

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BLUEFIELD

OHIO VALLEY ENVIRONMENTAL COALITION,  
WEST VIRGINIA HIGHLANDS CONSERVANCY,  
APPALACHIAN VOICES, and  
THE SIERRA CLUB

Plaintiffs,

v.

CIVIL ACTION NO. 1:19-00576

BLUESTONE COAL CORPORATION,

Defendant.

**MEMORANDUM OPINION AND ORDER**

Pending before the court are plaintiffs' motion for partial summary judgment, (ECF No. 54), and defendant's motion for summary judgment. (ECF No. 56.) For the reasons that follow, plaintiffs' motion for partial summary judgment is **GRANTED in part and DENIED in part**, and defendant's motion for summary judgment is **DENIED**.

**I. Factual and Procedural Background**

***A. The 2016 Consent Decree***

Defendant Bluestone Coal Corporation ("defendant") is a subsidiary of Southern Coal Corporation ("SCC"), (ECF No. 9), and is therefore subject to the Consent Decree entered against SCC by the U.S. District Court for the Western District of Virginia on December 19, 2016. (ECF No. 8, Ex. 1.) The Consent Decree applies to all "facilities" and "future facilities" of SCC and

therefore includes the Red Fox Surface Mine, which is owned and operated by defendant. (ECF No. 8, Ex. 1 ¶¶ 7, 14.dd, 14.gg.)

The Consent Decree sets forth a scheme of stipulated penalties for violation for effluent limit exceedances (daily, monthly or quarterly, as required by permits), failures to sample, reporting violations, non-compliance with terms of the Consent Decree, and for persistent non-compliance. (See ECF No. 8, Ex. 1 ¶¶ 84-96.) SCC must calculate stipulated penalties for violations, which are then included in the quarterly reports, and which must be paid by the date the quarterly reports are submitted. Those penalties as a non-exclusive remedy that would qualify for an offset against any statutory penalties that are subsequently assessed. (Id. Ex. 1 ¶¶ 84-102.) The Consent Decree also contained a provision that “[t]his Consent Decree does not . . . limit the rights of third parties, not party to this Consent Decree, against Defendants, except as otherwise provided by law.” (Id. Ex. 1 ¶ 128.)

***B. Red Fox Mine violations in the Consent Decree***

The Consent Decree only adjudicated and prosecuted the violations of permit limitations identified in Appendix F. (Id. Ex. 1 ¶ 122; see also ECF No. 11, Ex. C (relevant excerpts of Appendix F).) Identified within Appendix F were a set of violations of West Virginia National Pollution Discharge Elimination System (“NPDES”) Permit No. WV1006304 at defendant’s

Red Fox Surface Mine. (ECF No. 11, Ex. C.) Those violations occurred between April 2011 and June 2015, and included some violations of specific permit limitations at Red Fox Mine Outlets 001-008, 020, and 046, but the Consent Decree did not list or include any violations of the permit limitations for selenium at Outlets 005-008 chiefly at issue in this case. (See id.) Thus, there is no overlap between the violations prosecuted in the 2016 Consent Decree and those alleged in the present action.

The Red Fox Mine operates under WV/NPDES Permit WV1006304 and WV/SMCRA Permit S007282. (See ECF No. 9, Ex. 2.) The West Virginia Department of Environmental Protection ("WVDEP") renewed that permit on March 12, 2014, for a five-year term ending on August 13, 2018. (ECF No. 55, Ex. B.) WVDEP has administratively extended the permit until August 13, 2020. (Id. Ex. C.) At the time the Consent Decree was entered, defendant's WV/NPDES Permit No. WV1006304 did not contain a numerical effluent limit for selenium at Outlets 005-008. (See ECF No. 11, Ex. E.) Instead, the permit only contained a compliance schedule for selenium at those outlets. (See id. Ex. E.) That schedule was imposed in a permit modification that the WVDEP issued on June 21, 2016. (Id. Ex. E.) Under that modification, defendant had to monitor and report the selenium concentration at those outlets until June 22, 2018, but on and after June 22, 2018,

defendant's discharges at Outlets 005-008 had to comply with numerical effluent limits for selenium.<sup>1</sup> (See id. Ex. E.)

***C. Defendant's permit violations and plaintiffs' suit***

According to its quarterly reports, defendant violated its monthly average selenium limit 60 times and its daily maximum selenium limit 78 times at Outlets 005, 006, 007, and 008 from July 2018 through March 2020. (ECF No. 54, Ex. F.) Defendant does not deny that that its discharges at these Outlets exceeded permitted levels for selenium discharge. (ECF No. 57.)

On June 4, 2019, plaintiffs mailed notice of the violations and their intent to file suit in letters addressed to defendant, the EPA, OSMRE, and the WVDEP, as required by § 505(b)(1)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(b)(1)(A), and § 520(b)(1)(A) of the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1270(b)(1)(A). After waiting the required sixty days, during which neither the EPA, OSMRE, and/or the WVDEP commenced an action to redress the alleged violations, on August 6, 2019, plaintiffs filed the instant Complaint against defendant pursuant to the citizen suit provisions of the CWA, 33 U.S.C. §§ 1251 et seq., and SMCRA, 30 U.S.C. §§ 1270 et seq. Plaintiffs' suit seeks declaratory and injunctive relief as well as civil penalties against defendant for selenium limit violations at

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<sup>1</sup> Those limits are a monthly average of 4.7 µg/l and a daily maximum of 8.2 µg/l. (Id. Ex. E.)

Outlets 005-008 at the Red Fox Surface Mine. (ECF No. 1.) The court notes that the Complaint does not address or seek relief for defendant's violations of its compliance schedule for construction of a selenium treatment system. (See ECF No. 1.)

Defendant, through SCC, paid approximately \$278,000 in stipulated penalties for those selenium effluent violations at Red Fox Mine occurring from July 2018 to June 30, 2019. (ECF No. 9.) Defendant states it has also paid additional stipulated penalties for violations occurring after June 30, 2019. (ECF No. 57.) However, defendant has paid no stipulated penalties for 40 violations of the daily maximum selenium limit at Outlets 005-008 from July 2018 through the first quarter of 2020. (See ECF No. 58, Ex. A.)

#### ***D. Denial of Motion to Dismiss***

Defendant filed a motion to dismiss on September 25, 2019, arguing that plaintiff's suit was precluded by the Consent Decree. (See ECF Nos. 8, 9.) On June 3, 2020, this court entered its Memorandum Opinion and Order denying defendant's motion to dismiss. (ECF No. 60.) The court held that the Consent Decree did not preclude plaintiffs' suit because the Consent Decree was not being diligently prosecuted. The court so found for the following reasons: the Consent Decree was not designed to require compliance with the permit violations at

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