mountain Coal's contention that only emissions matter fails.[8]

Indeed, the regulators knew how to make a source's "emissions" alone dispositive of the PSD permitting requirement. *See Russello v. U.S.*, 464 U.S. 16, 23 (1983). The regulatory definition of a major modification—Subsection (25)(c)'s counterpart—provides a prime

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[7] The notion that "qualifying" modifies "stationary source," as Mountain Coal suggests (ECF Doc. 76 at 7-8), is only partially correct. The modifier is the entire clause "qualifying as a major stationary source," not merely the word "qualifying." Moreover, "qualifying" also limits and modifies "major stationary source."

[8] *See, e.g.*, 5 C.C.R. §§ 1001-5:3D.VI(B)(1)(b) (exempting certain pollutants from complying with PSD requirements when "the *emissions* from the source or modification would not be significant") (emphasis added); 1001-5:3D.VI(B)(3)(c) ("For ozone, the *emissions* increase or net *emissions* increase of volatile organic compounds or nitrogen oxides from the source or modification would be less than 100 tons per year") (emphasis added).

example. Under that definition, a source must obtain a PSD permit under the "major modification" theory if there is "a significant *emissions* increase of a regulated NSR pollutant and a significant net *emissions* increase of that pollutant." 5 C.C.R. § 1001-5:3D(II)(A)(23) (emphasis added). But in Subsection (25)(c), the drafters did not use the word emissions, opting for "qualifying as a major stationary source" instead.

Mountain Coal also argues that its minor-source permit is not relevant because emission levels may increase after permit issuance and rise above the 250 tpy major-source level. ECF Doc. 76 at 12-13. But that raises a factual question—did the Mine's VOC emissions increase after the 2010 minor source permit such that it no longer qualified (under Mountain Coal's theory) as a minor source—which the Court should not resolve at the motion to dismiss stage. If it is considered, as alleged and documented, Mountain Coal has maintained that the Mine's VOC emissions were never above the 250 tpy threshold, as evident by its submission to the Air Division of two sets of APENs in 2014 and 2019 and two permit applications in 2020. *See, e.g*, ECF Doc. 1, ¶¶ 61, 64; *see* ECF Doc. 66-2; ECF Doc. 66-3; ECF Doc. 53-5 (Ex. 2 at MCC003745), ECF Doc. 54 (Ex. 11 at WEG001077, WEG001089). Mountain Coal has never wavered on this position and filed a permit application on September 15, 2020 that concedes the Mine did not qualify as a major source. ECF Doc. 53-5 (Ex. 3 at WEG004887).[9]

To support the argument that permits do not matter, Mountain Coal also relies on a January 22, 1988 letter that EPA wrote to the State of Ohio. ECF Doc. 76 at 6-7. EPA's three-page letter does not have the force of law, *Christensen v. Harris Cty*., 529 U.S. 576, 587 (2000),

[9] If Mountain Coal believed otherwise, that application would not have evaluated the Expansion under Subsection (25)(c). *See* ECF Doc. 75 at 23. If Mountain Coal believed that the Mine was a major source—which is its position for the purpose of this Motion—the company would have submitted a permit application using the "major modification" regulatory scheme. *See* 5 C.C.R. § 1001-5:3.D.II(A)(23). It did not.

nor is it legally binding on the Air Division, *see Pub. Serv. Co. of Colo. v. EPA*, 225 F.3d 1144, 1147 (10th Cir. 2000). It also does not provide EPA's official interpretation of the disputed clause after public notice and comment. Rather, the letter was written for a specific source in Ohio, the Pro-Tech Coating Company, over 30 years ago. Moreover, EPA's 1998 letter cannot be read to mean that permits are irrelevant. It states that the facility's existing minor-source permit restricted emissions of nitrogen oxide (NOx) to 243 tpy by limiting "actual fuel usage,"[10] and that emissions were calculated using this permit restriction. Consequently, the minor-source permit was relevant for assessing whether Pro-Tech qualified as a major source.[11]

In sum, permits are a relevant factor for assessing whether the Mine qualified as a major source under Subsection (25)(c). Any other conclusion goes too far—it would mean that, had a major-source permit been issued, Mountain Coal could not use this fact to argue Subsection (25)(c) does not apply because the Mine qualified as a major source.

B. Allegations Concerning The Mine's Emissions Are Sufficient To Support Plaintiffs' First Claim.

Mountain Coal tries to downplay Plaintiffs' allegations that the Mine's emissions, as reported by the company, have been below the major-source threshold. ECF Doc. 76 at 11-14. But these allegations are based on publicly available administrative documents wherein Mountain Coal was required to disclose all VOC emissions coming from the Mine. *See* 5 C.C.R.

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[10] As EPA explains, "restrictions in the permit will keep the total existing facility NOx emissions at no more than 243 tpy. This was intended to keep the potential emissions at a minor source level." *Available at* https://www.epa.gov/sites/production/files/2015-07/documents/protec98.pdf.

[11] Mountain Coal quotes page 2 of the letter as saying "past permitting" is not relevant, ECF Doc. 76 at 7, but the quote is taken out of context. The quote relates to EPA's analysis of whether the proposed *modification*, not the existing source, involved a "nested major source" that alone constituted a major source. The letter does not support Mountain Coal's argument about permits.

§§ 1001-5:3.A.II(A)(1), 1001-5:3.A.II(B)(2) & (3); *Extraction Oil & Gas*, 457 F.Supp.3d at 941-42. In each, Mountain Coal certified as "complete, true, and correct," ECF Doc. 66-3 at 1, 6, that the Mine's VOC emissions are not above 250 tpy, ECF Doc. 53-5 at 32 (MCC003724) (reporting actual emissions in 2019 were 213.86 tpy).[12] Mountain Coal cannot now say its prior statements in publicly available documents were wrong or incomplete to advance its litigating position.

C. Allegations Concerning The Expansion's Potential Emissions Do Not Defeat Plaintiffs' First Claim.

As explained, ECF Doc. 75 at 18 n.15, the emission allegations that Mountain Coal and the Recommendation point to were intended to address the Expansion's potential emissions, not the Mine's. While the Complaint, in conformance with Subsection (25)(c), alleges facts showing that the Mine did not "qualify as a major stationary source," it also alleges facts to demonstrate that the Expansion "would constitute a major stationary source by itself." For the former element, the Complaint relies on the minor-source permit and Mountain Coal's statements about VOCs emissions. For the later, Plaintiffs projected VOCs emissions based on an emissions formula because Mountain Coal did not begin monitoring VOC emissions until mid-2019.[13] Plaintiffs' allegations about whether the Expansion itself will emit above 250 tpy came from an

[12] The same permit application provides that the Mine's potential-to-emit based on 2019 data was 220.26 tons. ECF Doc. 53-5 at 32 (MCC003724).

[13] Mountain Coal has long refused to monitor the Mine's VOC emissions. Beginning in 2012, the Air Division promised to obtain emission data for the Mine. U.S. Forest Service, Final Supplemental Environmental Impact Statement, Federal Coal Lease Modifications COC-1362 and COC 67232 at 108-109, 597-598 (Aug. 2017) ("[T]he Colorado Air Pollution Control Division...will be requiring all coal mines in the state, including the West Elk Mine, to gather additional data to provide a more accurate annual estimate of VOC emissions."), *available at*: https://www.fs.usda.gov/nfs/11558/www/nepa/68608_FSPLT3_4051445.pdf. After Plaintiffs, through the Colorado Open Records Act, requested this data, the Air Division asked Mountain Coal to provide it by March 22, 2019. For various reasons, Mountain Coal had not been monitoring actual emissions, but supported developing a monitoring protocol. The Air Division and Mountain Coal agreed on one by June 2019 and VOC monitoring began shortly thereafter.

emission estimate calculated from a methane-to-VOC ratio and past years of methane emissions. ECF Doc. 1, ¶¶ 68-69. Although new emission data—showing the Expansion has a potential-to-emit above 460 tpy, ECF Doc. 53-5 (Ex. 3 at WEG004886)—render Plaintiffs' calculations less important, Mountain Coal says these allegations create an inconsistency.

However, these allegations do not defeat Plaintiffs' First Claim under a Rule 12(b)(6) standard. First, there is no inconsistency because the minor-source permit establishes that the Mine did not "qualify" as a major source, regardless of allegations about Mine emissions.

Second, these allegations are permissible under the federal pleading rules. At the dismissal stage, the Court is obligated to construe factual allegations in Plaintiffs' favor. *Straub v. BNSF Ry.*, 909 F.3d 1280, 1287 (10th Cir. 2018). The Court should thus accept—not ignore—Plaintiffs' allegations taken from the company's certified statements that emissions at the Mine never rose to the 250 tpy level. *See, e.g.*, *Harjo v. City of Albuquerque*, 326 F.Supp.3d 1145, 1198 n.37 (D.N.M. 2018) (construing competing allegations so that claim is plausible); *see also Cohon v. State of New Mex. Dep't of Health*, 646 F.3d 717, 725 (10th Cir. 2011) ("The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present."). Moreover, under Rule 8(d)(2), Plaintiffs may plead inconsistent statements for a claim as long as "any one of them is sufficient" to support the claim. Fed.R.Civ.P. 8(d)(2); *see also* Wright and Miller, 5 Fed. Prac. & Proc. Civ. § 1283, at 724 ("Under Rule 8(d)(2), a party is permitted to set forth inconsistent statements either alternatively or hypothetically *within a single count* or defense.") (emphasis added). Allegations about the minor-source permit and from Mountain Coal's air documents sufficiently establish that the Mine did not "qualify[] as a major stationary source." *See Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014) ("A plaintiff…must plead facts sufficient to show that her claim has substantive plausibility.").

Mountain Coal cites two cases to argue conflicting allegations are impermissible. ECF Doc. 76 at 14. But neither case recognized that Rule 8(d)(2) provides that "alternative statements" can form the basis of different claims or even support the same count, "regardless of consistency." *Henry v. Daytop Vill.*, 42 F.3d 89, 95 (2d Cir. 1994) ("The inconsistency may lie either in the statement of the facts or in the legal theories adopted.") (citing, Moore's Federal Practice ¶ 8.32, at 8–214 to 8–215 (2d ed. 1994)); *Leal v. McHugh*, 731 F.3d 405, 414 (5th Cir. 2013) ("[E]ven if Appellants' factual allegations were somehow inconsistent—which they are not—they do not render a right to recovery elusive."); *DirecTV v. Meinhart*, 158 F. App'x 309, 311 (2d Cir. 2005) ("If a part of the complaint adequately pleads a violation of the statute, the complaint should not be deemed insufficient on the ground that another part does not.").

D. Alternatively, Dismissal Without Prejudice So That Plaintiffs Can Amend Their First Claim Is Appropriate.

Mountain Coal contends that Plaintiffs should not be allowed to amend if the First Claim is dismissed. ECF Doc. 76 at 18-19. In essence, Mountain Coal argues that whenever a defendant moves to dismiss, a plaintiff must amend immediately—or at least before the court rules on that motion—or else the plaintiff has unduly delayed requesting leave to amend. That is not the law, nor should it be.

Mountain Coal relies on *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001) for support. ECF Doc. 76 at 18-19. In that case, the plaintiffs sought leave to amend their Complaint for a second time over two years after the original filing, and just before the court was to rule on a motion for summary judgment, in order to add an entirely different legal theory. *Hayes*, 264 F.3d at 1022, 1026-27. Here, however, only ten months have passed since the Complaint was submitted, this would be the first amendment, the Court has yet to rule on Mountain Coal's Motion to Dismiss, and Plaintiffs would simply allege new facts that post-date the Complaint

and clarify existing allegations while maintaining the same legal theory. *Hayes* is inapposite.

Dismissal with prejudice is inappropriate unless it is "patently obvious" the plaintiff cannot plead a plausible claim and amendment would be futile. *Medina v. Samuels*, 2020 WL 7398772, at *7 n.5 (D. Colo. Dec. 17, 2020); *see also Davis v. Miller*, 571 F.3d 1058, 1061 (10th Cir. 2009) (recognizing dismissal with prejudice is "drastic" and "a last resort"). Plaintiffs can cure any pleading deficiencies by relying on Mountain Coal's own assertions about the Mine's emissions found in certified public filings. This Court should therefore dismiss, if at all, without prejudice. *See, e.g.*, *Watson v. Vista Outdoor*, 2016 WL 11523306, at *4 (D. Colo. June 29, 2016) (dismissing claims without prejudice while requiring amendment by date certain).

CONCLUSION

The Court should deny Mountain Coal's Motion to Dismiss in its entirety.

Respectfully submitted on March 9, 2021,

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CERTIFICATE OF SERVICE

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

/s/ Neil Levine
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