IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:19-1920

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

Petitioners,

v.

DAVID L. BERNHARDT, in his capacity as United States Secretary of the Interior;
UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT;
JOSEPH BALASH, in his official capacity as Assistant Secretary of Land and Minerals Management, U.S. Department of the Interior;
GLENDA OWENS, in her official capacity as Acting Director of U.S. Office of Surface Mining Reclamation and Enforcement;
DAVID BERRY, in his official capacity as Regional Director of U.S. Office of Surface Mining, Western Region,

Federal Respondents,

and

Mountain Coal Company LLC, Intervenor

MOUNTAIN COAL COMPANY'S RESPONSE TO MOTION FOR VOLUNTARY REMAND

Intervenor-Defendant Mountain Coal Company LLC ("Mountain Coal") briefly responds[1] to the Federal Defendants' Motion for Voluntary Remand to address three points: (1) to confirm that Mountain Coal supports the Motion; (2) to provide the Court with the map and status of mining information displayed during the October 17, 2019 oral argument on the merits; and (3) to highlight the adverse consequences of vacatur or injunctive relief.

(1). Mountain Coal Supports the Motion for Voluntary Remand

In addition to the general policy reasons articulated in the Federal Defendants' Motion for liberally granting voluntary motions to remand, there are compelling reasons to grant the motion in the unique posture of this litigation. Simply put, the facts have overtaken Petitioners' claims. As discussed by the Federal Defendants, the motion is principally not so much to "re-consider" their prior decision on flaring, as it is to consider Mountain Coal's *new* proposal to achieve the same environmental objective. Petitioner Conservation Groups assert that during consideration of the proposed modification of the mine plan, the Federal Defendants' should have studied in detail an alternative that would require flaring "as a condition of mining publicly-owned coal from beneath publicly-owned lands," ECF #26 at 19, so as to provide "the public and decisionmakers the opportunity to compare two competing visions for use of public lands." ECF #33 at 11. Even if the Court finds that the Conservation Groups' argument is meritorious, the remedy would be just that -- a *study* of flaring. And while the Court has the authority to halt mining while the study is under away, the Federal Defendants could not be compelled to require flaring at the study's conclusion. NEPA does not mandate particular results, *Robertson v.*

[1] Mountain Coal files this response well in advance of the deadline in D.C.COLO.LCivR 7.1(d) to facilitate the Petitioners' filing a consolidated response.

Methow Valley Citizens Council, 490 U.S. 332, 350 (1989), and the Conservation Groups have not identified any other federal law that would compel such an outcome.

In contrast, Mountain Coal has now proposed to *affirmatively implement* flaring, i.e., to not simply *study* the "two competing visions" but to make the Conservation Groups' advocated vision a reality. The distinction between requiring flaring and approving a voluntary flaring proposal is certainly too fine to support the drastic remedies of vacatur or an injunction.

As articulated at the hearing, the Conservation Groups' principal concern appears to be the prospect that some amount of mining in in the Lease Modifications may occur before the flares get approved and installed (assuming they are approved by MSHA). The Conservation Groups contended that Mountain Coal's current flaring proposal "validates" their argument that flaring was feasible at the time of mine plan approval and therefore OSMRE erroneously lost the opportunity to study and potentially require flaring in advance of mining. In their view, any ill effects from an interruption of mining therefore lie at the feet of OSMRE/BLM and Mountain Coal, not the Conservation Groups.

The Conservation Groups fail to acknowledge that Mountain Coal's present flaring proposal is materially different from that advocated by the Conservation Groups or analyzed in Mountain Coal's R2P2 Update. The Conservation Groups advocated:

> transporting the methane via pipe along existing roads and rights-of-way . . . and combusting the methane via a central, enclosed flare.

ECF #26 at 18 (summarizing the Raven Ridge proposal). Piping natural gas along temporary roads on public lands poses a host of safety, logistics, surface impact, and cost issues, as do many flare designs. Mountain Coal nevertheless thoroughly analyzed the Conservation Groups' proposal and several other options for reducing methane emissions in the R2P2 Update, but

neither the Conservation Groups nor Mountain Coal were then aware that a mobile flaring system like that now proposed by Mountain Coal was viable. Consequently, it is not correct to suggest that the identification of a potentially viable design in late 2019 proves that BLM, OSMRE, or Mountain Coal erred in their evaluations of flaring in 2017 and 2018.

Mountain Coal takes the Conservation Groups at their word that they are not seeking to impose undue hardship on the West Elk Mine or its employees. As they repeatedly contended in their briefing, the entire function of flaring is to mitigate emissions *while allowing mining to go forward. See, e.g.*, ECF #26 at 20 ("a mandatory flaring alternative meets [the purpose and need] by allowing Arch to mine precisely the same amount of coal . . ."). Ultimately, then, the Conservation Groups, OSMRE, and Mountain Coal are unified in the objective in getting flaring up-and-running as soon as practicable, assuming and as soon as MSHA signs off on its safety.

(2). <u>Status of Mining Information</u>

At the October 17, 2019 hearing on the merits, Mountain Coal displayed a map showing the current status of mining at the West Elk Mine, explained how mining is expected to progress over the next few months, and identified the consequences of vacatur or an injunction. Because this material may be of use in evaluating the Federal Defendants' motion, the map is attached, along with an explanatory declaration from the West Elk Mine's Manager of Engineering and Environmental Affairs, John Poulos.

The following are the salient facts:

- Mountain Coal has enough remaining coal in a previously approved longwall coal panel LWE8 to mine through approximately the end of 2019, Poulos Decl. ¶ 5;
- At that point, mining would progress to longwall coal panel LWSS1; all the surface disturbance for this panel is complete, and the underground workings are nearly complete, *id.* ¶¶ 6-9;

- Longwall coal panel LWSS1 would provide approximately 8-9 months of longwall mining, *id.* ¶ 9;

- No other longwall coal panels are ready to be mined; if the mine plan modification is vacated or mining is enjoined, then longwall mining would halt upon exhaustion of LWE8, *id.* ¶ 10;

- The mine shut-down would last until the earlier of reinstatement of the federal mine plan approval, or alternative longwall coal panel LWE14 can be made ready for mining, which will take approximately 6-8 months, *id.* ¶ 11; and,

- During the shutdown, West Elk would be unable to fulfill its coal supply agreements, and layoffs would be likely for a substantial portion of its 365 person workforce, *id.* ¶ 12-13.

In the meantime, Mountain Coal has been and will continue to work diligently to provide OSMRE and MSHA with whatever information is necessary to perform the supplemental NEPA analysis described in the Federal Defendants' motion, and to obtain all necessary approvals to implement flaring. Mountain Coal is also providing the 2017 and 2018 Annual Hydrology Reports (and related information) for use in updating the water resources analysis. These reports further confirm that mining is not presently affecting water quality or quantity, and that mining the Lease Modifications will similarly have no significant effects on water resources, including fish and other wildlife.

(3). <u>Vacatur or Injunctive Relief Would be Unduly Punitive</u>

With the filing of the Federal Defendants' motion, there appears to be no real divergence between the Parties except as to timing. The Conservation Groups advocate vacatur as means to ensure that a decision on flaring precedes mining of the Lease Modification coal. Failing vacatur, they appear to support injunctive relief for the same reason, and to "spur" prompt action

on the flaring proposal. In fact, either relief will have negative effects out of proportion to the purported benefits.

Vacatur will have the effect of nullifying a long chain of analyses and approvals and would unnecessarily prolong action on the flaring proposal. For example, the mobile flares that Mountain Coal has proposed pose no incremental surface impact, and may be approvable without further modification of the mine plan, following satisfaction of NEPA. But, if the mine plan is vacated then a new approval from the Assistant Secretary of Lands and Minerals will be required, adding weeks if not months to the decision timeline to no real benefit.

An injunction without vacatur would streamline the decisional requirements and timelines, but put the Federal Defendants on a problematic countdown clock. Because Mountain Coal has made a *new* proposal, with information the Federal Defendants have not previously seen (as opposed to simply reconsidering a prior decision), it is not presently possible to predict exactly how much time the supplemental NEPA should take. This is compounded by the need for the proposal to be vetted with the BLM, Forest Service, MSHA, and the State of Colorado. Consequently, while Mountain Coal is optimistic and advocates that the supplemental NEPA be completed expeditiously, any immediate or short-fuse injunction has a significant likelihood of resulting in a highly disruptive shutdown.

All this occurs against the backdrop of unintended consequences. Mountain Coal completed a very extensive and thorough R2P2 Update in November 2018, in full compliance with the terms of the Lease Modifications. Mountain Coal would have been justified at that point in turning its attention to other matters, and not revisiting the issue of flaring for a significant period. Nevertheless, Mountain Coal continued to survey the flaring landscape,

remained a willing and energetic participant in the North Fork Coal Mine Methane Working Group, and pursued the mobile flaring solution as soon as it became aware of its possibilities. To use Mountain Coal's diligence against it as basis to threaten a shutdown of the Mine would certainly deter other coal mining operations from being similarly diligent. That would hardly be sound policy or an equitable outcome.

The Federal Defendants have proposed providing updates to the Court at 30-day intervals following remand. This ongoing notice requirement provides the Court and the Parties with ample ability to track OSMRE's progress, and enter further relief if ever necessary.

Conclusion

For the foregoing reasons, the Federal Defendants' motion should be granted as proposed.

Respectfully submitted this 7th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2019, I caused the foregoing document, **MOUNTAIN COAL COMPANY'S RESPONSE TO MOTION FOR VOLUNTARY REMAND** to be electronically filed with the Clerk of the Court using the CM/ECF system. Notification of such filing will be sent to the following email addresses:

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s /*Vanessa Thompson*