United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Western Region
1999 Broadway St., Suite 3320
Denver, CO 80202-3050

April 18, 2018

Ms. Shannon Hughes
Mr. Jeremy Nichols
Wild Earth Guardians
2590 Walnut Street
Denver, CO 80205 Certified Mail

Re: Request for Informal Review of November 28, 2017 Denver Field Branch Decision –Citizen Complaint and Request for Inspection – West Elk Mine

Dear Ms. Hughes and Mr. Nichols:

On December 8, 2017, the Office of Surface Mining Reclamation and Enforcement (OSMRE) received WildEarth Guardians' (WEG) "Request for Informal Review of a Denial of a Citizen Complaint Filed Pursuant to the Surface Mining Control and Reclamation Act" (Request for Informal Review). The Request for Informal Review is dated December 6, 2017, and it was sent in accordance with 30 U.S.C. § 1267(h) and 30 C.F.R. § 842.15.

The Request for Informal Review follows a November 28, 2017, decision by the OSMRE Denver Field Branch (DFB) denying your October 20, 2017, "Complaint and Request for Inspection Over Failure of West Elk Mine, Permit Number C-1980-007, to Comply With Applicable State and Federal State and Federal [sic] Coal Mining Laws and Regulations" (Complaint). That Complaint alleged violations of federal and state coal mining laws, regulations, the federal mining plan required by the Mineral Leasing Act (MLA), and applicable permits based upon alleged violations of clean air laws and regulations at the Arch Coal, Inc., Mountain Coal Company, LLC, (MCC) West Elk Mine located in Gunnison County, Colorado.

Following a detailed review of all available information, I am affirming the November 28, 2018 decision issued by the DFB. My finding is explained below.

Background

Statutory and Regulatory Background

Section 517(h)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) provides that any person who may be adversely affected by a surface mining operation may notify OSMRE in writing of any violation of the Act which he has reason to believe exists at the surface mining site. 30 U.S.C. § 1267(h)(1). That provision

also provides OSMRE with the authority to establish procedures for informal review if the authorized representative from OSMRE declines to issue a citation for any such alleged violation. *Id*. OSMRE established informal review procedures in 30 C.F.R. § 842.15.

Under section 521(a)(1) of SMCRA, whenever OSMRE has "reason to believe" that "any person is in violation of any requirement [of SMCRA] or any permit condition required by [SMCRA]," OSMRE must notify the regulatory authority (RA)—the Colorado Division of Reclamation, Mining and Safety (DRMS) in this case. 30 U.S.C. § 1271(a)(1). The RA then has ten days to take appropriate action to cause the violation to be corrected or show good cause for not taking action. *Id.*; *see also* OSMRE's implementing regulation at 30 C.F.R. §§ 842.11(b)(1) and 843.12(a)(2). The initial notice OSMRE gives to the RA under this provision is commonly referred to as a ten-day notice (TDN). If the RA fails to take appropriate action, or show the requisite good cause for failing to act, OSMRE will order and conduct a federal inspection of the surface coal mining operation at which the alleged violation is occurring, unless the information available to OSMRE is a result of a previous federal inspection. *Id.* at § 842.11(b)(1)(iii)(C). Only if the federal inspection reveals that a violation exists will OSMRE take an enforcement action, including issuance of a notice of violation or cessation order, as appropriate.[1] *Id.* at § 843.12(a)(2).

Factual Background

WEG Citizen Complaint

On October 23, 2017, OSMRE received a Citizen Complaint (Complaint) dated October 20, 2017 from WEG alleging violations at the West Elk Mine. The Complaint was addressed to both OSMRE and the DRMS. An advance copy of the Complaint was sent to OSMRE and DRMS by simultaneous email delivery on October 20, 2017.

The Complaint claimed it was sent pursuant to section 517(h)(1) of SMCRA, SMCRA's implementing regulations, 30 C.F.R § 842.12(a), the Colorado Surface Coal Mining Reclamation Act (CO SCMRA), C.R.S. § 34-33-122(7), and the Colorado Mined Land Reclamation Board Regulation 5.02.5(1). The Complaint also alleged violations of federal and state permitting requirements and the MLA mining plan approved by the Assistant Secretary for Land and Minerals Management.

The Complaint requested that DRMS and OSMRE initiate enforcement actions and order MCC"to cease methane venting unless and until the company complies with relevant clean air requirements." Complaint at 1. This request was based on WEG's assertion that MCC is violating state and federal SMCRA standards, its state mining permit, and its MLA mining plan because it is allegedly not in compliance with applicable air quality standards. The allegation states that "[w]hile engaging in the practice of venting methane into the air, the company is releasing regulated volatile organic compounds ("VOC") emissions, including gases like benzene, toluene, and butane." Complaint at 1. The allegation further states that "[i]n spite of these emissions, [the operator] has yet

[1] Under section 521(a)(2) of SMCRA, OSMRE must immediately issue a cessation order when, on the basis of a Federal inspection, OSMRE determines "that any condition or practices exist, or that any permittee is in violation of any requirement of [SMCRA] or any permit condition required by [SMCRA]" and that condition, practice, or violation creates imminent harm or danger. 30 U.S.C. § 1271(a)(2).

to report these emissions, secure required permits to allow these emissions, and to control these emissions according to state and federal clean air laws and regulations. In turn the company is violating its mining permit and other applicable coal mining laws and regulations." Complaint at 1. The Complaint also included the following documents:

1. Cover letter dated October 20, 2017 from WEG to OSMRE and DRMS (17 pages);
2. Exhibit 1 – Air Pollution Control Division, Field Inspection Report, dated February 20, 2013, revised April 4, 2013 (30 pages);
3. Exhibit 2 – Colorado Department of Public Health and Environment – Memorandum – Confidential Deliberative, dated September 26, 2014, updated January 7, 2015 (5 pages); and ,
4. Exhibit 3 – Air Pollution Control Division, Field Inspection Report dated April 19, 2016, revised July 1, 2016 (37 pages).

Other Information Received Considered by DFB

On October 20, 2017, the OSMRE and DRMS also received an email (copy attached) from MCC. Attached to the email was a letter dated January 11, 2017 to MCC from the Director of the Colorado Department of Public Health and Environment (CDPHE), who oversees the Air Pollution Control Division (APCD)—the Clean Air Act regulatory authority in Colorado. That letter explained that CDPHE, which includes the APCD, was not taking any enforcement action against MCC related to VOCs emissions. On October 24, 2017, OSMRE and DRMS received another email (copy attached) from MCC that contained excerpts from *High Country Conservation Advocates v. United States Forest Serv. et al.*, 52 F. Supp. 3d 1174 (D. Colo. 2014) about VOCs emissions at West Elk.

On October 30, 2017, DRMS responded to the WEG complaint. OSMRE was copied on the DRMS letter. The DRMS letter reiterated that the APCD had not made a determination that the West Elk Mine exceeded state and federal air quality standards for VOCs emissions. Further, DRMS asserted that it did not have any independent jurisdictional authority to make such a determination. Accordingly, DRMS concluded that an inspection was not warranted. On October 31, 2017, WEG filed a Request for Informal Review with the DRMS Director, with copy to OSMRE.[2]

DFB Response

On November 28, 2017, the DFB issued its own response to the Complaint. The DFB response concluded that: "[a]fter careful review of your complaint and available information, we do not have reason to believe a violation exists under SMCRA, the federal regulations, the federal mine plan, the Colorado state program or the state-issued SMCRA permit." DFB Response at 1. The DFB response explained that OSMRE and DRMS lack any authority to implement the Clean Air Act. *Id.* at 2. In reaching this conclusion, the DFB repeated the fact that SMCRA does not provide OSMRE with the authority regulate air pollution and that "[i]n Colorado, the Environmental Protection Agency, through the Colorado Air Pollution Control Division is responsible for administering the [Clean Air Act]." *Id.* at 2 (citing 30 U.S.C. § 1292(a)). Citing to the January 11, 2017 letter from

[2] Subsequent to the DFB's decision, the DRMS Director issued a finding on November 30, 2017, with copy to OSMRE. The DRMS Director also concluded that the alleged violations did not exist, and that DRMS lacked jurisdiction over VOC compliance matters.

the CDPHE's Director of Environmental Programs, the DFB further explained that it had no reason to believe that MCC was out of compliance with its air quality permit because the agency with authority to determine violations of the Clean Air Act, the CDPHE APCD, has looked at the MCC's compliance with standards applicable to VOCs at the West Elk Mine and has neither "required MCC to permit, report or control VOC emissions at the West Elk Mine" nor "issued any noncompliance findings to MCC." *Id.* For these reasons, the DFB concluded that the Complaint did not provide a reason to believe a violation exists under SMCRA and that a Federal inspection was not warranted.[3] *Id.*

Request for Informal Review

On December 8, 2017, OSMRE received the WEG Request for Informal Review dated December 6, 2017. The Request for Informal Review included the original Complaint, along with exhibits, including some containing information not previously included with the original Complaint or made available to the DFB when it issued its response.[4] In addition, in its Request for Informal Review, WEG attempts to establish standing to seek Informal Review. *See* Request for Informal Review at pp. 3-4 and Exhibits 3 and 4.[5]

WEG's asserts the DFB Response is contrary to SMCRA and the federal regulations because a federal inspection was not ordered based on the Complaint's allegations in accordance with the standard set forth in 30 C.F.R. § 842.11(b)(2). *Id.* at 5. WEG claims that the DFB did not properly consider the factual information provided by WEG that they allege demonstrates a violation of "State and Federal air quality laws and regulations, and that

[3] The DFB Response also addressed the claim in your Complaint that alleged that MCC was out of compliance with its MLA mining plan because of the alleged air quality violations. DFB Response at p. 2. Because WEG's Request for Informal Review did not question the DFB's response on this claim and because, as explained by DFB, mining plans are not the proper subject of a citizen complaint or informal review request, I do not address it further.

[4] The December 6, 2017 Request for Informal Review included the following documents:

1. Request for Informal Review of a Denial of a Citizen Complaint Filed Pursuant to the Surface Mining Control and reclamation Act – Pleading – (12 pages);
2. Exhibit 1 – October 20, 2017 Complaint, including the originally submitted cover letter and Exhibits 1 through 3 referenced above (92 pages);
3. Exhibit 2 – November 28, 2017 OSMRE DFB decision letter to WEG (3 pages);
4. Exhibit 3 – WEG Corporation data, new information not previously submitted with the original Complaint (3 pages);
5. Exhibit 4 – Declaration of Jeremey Nichols, dated December 5, 2017, new information not previously submitted with the original Complaint (10 pages);
6. Exhibit 5 – Bloomberg BNA, Environment and Energy Report, "Arch Coal's Emissions Unenforced as Colorado Cites Uncertainty", new information not previously submitted with the original Complaint (4 pages);
7. Exhibit 6 – Document entitled "Prepared for Mountain Coal Company LLC; West Elk Mine Somerset. Colorado E Seam gathering Options September, 2009, new information not previously submitted with the original Complaint (33 pages); and,
8. Exhibit 7 – Unsigned letter from WEG to Will Allison, Director, Colorado Air Pollution Control Division, dated March 2, 2012, new information not previously submitted with the original Complaint (5 pages).

[5] For purposes of this Informal Review decision, I consider standing to be established and will not discuss it further. However, this decision does not limit OSMRE's ability to raise the issue of standing, if appropriate, in future proceedings.

the company is accordingly violating several provisions of its permit, C-1980-007, SMCRA, and SMCRA regulations." *Id.* at 6. WEG notes that the January 11, 2017 letter from the CDPHE only states that Colorado was choosing not to take enforcement action against MCC, not that MCC is in compliance with the state and federal air quality laws. *Id.* They support this proposition by citing to two separate inspection reports from 2012 and 2015 that state MCC was out of compliance and recommending enforcement action. *Id.* at 7. Although WEG recognizes that no enforcement action was actually initiated, they claim this does not mean that MCC is in compliance with the state and federal air quality laws. *Id.*

WEG also claims that OSMRE's SMCRA enforcement authority extends to taking enforcement actions for violations of state and federal air quality laws. *Id.* at pp. 8-11. WEG asserts that "the offending activity in question—methane venting above West Elk mine—is a surface mining activity that can and must be regulated consistent with SMCRA, SMCRA regulations, and applicable permit conditions. *Id.* at 9. WEG claims that OSMRE would not have to determine MCC's compliance status but only confirm that MCC is "out of compliance" based on the 2012 and 2015 inspection reports. *Id.* WEG concludes that there was "clear evidence of violations of surface coal mining laws and regulations and applicable permit conditions" that "should have led the agency to conduct an inspection." *Id.* at 11.

Finding

The Request for Informal Review was submitted to me on December 6, 2017 pursuant to 30 U.S.C. § 1267(h) and 30 C.F.R. § 842.15. The federal regulations at 30 C.F.R. § 842.15 allow a person who is or may be adversely affected by a coal mining and reclamation operation to request that the Director or her designee informally review an authorized representative's decision not to inspect. As noted above, in this case, the Request for Informal Review follows a Complaint submitted jointly and simultaneously to the OSMRE Western Regional Director and the DRMS Director. OSMRE and DRMS reviewed the original Complaint independently in accordance with the applicable federal or state laws and regulations. This Finding reviews only the DFB's Response.

As indicated above, WEG's Request for Informal Review included information not previously included with the original Complaint, and the DFB did not consider the new information that WEG presented with its Request for Informal Review. Nevertheless, in the interest of full and fair consideration of all available information, I considered all of the information provided with the original Complaint, all of the information reviewed by the DFB, and all the information included with the Request for Informal Review in order to determine if there is a "reason to believe" there is a violation at the West Elk Mine.

The "reason to believe" standard is required by SMCRA and its implementing regulations and cited by WEG in both of the original Complaint and in the Request for Informal Review—30 U.S.C. § 1271(a)(1) and 30 C.F.R. § 842.11(b). In particular, as set forth in 30 U.S.C. § 1271(a)(1), when determining whether to order a federal inspection in a primacy state such as Colorado, OSMRE must first determine whether we, "on the basis of any information available . . ., including receipt from information from any person, . . . h[ave] reason to believe that any person is in violation of any requirement of" SMCRA or any permit condition required by SMCRA. 30 U.S.C. § 1271(a)(1). If we have such "reason to believe," we must then notify the State regulatory authority—DRMS—and give them ten days to take appropriate action or show good cause. *Id.*

The federal regulations provide additional direction as to when OSMRE had "reason to believe." As you note on page 5 of your Request for Informal Review, 30 C.F.R. § 842.11(b)(2) states that OSMRE "shall have reason to believe that a violation, condition or practice exists if the facts alleged by the informant would, if true, constitute a condition, practice or violation referred to in (b)(1)(i)." The cross-referenced section—30 C.F.R § 842.11(b)(1)(i)—restates the standard in 30 U.S.C. § 1271(a)(1) that OSMRE must look at the information available before determining whether a reason to believe exists such that a TDN must be issued. To the extent there is any conflict between §§ 842.11(b)(2) and 842.11(b)(1)(i), these two provisions are easily reconcilable. OSMRE's duty is to presume the truth of the allegations presented in a citizen's complaint and consider that information along with any other information that is available before it determines whether it has a reason to believe there is a violation of SMCRA, the regulations, the State program, or a permit condition. If it does have reason to believe, OSMRE must issue a TDN. Pursuant to the regulations, OSMRE would not conduct a federal inspection until after it has reviewed the RA's TDN response and made determination as to whether the RA has taken appropriate action or has good cause.

My review indicates that the DFB followed the appropriate process. Nothing in the DFB's response indicates it considered your factual allegations about the VOCs emissions to be untrue. However, DFB properly based its decision on whether it has reason to believe a violation of SMCRA, the regulations, or a permit condition existed after it considered all the evidence it had available, including the January 11, 2017 letter from CDPHE.

In your Request for Informal Review, you maintain that MCC is violating SMCRA, the SMCRA regulations, and applicable permit conditions because of MCC's alleged noncompliance with state and federal air quality laws and regulations. Request for Informal Review at p. 9. Your Request for Informal Review, however, did not specify what provision of SMCRA, the implementing regulations, or the permit that MCC is violating assuming that MCC is not in compliance with its clean air requirements. Your Complaint, however, alleged various violations of the Clean Air Act and state air laws. Complaint at 9-14. None of those requirements are SMCRA requirements, and we have no jurisdiction over those matters even if they occur on surface coal mining operations. 30 U.S.C. § 1292(a)(4). The only provision in SMCRA that specifically requires compliance with the applicable air quality laws is section 508(a)(9), which states that a reclamation plan must describe "the steps to be taken to comply with applicable air and water quality laws and regulations and any applicable health and safety standards."[6] 30 U.S.C. § 1258(a)(9). Moreover, the only relevant regulation requires an air pollution control plan, which requires monitoring for the purpose of evaluating "the effectiveness of the *fugitive dust control practices* proposed under paragraph (a)(2) of this section to comply with Federal and State air quality standards." 30 C.F.R. § 780.15 (emphasis added). Thus, SMCRA's air monitoring requirements are limited only to fugitive dust, not VOCs or federal and state clean air quality standards[7] *See also In re Permanent Surface Mining Regulation Litig. I, Round*

[6] In contrast, there is a federal regulation that specifically states that "[d]ischarges from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations . . . ." 30 C.F.R. § 816.42. Furthermore, as explained in the DFB's Response, OSMRE once tried to regulate air pollution from surface coal mining operation, and a court determined that doing so was beyond its authority. DRB's Response at p. 3 (citing *In re Permanent Surface Mining Regulation Litig. I, Round II*, 1980 U.S. Dist. LEXIS 17660 (D.D.C. May 16, 1980)).

[7] As DFB noted, SMCRA does not provide state or federal regulators with authority to regulate air pollution on surface mining and reclamation operations except as attendant to erosion. *See In re Permanent Surface Mining Regulation Litig. I, Round II*, 1980 U.S. Dist. LEXIS 17660, *40-45 (D.D.C. May 16, 1980) ("[T]he legislative history [of SMCRA] indicates that

II, 1980 U.S. Dist. LEXIS 17660, *40-45 (D.D.C. May 16, 1980) ("[I]f Congress wanted the Secretary to develop regulations protecting air quality, it could have done so . . . .").

Your Complaint, however, does allege that MCC is violating permit conditions that require compliance with applicable clean air laws. Complaint at p. 15. In order to conclude that such emissions are violating any or all of MCC's permit conditions related to compliance with State and Federal clean air laws or even 30 U.S.C. § 1258(a)(9), I would need to determine, based on the evidence known to me, whether I have reason to believe that these emissions constitute a violation of one or more of MCC's permit conditions or the applicable air quality laws and regulations. Although I do not question the factual assertion that you make that the West Elk Mine may be emitting VOCs, for the following reasons, I find that I do not have reason to believe that such emissions constitute a violation of the MCC's permit conditions or 30 U.S.C. § 1258(a)(9).

To begin, the allegations you have provided, if true, demonstrate that one inspector within the APCD of the CDPHE determined in 2012 and again in 2015 that MCC was out of compliance with VOCs emissions and recommended enforcement action to address ongoing violations. *See* Complaint, Exhibits 1 and 3. If this information was the only information available to me, issuance of a TDN might be appropriate.

However, the DFB and I are aware of other information that not only contradicts but also outweighs both the conclusion of that inspector that MCC is out of compliance and your statement that "the Colorado agency charged with regulating air quality—has confirmed that West Elk is 'out of compliance' with applicable State and Federal clean air laws and regulations. . . ." Request for Informal Review at 9. As discussed below, this additional information shows that the appropriate Clean Air Act authority has, in fact, not determined that the emissions constitute a violation of the applicable air quality laws and regulations. Because we have no authority to independently interpret the applicable air quality laws and regulations, we must rely on the Clean Air Act authority to determine compliance with existing air quality laws and cannot conclude that certain emissions violate 30 U.S.C. § 1258(a)(9) and/or the permit conditions requiring compliance with applicable federal and state air quality standards.

The additional information to which I refer includes the January 11, 2017 letter from CDPHE's Director of Environmental Programs, which oversees the APCD. That letter makes clear it is not the position of the state Clean Air Act authority that MCC is out of compliance with applicable air quality laws— it is only the position of an individual inspector. *See* January 11, 2017 letter from CDPHE to MCC. In your Request for Informal Review, you discount the informative value of this letter claiming that it does not state that MCC "is in compliance with applicable State and Federal clean air act laws and regulations, but rather asserted that Colorado regulators were choosing not to take enforcement action." Request for Informal Review at 6. I disagree with your characterization of the January 11, 2017 letter. The conclusion of the January 11, 2017 letter was as you state—that CDPHE declines to take enforcement action. But the reason CDPHE reached that conclusion was because of questions about the applicability of the standards the inspector was seeking to enforce on MCC (i.e., the standards the inspector applied only apply to point sources, and CDPHE has not determined whether West Elk mine is a point source or a fugitive source). Because of uncertainty regarding the standard, CDPHE in that letter

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Congress only intended to regulate air pollution related to erosion."). All other air emissions from surface coal mining and operations are regulated by the Clean Air Act and under the jurisdiction of other agencies.

made clear that the 2012 and 2015 inspection reports represent only the position of the individual inspector and not the CDPHE or APCD. Until the APCD as an agency determines whether these emissions constitute a violation of an applicable state and federal air quality law, I do not have reason to believe that SMCRA or a permit condition is being violated even if VOCs are being emitted. As of October 30, 2017, the APCD has not made such a determination. *See* October 30, 2017 DRMS Response to WEG's Complaint and Request for Inspection Over Failure of West Elk Mine, Permit Number C-1980-007, to Comply with Applicable State and Federal Coal Mining Laws and Regulations (the Air Pollution Control Division "has not made any determination that the West Elk Mine has exceeded State and Federal air quality standards for VOC emissions . . . .").

In your Request for Informal Review, you also cite to an article from Bloomberg Environment in support of your proposition that CDPHE's Director of Environmental Programs does not deny the emissions, but you also concede there are "issues" around "quantifying emissions." Request for Informal Review at pp.6-7 and Exhibit 5. Like CDPHE's Director of Environmental Programs, I do not deny the existence of the emissions; however, the "issues" mentioned go to the heart of the matter: "Do the emissions constitute a violation of an applicable state and federal air quality law?" On that point, the evidence we have is that the agency with the authority to make that determination—CDPHE APCD—has not determined any applicable air quality standards have been violated because it is unclear whether the emissions at West Elk Mine are covered by the applicable air quality standard you assert was violated. *See* January 11, 2017 letter from CDPHE to MCC..

In the Request for Informal Review, you note that WEG's Complaint does not ask OSMRE to assert "authority to implement the Clean Air Act or to regulate air emissions that are not properly within the agency's regulatory jurisdiction." Request for Informal Review at p. 8. Yet, you suggest that we do our own testing, discuss the matter with APCD inspectors, and request emissions data from MCC. To "[a]t the least, . . . confirm for itself whether emissions of VOCs are exceeding State/or Federal air quality reporting and permitting thresholds." *Id.* at 10-11. In order to confirm for ourselves, we would be required to resolve the dispute over the state or federal air quality standards that should apply here. Under 30 U.S.C. § 1292(a)(4), we are prohibited from undertaking such an analysis. Otherwise, our determination about whether certain emissions violate the Clean Air Act standards could be considered as superseding the Clean Air Act authority's own decision about whether the Clean Air Act has been violated. Therefore, until and unless CDPHE APCD determines that the VOCs emissions constitute a violation of federal or state clean air laws and regulations, there is nothing we could find in the course of a federal inspection that would lead us to identify a violation of SMCRA or a permit condition.

For these reasons, I agree with the DFB's conclusion that OSMRE does not have a reason to believe that there is a violation of SMCRA, the regulations, or a permit condition. That being the case, I have no authority to issue a TDN or order a federal inspection.

If you do not agree with this decision, you have the right under 43 C.F.R. §§ 4.1280 *et seq.* to appeal to the Office of Hearings and Appeals. If you wish to appeal this decision, your written notice of appeal must be filed *within 20 days from receipt of this decision* at the following address:

U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
Attn: David Berry, Regional Director

1999 Broadway Street, Suite 3320
Denver, CO 80208
Telephone number 303-293-5001

In addition, you must send a copy of your notice of appeal to the following two addresses:

Office of Hearings and Appeals
Interior Board of Land Appeals
80 I N. Quincy Street, Suite 300
Arlington, Virginia 22203
Telephone number 703-235-3800

AND

U.S. Department of the Interior
Office of the Solicitor
Attn: Kristen Guerriero
755 Parfet Street, Suite 151
Lakewood, CO 80215
Telephone number 303-445-0614

As part of your appeal, you are required to file a statement of reasons for the appeal. If a statement of reasons is not included in the notice of appeal, it must be submitted within 20 days after the filing of the notice of appeal.

Should you appeal, please be aware of your obligations, under 43 C.F.R. §§ 4.1109(a)(1) and 4.1105(a)(5) to also notify other parties, and your obligation under 43 C.F.R.§ 4.1283 to serve personally or by certified mail, return receipt requested, a copy of the notice of appeal and a copy of any statement of reasons, written arguments, or other documents on each party within 15 days after filing the document. Proof of service shall be filed with the Board within 15 days after service. Failure to serve may subject the appeal to summary dismissal pursuant to 43 C.F.R. § 4.1285.

Sincerely,

David Berry
Regional Director

cc: Kristen Guerriero, Office of the Solicitor
Mr. Jim Miller, Mountain Coal Company, LLC (Certified Mail)

Attachments

BISON CONNECT

Strand, Howard <hstrand@osmre.gov>

Fwd: MCC Letter from APCD

1 message

David Berry <dberry@osmre.gov> Fri, Oct 20, 2017 at 2:25 PM
To: hstrand@osmre.gov

Begin forwarded message:

From: "Welt, Kathy" <KWelt@archcoal.com>
Date: October 20, 2017 at 1:20:04 PM MDT
To: "'ginny.brannon@state.co.us'" <ginny.brannon@state.co.us>, "dberry@osmre.gov" <dberry@osmre.gov>
Cc: "john.swartout@state.co.us" <john.swartout@state.co.us>
Subject: MCC Letter from APCD

I just read the E&E article below about a complaint filed with both DRMS and OSM today. The complaint is linked in the article. https://www.eenews.net/greenwire/2017/10/20/stories/1060064225

Please see the letter attached from Martha Rudolph of CDPHE in regard to this matter.

Kathy Welt,

Environmental Engineer III

Mountain Coal Company, LLC

West Elk Mine

5174 Highway 133

Somerset, CO 81434

Phone (970) 929-2238

Cell (970) 433-1022

Fax (970) 929-5050

COLORADO
Department of Public
Health & Environment

Dedicated to protecting and improving the health and environment of the people of Colorado

Kathleen G. Welt
Environmental Engineer III
Mountain Coal Company, LLC
West Elk Mine
5174 Highway 133
Somerset, CO 81434

January 11, 2017

Dear Kathy,

Thank you for your December 22, 2016 letter regarding inspection report number 0510015-INSP-2015, concerning the April 29, 2015 inspection of the West Elk Mine. You have raised concerns regarding the inspector's determination that the West Elk Mine is not in compliance with requirements to report volatile organic compounds ("VOCs') emissions on an air pollutant emissions notice ("APEN"), and has failed to apply for an operating permit. We understand that you question this report because you disagree with the inspector's determination that the emissions from the mine are a point source rather than a fugitive source, and that the inspector's estimates of VOC's are inaccurate. We recognize that there may be some confusion regarding the recommendations contained in the inspection report, and the ultimate decision of the Division regarding any actions to be taken in response to the report. As explained below, the Division is not taking any enforcement action against the West Elk Mine at this time.

As you are aware, we have been working with you and with others, including the Colorado Mining Association, to talk through the unique issues related to gathering information on VOC emissions from mining facilities. These discussions have, in part, focused on the potential technical challenges in collecting meaningful emissions data. We would agree that there is not yet an approved method or emissions factor for estimating coal mine VOC emissions. Because of the difficulty in estimating these emissions, the Division is reviewing the information available and has not yet finalized any estimate of the mine's VOC emissions.

We have also discussed the issue whether these emissions are point source or fugitive emissions. We understand that EPA has, in the past, taken the position that these emissions are fugitive. We also understand that Ohio EPA has taken the position that emissions from coal mines are fugitive, and that determination has not been questioned, to our knowledge, by EPA. More recently, we understand that EPA may have suggested that some emissions from coal mines could be point sources; however, EPA has not made any official determination and, in fact, has declined to pursue regulation of coal mine emissions under Clean Air Act 111(b)(1)(A) based upon its discretion to prioritize its limited resources.

The Division has not taken final action or reached a conclusion regarding whether these emissions are fugitive. In the inspection report, the inspector presumed that the coal mine VOC emissions are not

fugitive. That presumption or determination represents only the individual inspector's position, not the Division's position.

Finally, we need to assure you that the inspection report received by Mountain Coal Company LLC does not, on its own, initiate an enforcement action. It is Division management that must determine, using its discretion, whether to initiate enforcement based on the facts of each case, applicable law, and other appropriate factors. Every case is unique and is decided on its own merits. In this case, the Division considered the legal uncertainty regarding whether the West Elk Mine's VOC emissions are fugitive or non-fugitive, uncertainty regarding the quantity of VOC emissions, and other appropriate factors before using its enforcement discretion to decide not to pursue an enforcement action. The Division retains the authority to reconsider this determination and to consider any new facts or circumstances that may arise.

We hope this clarifies the Division's position regarding the determinations and recommendations in the April 29, 2015 inspection report. We take these inspection reports very seriously when determining the appropriate action to take; however, it is the Division management that makes the ultimate decision what action is pursued.

We hope to continue our dialog with you and others regarding the technical issues involved in accurately estimating VOC emissions from coal mines. We look forward to working with you on these issues.

If you have additional questions, please contact Shannon McMillan, (303) 692-3259.

Regards,

Martha Rudolph
Director of Environmental Programs

cc (electronic):
Shannon McMillan, APCD
Chris Colclasure, APCD
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Fwd: Additional Information

1 message

Berry, David <dberry@osmre.gov> Tue, Oct 24, 2017 at 12:30 PM
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From: **Welt, Kathy** <KWelt@archcoal.com>
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Attached is an excerpt from Judge Jackson's decision re: the WEG litigation.

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District Court VOC Decision.pdf
172K

iii. The Lease Modification FEIS Adequately Considered the Effect of Possible VOC Emissions.

Plaintiffs also claim the FEIS devoted insufficient attention to the possibility of volatile organic compound ("VOC") emissions from the methane wells[5] that would almost certainly be drilled as a part of the Lease Modification. Methane itself is not a precursor to VOCs, but hexane, propane, and a variety of other chemicals that often accompany coal-bed methane do have the potential to create VOCs. 40 C.F.R. § 51.100 (s)(1). The agencies acknowledged that VOC pollution is a "key" issue, but they made no effort to quantify potential VOC pollution in the FEIS. BLM_mods-9817 at 9826; *see also* BLM_mods7213 at 7222 (preliminary EA); FSLeasing-0046776 at 0046872-73.

The parties devote several pages of briefing to this issue. In a nutshell, the defendants argue that VOC emissions are highly variable; that existing data (which are sparse and relatively old) suggest that regardless of the variability those emissions are low; and that the only evidence suggesting emissions may be significant and worthy of additional study is the plaintiffs' faulty mathematical extrapolation using the old data. In response, the plaintiffs claim that their math is reasonable, existing facilities are unlikely to detect whether local VOC emissions are high, and in any event, the agencies have an obligation to go out and collect more data to determine whether VOC emissions are significant.

Just because the agencies called VOC pollution a "key" issue does not mean VOC pollution is likely to be significant. The agencies also offered several seemingly non-arbitrary reasons why the existing data are too variable and the emissions are too low to be useful in

[5] These methane wells are designed to vent methane from the underground mine for safety reasons. They are unrelated to the exploratory wells Arch plans to drill in order to determine the extent of the underlying coal seam.

modeling the effect of the Lease Modifications. FSLeasing-0046873, -0047305–07 (VOC concentrations too variable and too low for accurate modeling). The agencies also note that nearby air monitoring stations have not revealed any local exceedances of VOC limits. FSLeasing-0046857–58. Given that the rate of mining is expected to remain the same, the agencies concluded that VOC emissions were unlikely to change. *Id.* Moreover, the disagreement between the agencies and plaintiffs about the accuracy of plaintiffs' mathematical forecasting based on the old data from West Elk Mine strikes this Court as precisely the type of technical disagreement where deference to the agency is most important. *Cf. Wyoming*, 661 F.3d at 1246.

After deferring to the agencies' conclusions that current data do not support the modeling that plaintiffs request, the only remaining issue is whether the agencies were under an obligation to obtain additional information on VOC emissions. *See* 40 C.F.R. § 1502.22(a) (stating that an agency "shall" obtain additional information if it "is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant"). The agencies explain that obtaining more data on VOC emissions would not be essential to a choice among alternatives given that there is no evidence (with the exception of plaintiffs' disputed extrapolations) that emissions could be significant if the Lease Modifications were approved. Plaintiffs suggest that if the data were not essential, the agency would nonetheless be required to make a set of explicit findings to that effect. But strict, technical compliance with Section 1502.22 has never been required as long as other information in the agency documents reveals that the missing information is not essential. *See Colo. Envtl. Coal.*, 185 F.3d at 1172–73 (courts are "unwilling to give a hyper-technical reading of [40 C.F.R. §1502.22] to require the [agency] to include a separate, formal disclosure statement in the environmental impact statement to the effect that . . .

data is incomplete or unavailable") (citation omitted); *WildEarth Guardians*, 828 F. Supp. 2d at 1240 (agency satisfied Section 1502.22 where it stated that additional information on climate impacts was unavailable but that available information indicates impacts would not be significant). Here, the rest of the record, including the absence of any local exceedances and the relatively low levels of VOC emissions from the old data, indicates that VOC pollution will not be significant, and I find that the agency did not act arbitrarily by deciding not to obtain additional evidence of VOC emissions.

c. Colorado Roadless Rule FEIS.

Plaintiffs allege three NEPA violations in the Colorado Roadless Rule: (1) the agencies failed to disclose GHG pollution from the operation of mines that would occur pursuant to the rule, (2) the agencies failed to disclose GHG pollution from combustion of coal from the North Fork Valley exemption, and (3) the agencies failed to address, acknowledge, or respond to an expert report criticizing the agencies' assumptions about GHG pollution from the exemption.

Before delving into the details of the CRR, I note that the rule appears to be the product of exactly the kind of collaborative, compromise-oriented policymaking that we want in America. Broadly speaking, the CRR balances important conservation interests with the also important economic need to develop natural resources in Colorado. Not everyone got what they wanted out of the rule, but perhaps that is a sign that the political process worked as intended. All of this, however, is more or less beside the point in this litigation. The narrow question this Court must answer is whether the CRR and the North Fork exemption comply with NEPA's disclosure and analysis requirements. The specific issue is whether the agencies took a "hard look" at the rule's contribution to climate change, not whether the rule is a good idea or a bad idea. For the reasons that follow, I find that the agency failed to take a hard look at these effects,