

## Title V Permit/Clean Air Act: Federal District Court Addresses Statute of Limitations Issue



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A United States District Court (D. Colorado) (“Court”) addressed in a March 30th Order issues arising out of a Clean Air Act Citizen Suit enforcement action (“Action”). See *Wildearth Guardians, et al. v. Mountain Coal Company, et al.*, 2021 WL 1186669.

One of the issues addressed in the context of a Motion to Dismiss was whether the statute of limitations has expired in regards to an allegation that a facility had failed to obtain a Clean Air Act Title V permit.

Wildearth Guardians (collectively “Wildearth Guardians”) and other environmental organizations filed a Clean Air Act Action against Mountain Coal Company and Arch Resources (collectively “MCC”) alleging they were operating the West Elk Coal Mine (“Mine”) without a Clean Air Act Prevention of Significant Deterioration (“PSD”) construction permit and a Title V operating permit (“Title V Permit”).

The Order indicates that the Mine had been in operation since the 1980s. A substantial expansion was begun in January 2020. Wildearth Guardians subsequently filed the referenced action.

MCC filed a Motion to Dismiss. The Motion to Dismiss was referred to a Magistrate who held a hearing and ordered supplemental briefing.

One of the two issues the Magistrate addressed was whether the Title V Action was barred by the applicable five-year statute of limitations. (The parties agreed that the five-year statute of limitations was applicable [28 U.S.C. § 2462].)

28 U.S.C. § 2462 provides in part that an action:

. . . shall not be entertained unless commenced within five years from the date when the claim first accrued.

The Court declined to accept the Magistrate’s decision regarding the Title V permit statute of limitations issue. It distinguished the 10th Circuit Court of Appeals (“10th Circuit”) decision in *Sierra Club v. Oklahoma Gas & Electric Co.*, 816 F.3d 666, 671-72 (10th Cir. 2016) which concluded that the statute of limitations for a PSD permit claim begins to run at the commencement of a modification that requires such a permit. The 10th Circuit rejected the theory that each day of the modification constitutes a new, discrete violation for statute of limitation purposes. In other words, the 10th Circuit determined that the modification should be considered a single course of conduct properly characterized as a single, continuing violation.

The Court determined that the 10th Circuit analysis did not apply to the MCC operations (at least on the current record). It noted:

- Modification and construction occur for limited periods of time, while operations might occur in perpetuity. Defendants' asserted application of *Sierra Club* here leads to the proposition that if it began operating outside of the limitations period without a proper permit, it may continue to do so indefinitely.

The basis for distinguishing *Sierra Club* was the more narrow focus on conduct involving construction or modification of a facility.

The Court noted neither Wildearth or MCC's reference to any binding authority for analyzing statute of limitation issues in the context of a Title V operating permit. As a result, it concluded that Wildearth for purposes of responding to the Motion to Dismiss sufficiently alleged that the claim that MCC failed to obtain a Title V operating permit is not barred by the statute of limitations.

A copy of the Order can be downloaded [here](#).