

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

MOUNTAIN COAL COMPANY, and
ARCH COAL INC., n/k/a ARCH RESOURCES, INC.,

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case concerns a coal mine—the West Elk Mine (Mine)—that lacks two air-pollution permits required by the Clean Air Act (Act). The Act provides that Defendants Mountain Coal Company and Arch Resources Inc. (Mountain Coal), owners and operators of the Mine, cannot construct their expansion project or operate the Mine without the permits. Through these permits, the Mine's emissions of volatile organic compounds (causing ozone pollution or smog) and methane (a potent greenhouse gas) are to be controlled, monitored, and reported. Plaintiffs' lawsuit seeks to enforce the Act's prohibitions against Mountain Coal.

Mountain Coal asks the Court to dismiss Plaintiffs' two claims under Federal Rule of Civil Procedure 12(b)(6). The Motion contends that the applicable five-year statute of limitations, 28 U.S.C. § 2462, precludes Plaintiffs from enforcing Mountain Coal's permitting violations because the Mine opened in the early 1980s.

Plaintiffs’ two claims are timely. The first claim is that Mountain Coal violated the Act by beginning (and continuing) to construct the Mine expansion without obtaining a Prevention of Significant Deterioration (PSD) construction permit. This claim accrued when construction on the expansion started in January 2020, well within the five-year limitations period, and not, as Mountain Coal tells the Court, when the Mine was first built in the 1980s. Plaintiffs’ second claim is that Mountain Coal is operating the Mine without the operating permit required by Title V of the Act. Under the repeated-violations doctrine, Mountain Coal commits the same recurring violations of the Act each day it operates the Mine without a Title V permit and thus the accrual date for the limitation period starts anew with each violation. Neither of Plaintiffs’ claims is time barred and the Motion should be denied.

THE CLEAN AIR ACT

1. The Ozone Pollution Standard: Congress passed the Clean Air Act in 1977 “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and productive capacity of its population.” 42 U.S.C. § 7401(b)(1). It requires the U.S. Environmental Protection Agency (EPA) to set maximum concentration levels for certain pollutants within ambient air—known as the National Ambient Air Quality Standards or the NAAQS. *Id.* § 7409. One of the pollutants is ground-level ozone (smog). *See* 40 C.F.R. § 50.19. VOC emissions contribute to the creation of ozone pollution. ECF Doc. 1, ¶ 50.¹

EPA determines whether air quality is better or worse than the NAAQS for specified regions within each state. 42 U.S.C. § 7407(b) & (d). An area that meets that NAAQS for a pollutant is known as an “attainment” area, *id.* § 7407(d)(1)(A)(ii), and one that exceeds the

¹ A wide range of hydrocarbons gases are regulated as VOCs; although a hydrocarbon, methane is not regulated as a VOC. *See* 40 C.F.R. § 51.100(s).

NAAQS is a “nonattainment” area, *id.* § 7407(d)(1)(A)(i). The Mine is within an attainment area for VOCs, although at ninety-seven percent of the NAAQS. ECF Doc. 1, ¶ 39.

2. State Implementation Plans: States assist EPA to implement the Act and achieve the NAAQS. 42 U.S.C. § 7407(a). To do so, states develop implementation plans, or SIPs, that must at least conform to the Act’s requirements and be approved by EPA. 42 U.S.C. § 7410(a) & (k). If approved, SIPs become federal law and their provisions enforceable in federal courts. *Sierra Club v. Pub. Serv. Co. of Colo.*, 894 F.Supp. 1455, 1459 (D. Colo. 1995). In general, SIPs are a collection of state air regulations that include “enforceable emission limitations and other control measures means, or techniques, as well as schedules and timetables for compliance,” for achieving and maintaining compliance with the NAAQS. 42 U.S.C. § 7410(a)(2)(A). The Colorado Department of Public Health and Environment administers the air program through its Air Pollution Control Division (Air Division). Colo. Rev. Stat. § 25-7-111.

3. PSD Construction Permits: One set of the Act’s rules addresses constructing new and modified stationary sources of pollution. Within attainment areas, like here, these rules are known as the Prevention of Significant Deterioration. *See* 42 U.S.C. § 7470 *et seq.* “The [PSD] program’s purpose is to protect the public from any adverse health or welfare effects of air pollution that may occur despite achievement of NAAQS, and to require careful evaluation of all consequences of new industrial development.” *Resisting Envtl. Destruction on Indigenous Lands, Redoil v. EPA*, 716 F.3d 1155, 1159-1160 (9th Cir. 2013). Colorado’s PSD program, 5 C.C.R. § 1001-5:3D, is part of the approved SIP. *See* 81 Fed. Reg. 3963 (Jan. 25, 2016); 79 Fed. Reg. 8632 (Feb. 13, 2014).

For “major sources” of pollution, construction cannot occur unless the source has secured a PSD permit. 42 U.S.C. § 7475(a)(1); 5 C.C.R. § 1001-5:3D.I(A)(1) (major sources “shall not

begin actual construction in a[n]...attainment...area unless a permit has been issued containing all applicable state and federal requirements”). *See Sierra Club v. Okla. Gas & Elec.*, 816 F.3d 666, 669 (10th Cir. 2016). Major sources are those that emit or have the “potential-to-emit”² 250 tons-per-year of VOCs. 42 U.S.C. § 7479(a)(1); 5 C.C.R. § 1001-5:3D.II(A)(25)(a)(ii).³

Relevant to this case, PSD permits are required when a non-major source undertakes a physical change that itself emits or has the potential-to-emit 250 tons per year. ECF Doc. 1, ¶ 78. The definition of “major source” includes “any physical change that would occur at a stationary source not otherwise qualifying as a major stationary source under Sections II.A.25.a and II.A.25.b. of this part, if the change would constitute a major stationary source by itself.” 5 C.C.R. § 1001-5:3D.II(A)(25)(c); 40 C.F.R. § 51.166(b)(1)(i)(C).

A PSD permit requires a facility to reduce its emission by applying the “best available control technology” (BACT). 42 U.S.C. § 7475(a)(4); 5 C.C.R. § 1001-5:3D(VI)(A)(1). Not only does BACT apply to the pollutant that triggers the PSD permit requirement, but also to other pollutants, like methane, when emissions are above certain volumes. 42 U.S.C. § 7475(a)(4) (“...for each pollutant subject to regulation”). *See* 40 C.F.R. § 51.166(b)(48); 5 C.C.R. § 1001-5:3A.I(B)(44)(d).

² “Potential to emit” means the “maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.” 40 C.F.R. § 51.166(b)(4); 5 C.C.R. § 1001-5:3A.I(B)(37).

³ Under Colorado’s SIP, sources that have the potential-to-emit between 5 tons and 250 tons per year of VOCs must obtain a “minor” source permit. *See* 5 C.C.R. § 1001-5:3B.II(D)(3)(a), *id.* § 1001-5:3D.II(A)(25)(a)(ii). In contrast to PSD permits, minor-source permits trigger “only the barest of requirements.” *Sierra Club v. EPA*, 964 F.3d 882, 886 (10th Cir. 2020) (quoting *Luminant Generation v. EPA*, 675 F.3d 917, 922 (5th Cir. 2012)).

4. Title V Operating Permits: “Major sources” must also get a Title V permit before operating. 42 U.S.C. § 7661a(a); 5 C.C.R. § 1001-5:3C.II(A)(1). Congress added Title V permitting in the Act’s 1990 Amendments to “enhance compliance and improve enforcement,” *Sierra Club*, 964 F.3d at 886, believing them “crucial to the implementation of the Act,” *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). The emission trigger for Title V is less than for PSD purposes, as “major source” is defined as a “stationary facility or source of air pollutants that directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant...” 42 U.S.C. § 7661(2)(B) (citing 42 U.S.C. § 7602(j)).

Title V permits consolidate in a single operating permit all emission limitations that govern a source during operations, *Sierra Club*, 964 F.3d at 886, while also setting “inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.” 42 U.S.C. § 7661c((c). As one court stated, a Title V permit is “a source specific Bible for Clean Air Act compliance.” *Browner*, 80 F.3d at 873.

States may adopt their own Title V permitting programs, which EPA is tasked with approving provided certain elements are included. 42 U.S.C. § 7661a(d)(1); 40 C.F.R. Part 70. If approved, the states are then responsible for issuing Title V permits, though EPA can object to them, 42 U.S.C. § 7661a(d). *See Sierra Club*, 964 F.3d at 886. Colorado’s Title V program, as set forth in 5 C.C.R. § 1001-5:3C, was approved and became effective on October 16, 2000. 65 Fed. Reg. 49,919 (Aug. 16, 2000).

5. The Act Is a Strict Liability Statute: “The Act imposes strict liability upon owners and operators who violate the Act.” *Pound v. Airosol*, 498 F.3d 1089, 1097 (10th Cir. 2007). *Accord Pub. Serv. Co. of Colo.*, 894 F. Supp. at 1459. In removing a scienter element, Congress reasoned: “where protection of the public health is the root purpose of a regulatory scheme (such

as the Clean Air Act), persons who own or operate pollution sources in violation of such health regulations must be held strictly accountable. This rule of law was believed to be the only way to assure due care in the operation of any such source.” H.R.Rep. No. 94-1175, 94th Cong., 2d Sess. at 52 (1976). As such, a source cannot defend liability based on a lack of knowledge.

6. The Citizen Suit Provision: Congress recognized the Act’s enforcement could not be left solely to EPA and the states. Accordingly, the Act’s citizen suit provision, 42 U.S.C. § 7604, authorizes the public to enforce violations of the Act, such as both of Mountain Coal’s permitting violations. *Pub. Serv. of Colo.*, 894 F. Supp. at 1459 (“Recognizing the importance of attaining the remedial goal of the Clean Air Act and magnitude of the task at hand, Congress armed citizens with an independent means to require compliance with the Act.”).⁴

For PSD violations (First Claim), Congress authorized citizens to sue “any person who proposes to construct or constructs any new or modified major emitting facility with a permit required under part C of subchapter I of this chapter [the PSD provisions]...” 42 U.S.C. § 7604(a)(3). For the Title V violations (Second Claim), the citizen suit provision allows citizens to sue “against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter . . .” *Id.* § 7604(a)(1). The definition of “standard or limitation” includes “any requirement to obtain a permit as a condition of operations.” *Id.* § 7604(f)(4). *See NPCA v. TVA*, 480 F.3d 410, 418 (6th Cir. 2007).

The Act’s citizen suit provision authorizes district courts to impose civil penalties against

⁴ *See also Adkins v. VIM Recycling*, 644 F.3d 483, 501 (7th Cir. 2011) (“Congress...chose not to place absolute faith in state and federal agencies. It provided for citizen suits to enable affected citizens to push for vigorous law enforcement even when government agencies are more inclined to go slowly.”); *Black Warrior Riverkeeper v. Cherokee Mining*, 548 F.3d 986, 992 (11th Cir. 2008); *Sierra Club v. Chevron*, 834 F.2d 1517, 1525 (9th Cir. 1987).

polluters, 42 U.S.C. § 7604(a), which can be assessed for every day there is a violation, up to \$101,439 per day. *Id.* § 7413(e); 40 C.F.R. § 19.4; 85 Fed. Reg. 1751 (Jan. 13, 2020). A citizen can also obtain injunctive relief against illegal emissions and conduct. 42 U.S.C. § 7604(a).

FACTUAL BACKGROUND

1. The Mine: Mountain Coal owns and operates the Mine. ECF Doc. 1, ¶¶ 24, 25. The Mine is located in Gunnison County. *Id.* ¶ 39. The Mine has access to six horizontal coal seams—identified alphabetically, A through F. *Id.* Only one seam is mined at a time. *Id.* ¶ 43. The Mine’s coal is federally owned and lies primarily beneath National Forest lands. *Id.* ¶ 40. Consequently, Mountain Coal requires various federal and state approvals to extract coal. *Id.*⁵

Mining is conducted by the longwall mining method, which is a deep mining technique that progresses along a coal seam in sections or “panels.” ECF Doc. 1, ¶ 44. Once a panel is mined out, the longwall machine is moved to the next panel. *Id.* Panel construction involves building underground roadways and safety and take-out rooms. *Id.*

2. The Mine’s Air Pollution: When Mountain Coal extracts coal, VOCs and methane are emitted from the Mine’s ventilation air system—the Deer Creek air shaft and the Sylvester Gulch portal—and multiple methane drainage wells. *Id.* ¶ 54. Though required by the Act, these VOC emissions have never been permitted—not in a PSD permit or a Title V permit. *Id.* ¶ 57, 58.

Mountain Coal has a “minor source” air permit for the Mine, obtained in 2010. ECF Doc. 1, ¶ 57. That permit covers various emissions points and different pollutants, *id.*, including

⁵ Mountain Coal had secured seven coal leases from the U.S. Bureau of Land Management (BLM) and the U.S. Forest Service under the Mineral Leasing Act. ECF Doc. 1, ¶ 40. The company also obtained two other approvals, as required by the Surface Mining Control and Reclamation Act, from the U.S. Office of Surface Mining, Reclamation and Enforcement (OSMRE) and Colorado’s Division of Reclamation, Mining and Safety. *Id.* These federal approvals all required that the agencies first analyze the environmental impacts of mining under the National Environmental Policy Act. 42 U.S.C. §§ 4331 *et seq.*

emissions of particular matter (PM) released from the Mine’s ventilation air system. *Id.* ¶ 58.

Because the permit includes mandatory limits on PM emissions, the Air Division issued a “minor source” permit, as opposed to requiring a PSD or Title V permit. *Id.* ¶¶ 57-58. Notably, Mountain Coal’s 2010 permit does not address the VOCs emissions from the multiple methane drainage wells or the ventilation air system. *Id.* ¶ 57.

3. The Mine’s Expansion: Mountain Coal has been mining the E seam since 2008. ECF Doc. 1, ¶ 45. However, Mountain Coal needed to expand the Mine because it wanted to mine the E seam beyond the geographic boundaries of its federal coal leases. *Id.* ¶¶ 46, 47. To facilitate this expansion project, Mountain Coal obtained two modified leases from BLM in December 2017. *Id.* ¶ 46.⁶ After a successful challenge to a second federal approval, *WildEarth Guardians v. Barnhardt*, 423 F.Supp.3d 1083 (D. Colo. 2019), OSMRE issued its final mining plan amendment for the expansion on January 13, 2020. Exh. 1 at 1 (“This authorization [mining plan modification] expands the approved mining plan area into the following Federal coal lands.”).⁷

The Mine expansion extends the Mine’s footprint southward onto 1,720 additional acres of the National Forest. ECF Doc. 1, ¶ 46. The expansion authorizes Mountain Coal to drill thirty-nine new methane drainage wells, lay concrete for new wells pads, construct additional access roads, and mine an area that had previously been off-limits for environmental protection reasons. *Id.* ¶ 46, ¶ 55. Through the expansion, Mountain Coal has access to 10 million tons of additional coal, extending the life of the Mine by 2-3 years. *Id.* ¶ 47.

Mountain Coal began constructing and mining the expansion in January 2020. ECF Doc. 1, ¶¶ 47, 61, 80. *See WildEarth Guardians*, 423 F. Supp. 3d at 1090 (“Mining is scheduled to

⁶ The original BLM modified leasing decisions had been vacated and remanded. *See High Country Conservation Advocates v. U.S. Forest Service*, 52 F.Supp.3d 1174 (D. Colo. 2014).

⁷ Plaintiffs are attaching certain documents referenced in the Complaint to this brief.

begin in January of 2020.”); *id.* at 1093 (“With mining scheduled to begin in early 2020...”).

The company had to because B-seam coal ran out in December 2019. ECF Doc. 1, ¶ 47; Exh. 2 (OSMRE EA at 9) (“Longwall mining operations under the lease areas without the modification as described results in MCC running out of longwall coal at the end of December 2019 when the currently approved longwall Federal coal is mined out.”); *id.* at 4, 15. Mountain Coal’s Weston Norris recently stated that construction and mining of the expansion will continue throughout 2020. Exh. 3, ¶ 3 (“Mountain Coal’s construction plans for the Summer of 2020 call for the construction of roads to support mining for longwall panels LW-SS2 through LW-SS4. They also call for the construction of methane ventilation boreholes (‘MVB’) pads for each panel.”).⁸

4. Plaintiffs’ Notice Letter and Mountain Coal’s 2020 Permit Applications: Plaintiffs sent Mountain Coal a 60-Day Notice Letter on December 17, 2019. ECF Doc. 1, Exh. A. The Notice Letter—required by the Act’s citizen suit provision—identifies the company’s violations: constructing the expansion without a PSD preconstruction permit and operating the Mine without a Title V operating permit. *Id.* at 9-10. Plaintiffs explained the Mine has the potential-to-emit VOCs in amounts that exceed the “major source” thresholds for both permits. *Id.* at 6-8.

Shortly thereafter, the Air Division received two applications from Mountain Coal. On January 16, 2020, Mountain Coal applied to the Air Division for a construction permit. ECF Doc. 1, ¶ 61. Although seeking permission to emit VOCs from the ventilation air system and methane drainage wells, Mountain Coal applied for a minor-source construction permit, not a major source PSD permit. *Id.* The company contends its VOC emissions are below the 250-ton-per-year, major-source trigger for the PSD permitting. *Id.* No construction permit has issued.

⁸ Mr. Norris submitted this declaration to the district court after a Tenth Circuit remand (*High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020)) so that construction of the expansion could continue. *See* ECF Doc. 18 at 3, n.3.

Lacking a Title V operating permit, Mountain Coal applied for one on March 30, 2020. ECF Doc. 1, ¶ 76. In the application, the company concedes that the ventilation air shafts and methane drainage wells emit well over 100 tons per year of VOCs. *Id.* ¶¶ 64, 67, 76. No Title V permit has been issued at this time, but the Mine is operating. *Id.* ¶ 85. Mountain Coal recently informed the Air Division that *it* believes that the Mine became subject to the Title V permit requirement in 2019, due to 2019 emissions monitoring. Exh. 4 (“Knowledge as to the extent of VOC emissions was unknown until the 2019 sampling effort...”).⁹

5. Plaintiffs’ Two Claims: Plaintiffs filed suit on May 12, 2020. ECF Doc. 1. Plaintiffs’ First Claim addresses Mountain Coal constructing the expansion without first obtaining a PSD construction permit. *Id.* ¶¶ 78-81. Though Mountain Coal applied for a construction permit days after OSMRE provided the final approval needed for the expansion, no PSD construction permit has issued and therefore Mountain Coal is illegally constructing the Mine expansion. *Id.* ¶¶ 61, 80. The Second Claim addresses Mountain Coal’s illegal operation of the Mine without first securing a Title V permit. *Id.* ¶¶ 82-86. As with its construction activities, Mountain Coal continues to operate the Mine without a Title V operating permit. *Id.* ¶ 76.

STANDARD OF REVIEW

Granting a 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) (quotations and citations omitted). On a Rule 12(b)(6) motion, courts must accept all well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *Robbins v.*

⁹ Plaintiffs obtained this recent Mountain Coal email in a public records request and believe it to be central to the premise of Mountain Coal’s Motion.

Wilkie, 300 F.3d 1208, 1210 (10th Cir. 2002). These facts must be sufficient to render the claims plausible. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190-91 (10th Cir. 2012). Dismissal based on an affirmative defense, like the limitations bar, is only available “when it is clear on the face of the complaint that the right sued upon has been extinguished.” *Int’l Bhd. Of Elec. Workers v. Pub. Serv. Co. of Colo.*, 176 F.Supp.3d 1102, 1112 (D. Colo. 2016). *See Colo. Dep’t of Pub. Health & Env’t v. U.S.*, 381 F.Supp.3d 1300, 1310 (D. Colo. 2019).

Courts “may consider documents referred to in the complaint if the documents are central to the plaintiff’s claim and the parties do not dispute the documents authenticity,” *County of Santa Fe v. Pub. Serv. Co. of N.M.*, 311 F.3d 1031, 1035 (10th Cir. 2002), and “matters of which a court may take judicial notice,” *Tellabs v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007).

ARGUMENT

1. THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFFS’ CLAIMS

Plaintiffs’ two claims are governed by a five-year statute of limitations. 28 U.S.C. § 2462 (“[A]n action, suit or proceeding for the enforcement of any civil fine, penalty...shall not be entertained unless commenced within five years from the date when the claim first accrued.”). Under this limitations provision, a claim involving a singular act accrues when the violating action first begins if there is “a complete and present cause of action” at that time. *Okl. Gas*, 816 F.3d at 673. And under the “repeated-violations doctrine,” a claim involving “a series of repeated violations of an identical nature” can be pursued within five years of the violations. *SEC v. Kokesh*, 884 F.3d 979, 985 (10th Cir. 2018). *See also NPCA*, 480 F.3d at 417-19.

Mountain Coal’s argument rests entirely on the fact that the Mine opened in 1981 and mining began in 1982. ECF Doc. 18 at 1-2, 6, 17 (“the claim accrued decades ago”). Notably, while stating the claims should have been brought in the 1980s, Mountain Coal never reveals

how Plaintiffs' claims accrued back then. It cannot. Indeed, the triggering event for Mountain Coal's PSD-permit violation is constructing the Mine's expansion and that only started after all federal approvals for the expansion were finalized in January 2020. There could not have been a Title V permitting claim in 1981 or 1982, as the Act's Title V permitting program did not exist in the 1980s. And contrary to what the Motion says, Mountain Coal is telling Colorado's Air Division that Title V first applied to the Mine in 2019—not in 1981 or 1982.

A. Plaintiffs' PSD Construction Permit Claim First Arose When Mountain Coal Began Constructing The Mine Expansion.

The Act and the Colorado SIP provide that “major sources” cannot begin construction until the source secures a PSD permit. 40 C.F.R. § 51.166(a)(7)(iii); 5 C.C.R. § 1001-5:3D.I(A)(1) (major sources “shall not begin actual construction in a[n]...attainment...area unless a permit has been issued containing all applicable state and federal requirements”). Major sources, as defined, include “any physical change that would occur at a stationary source not otherwise qualifying as a major stationary source under Sections II.A.25.a and II.A.25.b. of this part, if the change would constitute a major stationary source by itself.” 5 C.C.R. § 1001-5:3D.II(25)(c); 40 C.F.R. § 51.166(b)(1)(i)(C) (same). Plaintiffs allege that the Mine is a major source and must obtain a PSD permit because: (1) the Mine is a stationary source, ECF 1, ¶ 79; (2) “the expansion is a physical change at the Mine” that “involves moving the longwall to a newly leased and approval area and constructing drainage wells, building access roads, constructing longwall panels and related undergrounds roads and crosscuts,” *id.*; (3) the Mine has a minor source permit and not a major source PSD (or Title V) permit, *id.* ¶ 57; and (4) as alleged is ¶¶ 61-73, “the expansion itself has the potential-to-emit more than 250 tons per year of VOCs,” *id.* ¶ 79. Plaintiffs' 60-Day Notice Letter makes the same assertions. ECF Doc. 1, Exh. 1 at 9-10 (“The mine's expansion is a major source under this definition: the mine is a “minor

source” that is undergoing a physical expansion that has the potential to emit over 250 tpy of VOCs.”). Consequently, as alleged, Mountain Coal was required to obtain a PSD construction permit before beginning to construct the expansion in January 2020. *Id.* ¶¶ 80-81.¹⁰

Tenth Circuit precedent makes clear that Plaintiffs’ PSD permitting claim is timely. In *Sierra Club v. Okla. Gas*, defendant modified a boiler at its power plant without first securing a PSD construction permit. *Okla. Gas*, 816 F.3d at 670. Plaintiffs filed suit within five years of construction ending, but more than five years after construction began. *Id.* In holding that plaintiff’s claim was too late, the court found that constructing without a PSD permit—the illegal conduct—is a singular act that results in a singular violation. *Id.* at 672 (“constructing or modifying a facility is best characterized as a single, ongoing act”). The court explained that the relevant inquiry is the date construction without a PSD permit began because that is when the claim first accrues. *Id.* at 671-72; *id.* at 673 (“Even one day of unpermitted modification would have presented a ‘complete and present’ violation of the statute.”).

Plaintiffs’ PSD claim is not even close to being barred by the five-year statute of limitations. Mountain Coal began constructing the expansion without a PSD permit just a few months before Plaintiffs filed this lawsuit. Even assuming the Mine was originally built in 1981, it is construction of the expansion in 2020 that matters. That is the date and event that triggers the PSD permitting requirement and the prohibition on construction absent a PSD permit.¹¹ The Court should deny Mountain Coal’s Motion. *See Swan Glob. Investments v. Young*, 2019 WL

¹⁰ Mountain Coal began construction in January 2020 because, after a November 2019 court remand concerning one of the approvals for the expansion, *WildEarth Guardians*, 423 F.Supp.3d at 1090 (“Mining is scheduled to begin in January of 2020”), it received the final authorization for the expansion from OSMRE on January 13, 2020. Exh. 1. *See also* Exh. 2 at 4, 9 & 15.

¹¹ *See San Luis Valley Ecosystem Council v. BLM*, 2015 WL 3826644, *4-7 (D. Colo. 2015) (highlighting significance of identifying correct action being challenged).

5095729, at *6 (D. Colo. Aug. 20, 2019) (“But here, nothing about the Complaint indicates on its face that the right sued upon has been extinguished.”), *report and recommendation adopted*, 2020 WL 897654 (D. Colo. Feb. 25, 2020).

Mountain Coal tries to distance itself from its own Mine expansion project, an implicit recognition that the expansion destroys its limitations defense. The Motion puts “expansion” in quotes as if Plaintiffs made up that term themselves. ECF Doc. 18 at 10 (“the so-called expansion”), *id.* at 11 (“disparate expansion allegations”). But pretending there is no Mine expansion is disingenuous, given that Mountain Coal has spent years trying to get federal agency approvals for the expansion and that the company applied for a construction permit for the expansion on January 16, 2020. ECF Doc. 1, ¶¶ 46-47, 61; ECF Doc. 31 at 3; *WildEarth Guardians*, 423 F.Supp.3d at 1092 (“MCC...petitioned OSM for the mining plan approving its expansion of the West Elk Mine.”); *id.* at 1105 (“Defendants' proposed timeline with new mining beginning in 2020 would allow mining to begin in the expansion area...”).

Then Mountain Coal contends there is no “separate claim for the alleged expansion.” ECF Doc. 18 at 10. But, as detailed above, the expansion is the basis for Plaintiffs’ First Claim.

Mountain Coal notes there is another way for PSD permitting to apply—when an existing “major source” undergoes a change that meets the definition of a “major modification.” ECF Doc. 18 at 11-14. *See* 5 C.C.R. § 1001-5:3D.II(23); 40 C.F.R. § 51.166(b)(2). PSD permitting under this theory is triggered *only if* the source already has a “major source” PSD permit. *Id.* This strawman is easily blown over. *See Keller v. City of Fremont*, 719 F.3d 931, 944 (8th Cir. 2013) (rejecting argument rooted in “false premise” and stating, “[h]aving woven this straw man, it is of course easy to blow him down”). Plaintiffs are not pursuing a “major-modification” argument here because, as alleged, “Mountain Coal does not have a major source PSD permit for

the Mine.” ECF Doc. 1, ¶ 79; ¶ 57 (“The permit is neither a major source PSD permit nor a Title V permit.”).

Mountain Coal discusses at length the “continuing violation theory” and why it does not save Plaintiffs’ claim. ECF Doc. 18 at 7-9. Mountain Coal notes it was not the original owner of the Mine, which means it cannot be held liable for its predecessor’s failure to obtain a PSD permit in the 1980s. *Id.* at 15. Since Plaintiffs *are not* claiming that a PSD permit should have been obtained in the 1980s, these discussions are irrelevant.

Mountain Coal misreads (ECF Doc. 18 at 6, 9) *Grand Canyon Trust v. Energy Fuels Res.* That Clean Air Act case involved a “work-practice” rule that limits the number of “tailing impoundments” at a uranium mill. *Grand Canyon Trust v. Energy Fuels Res.*, 269 F.Supp.3d 1173 (D. Utah 2017). The rule that plaintiffs were enforcing (40 C.F.R. § 61.252(a)(2)(i)) (“no new conventional impoundment may be built unless...”)) prohibits *constructing* a new impoundment if two impoundments are already operating. *Id.* at 1193 (“The Trust alleges that the Mill began violating the impoundment limit on November 11, 2010, when it constructed Cell 4B.”). Contrary to Mountain Coal’s assertion (ECF Doc. 18 at 6), the court acknowledged that the disputed impoundment was constructed within five years. *Id.* (“It is undisputed that Cell 4B was built within five years of the Trust's complaint”).¹² But the claim was rejected because Cell 4B did not meet the definition of a tailings impoundment and thus was not subject to the regulatory scheme. *Id.* at 1194-98.

Plaintiffs’ First Claim—constructing the expansion with a PSD permit—is not barred by the statute of limitations.

¹² *Grand Canyon* does not concern unlawful operations (ECF Doc. 18 at 9), because the regulatory prohibition targeted building impoundments only. 40 C.F.R. § 61.252(a)(2)(i).

B. Plaintiffs’ Operating-Without-A-Permit Claim is Timely Under the Repeated Violations Doctrine.

The statute of limitations applies differently to Plaintiffs’ Title V operating permit claim. *See U.S. v. S. Ind. Gas & Elec.*, 2002 WL 1760752, *4 (S.D. Ind. July 26, 2002) (“The distinction between preconstruction permit violations and operation permit violations is crucial.”); *N.Y. v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 656 (W.D.N.Y. 2003) (same). Whereas courts, including the Tenth Circuit, view illegal construction as a singular act and a singular violation, *Okla. Gas*, 816 F.3d at 672, operating without a Title V permit (or any other prerequisite to operations) is considered a series of repeated discrete acts. *TVA*, 480 F.3d at 417-19. *See e.g., U.S. v. Midwest Generation*, 694 F. Supp. 2d 999, 1004 (N.D. Ill. 2010) (recognizing this distinction, “Midwest Generation...moves to dismiss only the PSD counts” and not “violations of...the operations-permit provision”), *aff’d*, 720 F.3d 644 (7th Cir. 2013). Thus, unlike illegal construction, operating violations are governed by the repeated-violations doctrine.

The Tenth Circuit recently explained that “the repeated violations doctrine *divides* what might otherwise represent a single, time barred cause of action into several separate claims, at least one of which accrues within the limitations period prior to suit.” *Hamer v. City of Trinidad*, 924 F.3d 1093, 1100 (10th Cir. 2019) (internal quotations omitted; emphasis in original). In *Hamer*, the court ruled that the “public entity repeatedly violates [Americans with Disabilities Act and Rehabilitation Act] *each day* it fails to remedy a non-compliant service, program, or activity.” *Id.* at 1103 (emphasis added); *id.* at 1104 (plaintiffs’ injury recurred each day of non-compliance); *id.* at 1105 (“[A] public entity *does* commit a new violation each day that it fails to remedy a non-compliant service, program, or activity.”) (emphasis in original). The Tenth Circuit ruled similarly a year earlier. In *SEC v. Kokesh*, the court held that “defendants’ misappropriation of funds...are properly viewed as discrete violations,” 884 F.3d 979, 984 (10th

Cir. 2018), “with each unlawful taking being actionable for five years after its occurrence,” *id.* at 985 (holding “misappropriations constituted ‘a series of repeated violations of an identical nature’”) (quoting *Figueroa v. D.C. Metropolitan Police Dept.*, 633 F.3d 1129, 1135 (D.C. Cir. 2011)). *See also Okla. Gas*, 816 F.3d at 671, n.5 (recognizing “repeated, discrete violations” mean “an entirely new violation would first accrue apart from the other violations in the series and would begin a new statutory clock”). The wrongful acts in these cases were discrete, identical, and repeated.

The repeated-violations doctrine applies to Plaintiffs’ Second Claim.¹³ Under both Title V and the state’s Title V regulations, operating the Mine is prohibited without an operating permit in place. *See* 42 U.S.C. § 7661a(a) (“[I]t shall be unlawful for any person...to operate...a major source...except in compliance with a permit issued by a permitting authority.”); 5 C.C.R. § 1001-5:3C.II(A)(1) (“no person shall operate [a major source] without first obtaining an [Title V] operating permit”).¹⁴ Mountain Coal does not have the Title V permit it needs to lawfully operate the Mine. And each day the Mine operates without a permit is a discrete violation. Plaintiffs’ Second Claim is timely.¹⁵

¹³ Although the statute of limitations does not foreclose Plaintiffs’ Title V claim, civil penalties tied to this claim are limited to the past five years plus sixty days. *Sierra Club v. El Paso Gold Mines*, 2003 WL 25265873, at *6 (D. Colo. Feb. 10, 2003) (“I may assess civil penalties for a period of five years plus sixty days before the action was commenced until the trial date.”). *See also TVA*, 480 F.3d at 419 (noting plaintiffs could not seek penalties for violations beyond five years, but, [i]nsofar as they seek penalties for later violations, their claims are timely”); *Hamer*, 924 F.3d at 1100 (recovery only for violations within limitations period).

¹⁴ This operating prohibition applies to a source at any time, not just when *beginning* to operate, as is the case with the construction prohibition. *See* 5 C.C.R. § 1001-5:3D.I(A)(1) (polluter “...shall not begin actual construction...unless a permit has been issued”); 40 C.F.R. § 51.166(a)(7)(iii) (federal PSD regulations provide: “No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit”).

¹⁵ Mountain Coal’s argument against Plaintiffs’ Second Claim is devoid of some relevant details. While the Motion argues this claim accrued when the Mine began operating in 1982,

Courts have specifically held that the illegal operation of a polluting source is governed by the repeated-violation doctrine. In *NPCA v. TVA*, the Sixth Circuit held that illegally operating 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, the court identified two condition precedents for operating a source: “to apply BACT,” *id.*, and to “obtain a construction permit containing the proper emissions controls...even *post*-construction,” *id.* 419 (emphasis in original). The court ruled that the “cause of action manifests itself anew each day a plant operates without BACT limits on emissions,” *id.*, and without obtaining a construction permit, the “violation manifests itself each day the plan[t] operates,” *id.* Thus, until these conditions are satisfied, illegal operations recur daily, allowing for “independently actionable individual” claims. *Id.* at 417.

The particular condition does not change the analysis or outcome. When a source is operating without adhering to any relevant condition (like not having a Title V permit), discrete violations recur and claims against operations within the limitations period are not barred. In *Sierra Club v. PPL Mont.*, 2014 WL 12814425 (D. Mont. May 22, 2014), the court “conclude[d] each day that a modified source operates without the requisite MAQP [permit] and the BACT emission limitations that come with it constitutes a new and discrete violation of Montana’s SIP.” *PPL Mont.*, 2014 WL 12814425, *13, *report and recommendation adopted*, 2014 WL 12814426 (D. Mont. Aug. 13, 2014). Accordingly, “Plaintiffs have alleged a series a discrete

that cannot be true because Congress enacted the Title V provisions several years later in 1990 and Colorado’s program was only approved by EPA in 2000. 65 Fed. Reg. 49,919 (Aug. 16, 2000). Notably, the Motion does otherwise state when Mountain Coal began violating Title V. And in contrast to its Motion, Mountain Coal is arguing to the Air Division that the Mine first became subject to Title V’s permitting mandate in 2019. Exh. 4. Plaintiffs intend to enforce Mountain Coal’s repeated violations dating back five years plus sixty days. *See* ECF Doc. ¶ 76.

violations,” the court ruled, “potentially allowing them to recover civil penalties for each violation occurring within the five-year limitations period.” *Id.* In *Sierra Club v. Portland Cement Elect.*, the court found Oregon’s SIP imposed requirements on the source’s operations and held that “each day a facility operates absent a PSD permit and absent BACT constitutes a discrete violation of the CAA [the Act].” 663 F.Supp.2d 983, 992-94 (D. Or. 2009). And in *U.S. v. Duke Energy*, the court recognized that “[t]he violation continues...each day that Duke Energy operates an allegedly modified plant and emits pollutants into the atmosphere.” 278 F.Supp.2d 619, 651 (M.D.N.C. 2003); *id.* at 652-53 (holding illegal-operation claim not barred because permit was necessary condition of operations), *vacated on other grounds*, *EDF v. Duke Energy*, 549 U.S. 561 (2007). When a source does not comply with an operating prerequisite, the violations occur daily and can be enforced by a lawsuit filed within the five-year window.

Mountain Coal’s reliance on *HEAL Utah v. PacifiCorp* (ECF Doc. 18 at 8-9) fails due to the nature of the prohibited conduct in that Clean Water Act case. Plaintiffs has challenged PacifiCorp’s construction of a “collection system” for violating the prohibition against “discharging fill material” into a creek. *HEAL Utah*, 375 F.Supp.3d 1231, 1248 (D. Utah. 2019). The court compared the act of discharging to the act of construction—a singular type of conduct—and ruled the illegal discharge was a continuing violation that began (and ended) outside the limitations period. *Id.* at 1249 (“As in *Okla. Gas*, PacifiCorp’s addition of fill materials to jurisdictional waters during the installation of the collection system gave rise to a claim that first accrued outside the statutory period, even if its effects continued.”). In contrast, as the cases discussed above detail, each day the Mine operates without a Title V permit is a discrete violation that begins a new statutory clock.

Lastly, as several courts have reasoned, Mountain Coal should not receive a windfall because it has been able to avoid the Title V permitting requirement. In reaching its decision, the *Kokesh* court refused to reward defendants for years of illegal conduct, explaining that to find “defendants’ misappropriations constituted only one continuing violation...would confer immunity for ongoing repeated misconduct” and allow violations to continue indefinitely. *Kokesh*, 884 F.3d at 985. “We cannot countenance such a result, nor do we think that a proper interpretation of § 2462 requires us to.” *Id.* See also *U.S. v. Spectrum Brands*, 924 F.3d 337, 350 (7th Cir. 2019) (interpreting limitations statute so as to “ensur[e] that illegal conduct is punished by preventing a defendant from invoking the earliest manifestation of its wrongdoing as a means of running out the limitations clock on a course of misconduct that persisted over time”); *Birkelbach v. SEC*, 751 F.3d 472, 479 (7th Cir. 2014) (rejecting, as “absurd,” interpretation that “if an unethical supervisor were to avoid detection for five years, he could continue his unethical behavior *forever* without discipline”) (emphasis in original).

CONCLUSION

For the reasons set forth above, Mountain Coal’s Motion should be denied.

Dated: August 18, 2020

/s/ Neil Levine

Neil Levine (CO Bar No. 29083)
Public Justice
4404 Alcott Street
Denver, Colorado 80211
(303) 455-0604
nlevine@publicjustice.net

David A. Nicholas (MA Bar No. 553996)
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas100@gmail.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2020, I electronically transmitted Plaintiffs' Opposition To Defendant's Motion To Dismiss to the Clerk's Office using the CM/ECF System for filing and service on all registered counsel.

/s/ Neil Levine
Neil Levine