

Fugitive Emissions/Clean Air Act: Federal Court Addresses Whether Mine Facility Should Have Obtained Title V Permit



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10/04/2021

A United States District Court (D. Colorado) (“Court”) addressed in a September 30th Order an issue arising in a Clean Air Act citizen suit related to a coal mine. See *WildEarth Guardians, et al. v. Mountain Coal Company, and Arch Resources*, 2021 WL 4477327.

The issue addressed was whether a coal mine should have obtained a Clean Air Act Title V operating permit.

WildEarth Guardians, Sierra Club, Center for Biological Diversity, and High Country Conservation Advocates (collectively “WildEarth Guardians”) brought a Clean Air Act citizen suit action against Mountain Coal Company and Arch Resources (collectively “MCC”).

WildEarth Guardians alleged that West Elk Mine (“Mine”) was violating the Clean Air Act. They alleged that the mine should have obtained a Title V operating permit. The environmental organizations sought rulings that they have standing to bring this action and that the mine should have obtained the Title V operating permit.

WildEarth argued that the amount of volatile organic compounds (“VOCs”) emitted triggered a requirement to obtain a Title V operating permit. The Mine had been operating without such a permit. Further, on March 30, 2020, the Mine is stated to have applied for a Title V operating permit.

As to standing, MCC did not dispute WildEarth’s standing to bring the action. In addition, the Court stated it undertook an independent obligation to assure that standing exists. It found that the allegations in MCC’s Complaint adequately convey that:

. . . Plaintiffs’ members use and enjoy the lands where the Mine is located, that Defendants’ operation of the Mine detracts from their recreational activities and aesthetic interests, and that a favorable outcome from this lawsuit would redress their concerns about ozone pollution and other adverse environmental impacts of the Mine.

MCC argued genuine issues of material fact are present as to whether its emissions (in whole or in part) are “fugitive.” If so, they argued there are genuine issues as to whether its past emissions could be determined.

The Court noted that fugitive emissions are defined as:

. . . emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

See 40 C.F.R. § 52.21(b)(20).

The Court stated that WildEarth was not arguing that fugitive emissions count toward the threshold for a Title V permit. Instead, it characterized their argument as:

. . . the Mine's emissions from sources such as mine ventilation boreholes and other sources are clearly non-fugitive and that these sources alone exceed the threshold for a Title V permit.

Nevertheless, MCC was noted to have argued that the United States Environmental Protection Agency ("EPA") had not yet made an official determination as to whether emissions from coal mines are fugitive. Further, state environmental agencies have apparently come to different conclusions. As a result, the Court stated that this absence of clear authority imposed a "heavy burden" on WildEarth to show that the absence of a genuine issues as to whether the current regulatory framework requires a Title V permit.

The Court discounted WildEarth's reference to a 2015 inspection of the Mine in which an environmental agency inspector assumed the emissions were non-fugitive. A subsequent letter from the Colorado Air Division is stated to have indicated that there was legal uncertainty regarding whether the Mine's VOC emissions were fugitive or non-fugitive. The inspector's letter was deemed to be only the individual inspector's position as opposed to the Air Division's.

Finally, the Court also disagreed that MCC's application for a Title V permit in 2020 amounts to a concession that one is required. It referenced an affidavit provided by the Mine's general manager stating that there was no reliable data for VOC emissions prior to June 2019. Therefore, the Court stated it could not rule on the disputed nature of the emissions at this stage of the case because:

Substantial reason to believe that further discovery, particularly expert discovery, will illuminate the underlying issues.

The Court denies WildEarth's Motion for Summary Judgment.

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