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| DISTRICT COURT, GUNNISON COUNTY, STATE OF COLORADO Gunnison County Courthouse 200 E. Virginia Ave. Gunnison, CO 81230 | DATE FILED: April 4, 2024 4:20 PM CASE NUMBER: 2022CV30061 |
| Plaintiff: Mountain Coal Company, LLC v. Defendants: Water Quality Control Division of the Colorado Department of Public Health and Environment; and Center for Biological Diversity, WildEarth Guardians, High Country Conservation Advocates, and Sierra Club | ▲ COURT USE ONLY ▲ |
| | Case Number: 2022CV30061 Division/Courtroom: 2 |
| ORDER | |

This is an action brought by the owner and operator of the West Elk Mine, located near Somerset in Gunnison County, Colorado. Mountain Coal seeks judicial review of the renewal discharge permit issued August 30, 2019, by the Colorado Water Quality Control Division of the Colorado Department of Public Health. An initial decision by an Administrative Law Judge confirmed the challenged conditions of the permit pursuant to the Colorado Administrative Procedures Act C.R.S. § 24-4-101 *et seq.* after a three-day hearing with an Order issued on August 6, 2021. That decision was upheld by an administrative order issued by the Executive Director on November 7, 2022. Copies of those Orders are attached.

More particularly, this dispute concerns requirements related to 8 “contested outfalls” with respect to the permit renewal. One outfall is in the “train load out” area and the other seven are in Sylvester Gulch which eventually drains into the North Fork of the Gunnison River.

The issues before the Court include procedural questions, interpretation of language of the relevant Regulation, and the question of whether the record supports the findings made affirming the requirements for the 8 contested outfalls.

The application renewal on these 8 outfalls, which had not previously been addressed in prior permits, imposed requirements including numeric effluent limitations and monitoring on those outfalls. The administrative process and subsequently this Complaint for record review followed the final agency decision.

The record has been certified. The Complaint was timely filed. The parties stipulated to the briefing schedule and all briefs were timely filed. The Court was asked, and agreed, to permit oral argument, which has also been completed. There were photographs, which were already part of the record, and some demonstrative power point visual materials in those oral presentations, which the Court has considered for argument purposes but has not considered as part of the record. The Court file contains copies of all such visual materials used at oral argument.

As discussed below, the Court concludes:

- 1.) That the burden of proof was properly placed on the Plaintiff as the Applicant for the renewal permit. This information had not been previously disclosed by the Applicant.
- 2.) That the language in the relevant regulation is not ambiguous. Specifically, the “or” in dispute is in the disjunctive.

- 3.) That there is record support that each of the contested outfalls are related to “industrial activity.”
- 4.) That there is no requirement for the Division to expressly consider economic reasonableness for the permit requirements in dispute.

SUMMARY OF ARGUMENTS

Plaintiff argues that the burden of proof at the hearing was improperly placed on it rather than the Division given that the outfalls had existed at the time of prior permits and were apparent based on the materials previously filed with prior applications for permits and also were apparent on prior site inspections by representatives of Defendant.

Plaintiff asserts generally that the contested outfalls are not “associated with industrial activity” and therefore that a discharge permit is not required. Further, imposing numeric effluent limitations and monitoring for those outfalls is not supported by applicable law based on the language of the relevant regulation. Mountain Coal also argues that the Division failed to take into consideration the economic reasonableness of the requirements. Plaintiff also asserts that the decision is beyond the authority of the Division and specifically is within the scope of authority of the Division of Reclamation, Mining and Safety instead.

Defendant and the Conservation Groups assert that the decisions challenged have record support. They argue that the Court should give deference to the Division’s determinations as to the meaning of the applicable regulation. They also assert that because the contested outfalls were new information not previously provided by Mountain Coal in prior permit processes before the Division, the burden of proof was properly on Plaintiff. They argue the outfalls in dispute were properly found to be part of the industrial activities of the coal mining operation and integral to the coal mine operations, as distinguished from things like parking lots and office buildings and assert that conclusion had ample support in the record. They assert

that the contested outfalls are point source discharges over which the Water Quality Division has exclusive jurisdiction for water quality permit purposes and is not within the purview of the Division of Reclamation, Mining and Safety. They also contend that it was necessary to include effluent limits. Finally, they argue that there is no requirement to expressly consider economic reasonableness in the permitting process as the language Plaintiff relies upon is part of a “legislative declaration”.

STANDARD OF PROOF

Pursuant to C.R.S. § 24-4-106(7)(b) the Court in proceedings such as this may only reverse the outcome if the agency action is arbitrary or capricious, contrary to law, or unsupported by evidence in the record. Pursuant to subsection (d) of that statute, the Court shall determine all questions of law.

DEFERENCE

The parties disagree on the applicability of the legal theory of deference to the Division in interpreting regulations within the scope of its expertise. Plaintiff cites the Court to *Gomez v. J.P. Trucking*, 509 P. 3d 429 (Colo. 2022) where the Court was tasked with defining “interstate drivers”. Defendant and Intervenor cite the Court to *Weld Air & Water v. Colorado Oil and Gas Commission*, 457 P. 3d 727 (Colo. App. 2019) and *Rags over the Arkansas River v. Colorado Parks and Wildlife Board*, 360 P. 3d 186 (Colo. App. 2015). The Court agrees that the state of the law is that deference applies but is not dispositive. Further, that all recognized tools for interpreting language are to be applied before deference comes into play. Perhaps most recently, the Colorado Court of Appeals summarized this as follows in *Brennan v. Broadmoor Hotel Inc.*, 535 P.3d 1016 (Colo. App. 2023) at p. 1020:

We review administrative regulations de novo. *Gomez v JP Trucking, Inc.*, 2022 CO 21, ¶ 27, 509 P.3d 429. In construing an administrative regulation, we are guided by the same rules of construction that we would apply in interpreting a statute. *Id.* Our foremost goal is, of course, to give effect to the promulgating

body's intent. *Id.* If the language of the regulation is unambiguous, we enforce it as written, giving the words and phrases their common and ordinary meaning. *Id.*

At the same time, “[w]e must give deference to the reasonable interpretations of the administrative agencies that are authorized to administer and enforce the law.” *Ybarra v. Greenberg & Sada, P.C.*, 2016 COA 116, ¶ 28, 488 P.3d 109 (quoting *Tivolino Teller House, Inc. v Fagan*, 926 P.2d 1208, 1211 (Colo. 1996)), *aff’d*, 2018 CO 81, 429 P.3d 839. This means we may only reject an agency’s interpretation of its regulation when the plain language of the regulation compels a different meaning. *Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 2015 COA 11M, ¶ 27, 360 P.3d 186.

SUMMARY OF THE RECORD AS RELATED TO THE QUESTIONS BEFORE THE COURT

The record demonstrates the following:

- 1.) Plaintiff operates West Elk Mine, an underground coal mine located in the area of Somerset in Gunnison County. See Stipulated Facts attached to the ALJ Order ¶¶ 1-4.
- 2.) The initial permit by Defendant, WQCD issued in 1982. Stipulated Facts ¶ 7.
- 3.) A renewal permit by the Division was submitted in 1999 and issued in 2004. Stipulated Facts ¶¶ 8-11.
- 4.) Another renewal permit was applied for in 2008. Stipulated Facts ¶ 12.
- 5.) A site visit was requested by the Division and was performed in the fall of 2018. Stipulated Facts ¶ ¶14-15.
- 6.) A draft renewal permit was released in 2019 and despite objections by Plaintiff a final permit issued in 2019. Stipulated Facts ¶¶18-19.
- 7.) A three-day hearing was conducted before an Administrative Law Judge, who upheld the disputed conditions. May 17-19, 2021. Part 8 003004. A copy of that Order is attached.

- 8.) The Executive Director of the CDPH&E issued a Final Agency Order which corrected some factual findings but upheld the terms and conditions of the 2019 permit. November 7, 2022, Part 8 003004-3026. A copy of that Order is attached.
- 9.) The dispute relates to 8 contested outflows, one in the “Train Load Out” area and 7 in the “Sylvester Gulch” area. Stipulated Facts ¶¶ 19-21.
 - a. A stipulation was filed in earlier litigation in this Court, 19CV30041, enabling Plaintiff to continue mining operations at the West Elk Mine without compliance with the permit requirements on the contested outfalls pending the conclusion of this record review. This was recognized by all counsel in their briefing and the Court also takes judicial notice of its own case file.
- 10.) The West Elk Mine is a coal mine removing coal eight miles underground. ALJ Finding of Fact #47. This was not disputed in the appeal to the Executive Director. See also Plaintiff’s Complaint ¶ 2.
- 11.) The West Elk Mine has identified three coal seams, which are layered over each other separated by non-coal layers. F Seam is the top layer. E Seam is the middle layer. B Seam is the bottom layer. Finding of Fact #48.
- 12.) The West Elk Mine is located in a mountainous, semiarid area that receives little precipitation. Finding of Fact #49.
- 13.) Outfalls 25, 26, 27, 30, 32, 33, and 34 are located in an area referred to as Sylvester Gulch, which is over coal seam identified as E Seam.

Finding of Fact #50. Exhibit D-15 and see the Executive Director's Final Agency Order p.5.

- 14.) Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 were in existence at the time of the 1999 renewal permit application. Finding of Fact #51. Again, see also Final Agency Order p.5 noting that the parties do not dispute the features existed in 1999.
- 15.) The Sylvester Gulch haul road was constructed by MCC to gain access to the Sylvester Gulch area and used during the construction and on-going maintenance of the facilities located on the Sylvester Gulch access road. The facilities along the Sylvester Gulch access road include several fan buildings providing ventilation for the underground mining operations, an electrical substation providing power to the underground mining operations, dewatering stations providing water removal from the underground mining operations, and storage of equipment. Finding of Fact #57. JE 74-77, JE 78-79, JE 85, JE 87:1-88.5, M 165 and M 166.
- 16.) Without the facilities along Sylvester Gulch access road, the West Elk Mine would not be able to safely or effectively operate. Finding of Fact #58. See also the Division's brief at pages 21 and 22 with extensive references to the record regarding each contested outfall other than outfall 35 (the TLO contested outfall).
- 17.) Outfall 35 is located in a ditch at the end of the driveway for the train loadout area. Exs. JE 88-91. Finding of Fact #99.
- 18.) The train loadout area consists of two sets of railroad tracks, a retaining pond for most water run-off (permitted outfall 8 pond under Subpart B),

and a tall building that accepts the enclosed conveyor belt transporting coal, and the mechanism used to put the finished coal into the trains.

Finding of Fact #100.

- 19.) Coal fines from the train loadout area are visibly present in the ditch along the driveway leading to Outfall 35. Ex. JE 93. Finding of Fact #101.
- 20.) Coal fines from the train loadout area are visibly present at the top of the driveway leading to Outfall 35. Ex. JE 94. Finding of Fact #102.
- 21.) Water flows in the ditch along the driveway to Outfall 35 before flowing across the highway into the North Fork of the Gunnison River. Ex. JE 93. Finding of Fact #103.

Disputed Issues:

- 1.) Who should have had the burden of proof in this process;
- 2.) Are the “contested outfalls” related to industrial activity;
- 3.) Did the Division commit reversible error by failing to consider economic reasonableness of the conditions, and
- 4.) Did the Division have jurisdiction with respect to these issues or were they within the jurisdiction of DRMS; and
- 5.) Can the Division impose numeric effluent limitations to the contested outfalls.

ANALYSIS

Permits were issued twice previously for the Mine. Those prior permits did not call for regulation of the contested outfalls, notwithstanding their existence at the time. The record shows that while there were maps from which it could be inferred or assumed that the outfalls

existed, and were previous on site inspections, only after the site inspection in 2018 was the information available to the Division. Part 7 2918; 558:23-561:16.

The issue is whether this is “new information” such that Plaintiff rather than the Division must carry the burden of proof for the determination of the reasonableness of the change from the prior permits. Plaintiff argues that it was ascertainable from the materials previously provided and prior site visits. The findings, however, were that it was the duty of Mountain Coal to provide this information, which it failed to do. Thus, this was new information, and therefore, Mountain Coal’s burden of proof. See FAO at 12 CDPHE 003015.

Further as the Division and Intervenor argue, to reach the conclusion advocated by Plaintiff creates an incentive for those seeking permits to disclose as little as possible in the permitting process and to shift that burden to the Division to discover critical information. The Applicant is compelled to certify, and did so here, that it’s Application was true, accurate and complete. (emphasis added). JE 96. The burden is on the entity seeking a permit to provide all necessary information. These 8 contested outfalls are therefore “new” and were significant changes relevant to water quality which Plaintiff was obligated to provide, but had not. Regulation 61.7(d)(ii).

The Court further notes that the Executive Director further found that even if the burden of proof was on the Division, it had met the burden of proof. The Court agrees based on the facts outlined above.

The next issue is whether the contested outfalls are associated with the industrial activity of the coal mining operation. The Court has reviewed *Natural Resources Defense Council, Inc.v. Environmental Protection Agency*, 966 F. 2d 1292 (9th Cir. 1992) at pp.1304 and 1305 which stated:

We note that the language “discharges associated with industrial activity” is very broad. The operative word is “associated”. It is not necessary that storm water

be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.

There is a brief discussion of the issue in the legislative history: “[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.” 133 Cong.Rec. 985 (1987); see also 132 Cong.Rec. 31,968 (1986) (same). EPA argues that the words “directly related” indicate Congress’s intent to require permits for only those materials that come in contact with industrial materials. See 55 Fed.Reg. at 48,007. However, the examples given—parking lots and administrative buildings—indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.

EPA’s definition follows the language quoted above: “Storm water discharge associated with industrial activity means the *1305 discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” 40 C.F.R. § 122.26(b)(14).

Here there is record support that the Train Load Out Area which is the location where, by an overhead conveyor, the coal extracted from underground is transferred over the highway and to close proximity to the rail line where it is dumped into train cars to be transported from the mine. JE 46 01-04, M 169. Further, the record also shows existence of coal fines in the area. See particularly the Photos of the area Part 33, 007101-04 and Photos JE 46-03, JE 93, M 169 and 4604 and the testimony of Ms. Welt and Ms. Rosow. Accordingly, the Court finds the record supports a finding that this contested outfall is integral to the industrial activity.

The other contested outfalls, all in Sylvester Gulch, relate directly to the coal operation, specifically the electrical system for the mine, JE 74-77, dewatering the mine, 87:1-88:5, and ventilating the mine, JE 85. These are materially different from the examples of types of activities which are not directly related to the industrial activities, such as parking lots and office buildings. There is record support that these are both directly related and essential to the mining activity. These activities relate to the operation of the mining (electrical) safety of the mine (dewatering and ventilation) and transporting coal from the mine to market.

The Court concludes that the jurisdictional issue raised by Mountain Coal also must be rejected. That is, this is properly before Defendant, Colorado Water Quality Control Division, not the DRMS. The issue is not concerning the existence of the mine, but rather, water quality with respect to features related to the mining activity. See C.R.S. § 25-8-301 *et seq* including particularly C.R.S. § 25-8-302 (1)(b). Further, *Mid Continent Resources Inc. v. Looby*, 877 P. 2d 1385 (Colo. 1994) clearly demonstrates what is within the Mined Land Reclamation Division and what is in the realm of the Water Quality Control Division. Concluding WQCD is solely responsible for the issuance and enforcement of point source discharges.

The issue of whether Regulation 61 encompasses the outfalls also has record support. The Court agrees that section 61.3 (2) (c) must be read in the disjunctive, rather than the conjunctive. That language in relevant part reads as follows.

[t]he Division may not require a permit for discharges of stormwater runoff from mining operations...composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with **or** that have not come into contact with, any overburden, raw materials, intermediate products, finished product, byproduct or waste products located on the site of such operations. (Emphasis Added).

If it was intended to be the conjunctive as advocated by Plaintiff, it would have been stated as “and” rather than “or”. Although in a different context a 10th Circuit case, *United States v. O’Driscoll*, 761 F. 2d 589 (10th Cir 1985) stated at p. 597-598.

When the term “or” is used, it is presumed to be used in the **disjunctive** sense unless the **legislative intent** is clearly contrary. *Azure v Morton*, 514 F.2d 897,900 (9th Cir. 1975); *United States v Snider*, 502 F.2d 645,655 (4th Cir. 1974); Sutherland, Statutory Construction, 4th Ed., Vol. 1A § 21.14; 82 C.J.S., Statutes, § 335; 598 73 Am.Jur. 2d, Statutes § 241; Anno., 118 A.L.R. 1367, 1375.

See also *Lombard v. Colorado Outdoor Education Center Inc.* 187 P.3d 565, 571 (Colo. 2018) and *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 P. 2d 1343 (10th Cir 1987).

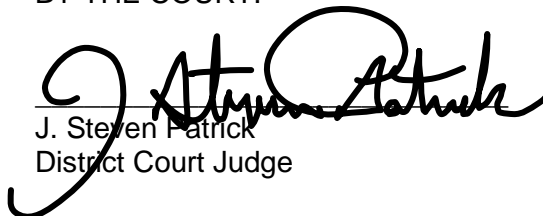
The Court agrees that C.R.S. § 25-8-102 (5) does not require consideration in this permitting process of economic reasonableness. This language is a “legislative declaration” with respect to Water Quality Control generally, not mandated requirements for permitting. See *Lester v. Career Building Academy* 338 P. 3d 1054(Colo. App. 2014). Notably the same section discussing economic reasonableness also includes references to consideration of environmental and public health costs and impacts as well.

The last issue is the question of numeric effluent discharge. The critical provisions are set forth in 40 C.F.R. sections 434.40 and 434.11 (e and f). As to the Sylvester Gulch contested outfalls, subsection 434.40 includes topsoil removal. As to TLO, see the discussion of coal processing and transit and access roads.

For the foregoing reasons, the Plaintiff’s Complaint is dismissed. There is record support and the conclusions were based on facts in the record and applicable law and regulations.

Dated this 4th day of April, 2024.

BY THE COURT:


J. Steven Patrick
District Court Judge

cc: e-filed to parties of record

EXHIBIT 1

EXECUTIVE DIRECTOR
DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT
STATE OF COLORADO

DATE FILED: December 7, 2022 11:24 AM

OAC Case No.: WQ-2020-0001

MOUNTAIN COAL COMPANY, LLC,
Petitioner,

v.

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,
WATER QUALITY DIVISION,
Respondent,

And,

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

FINAL AGENCY ORDER

This stormwater discharge permit matter is before the Executive Director of the Colorado Department of Public Health and Environment to review the Initial Decision issued by the Office of Administrative Courts' Administrative Law Judge (ALJ) and duly served upon the parties on August 25, 2021. The Initial Decision is attached as Exhibit 1 and is incorporated as set forth herein.

The parties filed stipulated exceptions and designated the record. Petitioner Mountain Coal Company, LLC ("Mountain Coal") filed exceptions, the other parties filed responsive briefs, and Mountain Coal filed a reply. Having reviewed and fully considered the arguments and the administrative record, the Executive Director

now enters this Final Agency Order under § 24-4-105, C.R.S., affirming the terms and conditions of the renewal stormwater discharge permit.

I. SUMMARY

At issue are portions of the discharge permit renewed by the Water Quality Control Division of the Colorado Department of Public Health and Environment (Division) on August 30, 2019 (permit) related to eight outfalls on the West Elk Mine site, operated by Mountain Coal. After a hearing, the ALJ made findings of fact, conclusions of law, and determined that the addition of Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 (“the Contested Outfalls”) to the permit and the effluent limitations the Division applied therein were proper. Mountain Coal asserts a number of challenges to the Initial Decision, which are discussed in turn below.

II. STANDARD OF REVIEW

On review of an initial decision, findings of evidentiary fact must not be set aside unless they are contrary to the weight of the evidence. § 24-4-105(15)(b), C.R.S.; *Colo. Custom Maid, LLC v. Indus. Claim App. Office*, 2019 CO 43, ¶ 12; *see also Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 9-10 (Colo. 1994) (holding that hearing officer’s finding may not be set aside where evidence could equally support alternative findings). The Executive Director reviews the ALJ’s conclusions of law for substantial evidence in the record and a reasonable basis in the law. *Bd. of Med. Exam’rs v. McCroskey*, 880 P.2d 1188, 1194 (Colo. 1994).

An agency is required to ascertain and give effect to the enacting body’s intent, giving words and phrases their plain and ordinary meaning, considering

the statute as a whole, and construing it in a manner that gives consistent, harmonious, and sensible effect to all its parts. *See* § 2-4-201(1); *Peabody Sage Creek Mining, LLC v. Colo. Dep’t of Public Health & Env’t*, 2020 COA 127, ¶ 10. It is presumed that, in enacting a statute, the General Assembly intends a reasonable result that is feasible to be executed. § 2-4-201(1)(d).

III. ANALYSIS

A. **The Executive Director modifies certain Findings of Fact and corrects factual errors in the Initial Decision as follows.**

As agreed by the parties in the Stipulated Joint Exceptions, the Executive Director corrects the following errors and terms used in the Initial Decision:

- **Recitation, p.1, first paragraph; and Discussion, p.12, second paragraph, Hearing dates:**
strike the words “May 17 through 20, 2021”;
substitute the dates “May 17 through May 19, 2021.”
- **Appearances, p.1, first paragraph, correct name:**
strike the words “Justine C. Beckman”;
substitute the name “Justine Beckstrom.”
- **Exhibit list, p.1, second paragraph, excluded portion of Exhibit D-20:**
modify the words “D 20 (except tab labeled 25235)”;
substitute the identifier “D 20 (except tab labeled “025-035 raw).”
- **Issues list, p.2, three instances in third paragraph, list of Outfalls:**
strike “26, 26” from series “Outfalls 25, 26, 26, 30, 32, 33, 34, and 35”;
substitute “Outfalls 25, 26, 27, 30, 32, 33, 34, and 35.”
- **Discussion, pp.10-11, Water Quality Control Act:**
 - a. (p.10) strike the words “enacted the Water Quality Control Act ((WQCA) in 1987”;
substitute words “repealed and reenacted the Water Quality Control Act ((WQCA) in 1981”;
 - b. (p.11) modify citation to § 25-8-102(2), C.R.S.; S.B. 1981-10;

Colo. Sess. Laws 1981, ch. 324, § 25-8-102 at sec.1.

- **Discussion, p.14, two instances in last paragraph, lists:**
strike the word and number “and 35”;
modify lists to “Outfalls 25, 26, 27, 30, 32, 33, and 34.”
- **Discussion, p.17, last full paragraph, incorrect mention of subsoil stockpiles:**
strike the words “subsoil is stored”;
modify sentence to state in full “Outfalls 32, 33, and 34 receive stormwater that flows over an area where topsoil was removed, a fan building was built, the hillside was cut, and gravel was placed on top of the exposed area where topsoil was removed.”
- **Discussion, p.18, second full paragraph, party’s position:**
insert the word “not”;
modify sentence to state in full “MCC argued the Division should not have included effluent limitation measures in the permit.”
- **Discussion, p.19, two instances in last paragraph, lists:**
strike the number “33” from list;
modify lists to state “Outfalls 25, 26, 27, 30, 32, and 35.”
- **Discussion, p.20, last paragraph:**
strike the word “set”; substitute the word “applied”;
modify sentence to state “The Division applied the Federal ELGs in Subpart B and Subpart D for Outfalls 25, 26, 27, 30, 32, 33, and 35.”

As agreed by the parties in the Stipulated Joint Exceptions, the Executive Director adopts as modified the following Findings of Fact:

- **Finding of Fact ¶43:**
strike the word “all”; substitute the words “a subset of the”;
modify phrase to state “and a judicial stay of a subset of the contested permit terms and conditions.”
- **Finding of Fact ¶46, Intervenor’s party status date:**
strike the words “November 2, 2020”;
substitute the date “November 20, 2020.”

Mountain Coal contends that Finding of Fact ¶50—that the Sylvester Gulch Facilities area is located over the E-Seam—is contrary to the weight of the evidence. The Executive Director rejects this challenge and concludes that Finding of

Fact ¶50 is supported by the weight of the evidence. Specifically, a map of the E-Seam shows that it underlies the Sylvester Gulch Facilities Area, and the record testimony reflects the same. *See* Hearing Exhibit D-15; Transcript V.1: 83-84, 177-78, 209-10; V.2: 304-05.

Mountain Coal contends that Finding of Fact ¶51—that Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 were in existence at the time of the 1999 renewal permit application—is inaccurate because in 1999 the Division did not yet consider these physical features to be outfalls. The parties do not dispute that the features now referred to as the Contested Outfalls existed in 1999 but had not yet been identified as such at the time of Mountain Coal’s 1999 Renewal Permit. The Executive Director determines that Finding of Fact ¶51 is not contrary to the weight of the evidence and concludes that no modification to Finding of Fact ¶51 is required or warranted.

Mountain Coal asserts that the Sylvester Gulch road is an “access” road, not a “haul” road as stated in Findings of Fact ¶¶53, 57, 58, 64, 69, 72, 76, 82, 89, 95, 96, and in the Discussion portion of the Initial Decision. Consistent with the substance of Finding of Fact ¶53—that removed coal does not travel along this road—the parties do not dispute the accuracy of characterizing the road as an access road. *See* Finding of Fact ¶53. The Executive Director modifies the phrase “haul road” and substitutes the phrase “access road” where it appears in Findings of Fact ¶¶53, 57, 58, 64, 69, 72, 76, 82, 89, 95, 96, and pages 14-15, 17, and 19 of the Initial Decision’s Discussion.

Mountain Coal contends that Finding of Fact ¶54—that the West Elk Mine has not started the process of reclamation or received back any of its bond—lacks evidentiary support in the record and seeks to remove it in its entirety. Based on record evidence,¹ the Executive Director modifies Finding of Fact ¶54 to read as follows: “Mountain Coal has started but has not fully reclaimed (returning the land to its approximate original contour and revegetating it in accordance with its reclamation plan) the West Elk Mine site—including the Sylvester Gulch Facilities Area—and will not finish implementing its reclamation plan until it is finished mining.”

Mountain Coal seeks to modify Finding of Fact ¶64—that Outfall 25 is a ditch located on the side of the Sylvester Gulch road with a metal half culvert—for two reasons: (1) because the half culvert is not metal and (2) because Mountain Coal installed the PVC half culvert to facilitate required sampling. Because the parties agree that reference to a “metal” half culvert is incorrect, the Executive Director strikes the word “metal.” Because no party disputes the reason for the half culvert’s installation, *see* Finding of Fact ¶35, and Finding of Fact ¶64 is not contrary to the weight of such evidence, the Executive Director concludes that no further modification is required or warranted on that basis.

Accordingly, the Executive Director modifies the following Findings of Fact to state in full:

- Finding of Fact ¶64 to state in full: “Outfall 25 is a ditch located on the side of the Sylvester gulch access road with a half culvert.

¹ *See* Transcript V.1:188-200; V.2:307-310, 319-21; V.3:472-73.

Exs. JE 61-63.”

- Finding of Fact ¶70: “Outfall 26 is a ditch with a half culvert that moves water under the Sylvester Gulch access road to a catch basin with another culvert directing water further downstream. Exs. JE 67-71.”
- Finding of Fact ¶76 to state in full: “Outfall 27 is a ditch with a culvert that directs water under the Sylvester Gulch access road to the Sylvester Gulch riverbed. Exs. JE 72-73.”
- Finding of Fact ¶89: “Outfall 32 is a half culvert located in a ditch along Sylvester Gulch access road located below the road to fan building 3. Exs. JE 82-83.”

Except as stated, the Executive Director otherwise rejects Mountain Coal’s challenge to Findings of Fact ¶¶70, 76, and 89.

Concerning Finding of Fact ¶71’s description of the area around Outfall 26, Mountain Coal contests that boulders are located where topsoil was removed to create the ditch and catch basin, contending that rocks were placed there for sediment and erosion control. The Executive Director is unable to conclude that the photographs relied on by Mountain Coal establish the purpose for placing the rocks, but such purpose having attenuated relevance if any, gives it limited weight.

To supplement Finding of Fact ¶72, Mountain Coal asserts that it is entitled to a finding that the subsoil stockpile has been revegetated. The Executive Director modifies Finding of Fact ¶72 to substitute the words “haul road” with the words “access road,” but concludes that the remainder of Finding of Fact ¶72 is supported by substantial record evidence and the supplement is not necessary for the determinations in this matter, and rejects Mountain Coal’s challenge on this ground. For the same reason, the Executive Director rejects Mountain Coal’s challenges to Findings of Fact ¶¶74 and 78.

Mountain Coal seeks to modify Finding of Fact ¶82—that Outfall 30 is located in a ditch and allows water to flow along the Sylvester Gulch access road—because the culverts discharge water under the Sylvester Gulch access road. Because it is consistent with record evidence and not contested by the parties, the Executive Director modifies Finding of Fact ¶82 to state in full: “Outfall 30 consists of two sets of half culverts that discharge stormwater under the Sylvester Gulch access road. Exs. JE 78-81.”

Mountain Coal contends that Finding of Fact ¶95 is contrary to the weight of the evidence concerning the relative location where water from Outfalls 33 and 34 comeingle. The Executive Director concludes that no modification is warranted, and for the same reason, the Executive Director rejects Mountain Coal’s challenge to Finding of Fact ¶98.

As discussed above, Finding of Fact ¶95 is modified to state in full: “Outfalls 33 and 34 are two full culverts that direct water under Sylvester Gulch access road and empty to the same catch basin w[h]ere water is commingled. Ex. JE 87.”

Mountain Coal contends that Finding of Fact ¶96 is contrary to the weight of evidence establishing that the natural spring upstream from Outfall 34 runs through undisturbed land, which was not near or affected by building the Sylvester Gulch access road. Because it is consistent with record evidence and not contested by the parties, the Executive Director modifies Finding of Fact ¶96 to state in full: “Upstream from Outfall 34 is a natural spring that runs through undisturbed land.”

As stipulated by the parties, the Executive Director modifies Finding of Fact ¶97, to strike the words “to the topsoil stockpile,” and state in full: “Upstream from Outfalls 33 and 34 is the fan shaft 3 building area.”

Mountain Coal contends that Findings of Fact ¶¶101 and 102—that coal fines from the train loadout area are visibly present at the top of the driveway, and in the ditch along the driveway, leading to Outfall 35—are contrary to the weight of the evidence. However, the record contains testimony that the black material on the ground in the train loadout area, depicted in photographs in the record, is coal fines that have accumulated from loading trains. *See* Transcript V.1:207-08; Hearing Exhibits JE 46-4, JE 92, JE 93, M-169. And the testimony about the ballast used to bed the railroad tracks does not contradict this testimony. *See* Transcript V1:125:18-24. The Executive Director thus rejects this challenge and concludes that Findings of Fact ¶¶101 and 102 are supported by the weight of the evidence.

Mountain Coal contends that Finding of Fact ¶103—that water flows in the ditch along the driveway to Outfall 35—is contrary to the weight of the evidence. The record includes photographs of the train loadout area and driveway that show that the ground slopes at a downward angle from the train tracks to the driveway and ditch along the driveway, as well as testimony that Outfall 8—the sediment pond between the train tracks—does not capture all of the stormwater from the train loadout area. *See* Hearing Exhibits JE 90, JE 92, JE 93, JE 94; Transcript V.3:511-12; *see also* Transcript V.1:125-26, 203-04; Hearing Exhibit JE 46-4. The Executive

Director thus rejects this challenge and concludes that Finding of Fact ¶103 is supported by the weight of the evidence.

Subject to these modifications, the Executive Director adopts the remainder of each Finding of Fact in the Initial Decision as written.

B. Mountain Coal properly bears the burden of proof under Regulation 61.7(d)(ii).

Mountain Coal contends, on a number of grounds, that the ALJ incorrectly applied the burden of proof under Regulation 61.7(d)(ii). The Executive Director disagrees and concludes that the ALJ's allocation of the burden of proof is supported by substantial evidence in the record and a reasonable basis in the law.

Regulation 61.7 governs the burden of proof in permit renewal proceedings. Ordinarily, the party requesting an adjudication has the burden of proof. *See* 5 Code Colo. Regs. § 1002-61, Reg. 61.7(d). But the Division bears the burden of proof when it changes terms of a renewal permit without “significant changes in the facts relevant to water quality considerations.” Reg. 61.7(d)(ii).²

It is undisputed that, in connection with this application, the Division requested additional information about stormwater discharge from the mine,

² The pertinent subsection of Regulation 61.7(d)(ii), 5 Code Colo. Regs. § 1002-61, states in full:

The person requesting the adjudicatory hearing shall have the burden of proof in all hearings held pursuant to this section, except that the Division shall have the burden of proof under the following circumstances:

Where the Division denies renewal of a permit or changes the terms of a renewed permit and that denial or change is not based either upon significant changes in the facts relevant to water quality considerations or upon changes in the applicable statutes or regulations.

including specific locations of stormwater outfalls not reflected in the prior permit application. *See* Initial Decision, Findings of Fact ¶¶14-15; Transcript V.3:562. Because the Division’s determination that discharge permits were required for the Contested Outfalls was based on additional information that it did not previously have, the Executive Director concludes that the Division’s action was properly based on significant changes in the facts relevant to water quality considerations under Regulation 61(d)(ii).

Mountain Coal asserts that the ALJ’s finding—that the Division did not know facts necessary to determine whether the identified outfalls could be point sources before the 2018 site visit³—is contrary to the weight of evidence. According to Mountain Coal, its previous submission of information about the train loadout area, Sylvester Gulch Facilities Area, and other features made known to the Division on previous renewal applications and maps, and during its inspections and communications concerning permit modification requests, precludes the ALJ’s conclusion. The Division does not dispute that Mountain Coal provided information regarding the existence of physical features before the renewal application at issue.

The Executive Director determines that this evidence does not defeat the conclusion that there were “significant changes to the facts relevant to water quality considerations” for purposes of Regulation 61.7(d)(ii). Mountain Coal cites no legal requirement for the Division to make affirmative inquiries concerning potential regulatory conditions, and the Executive Director declines to interpret the

³ *See* Initial Decision, Discussion p.12.

regulation to create such obligation. The Executive Director recognizes the significance of the renewal application process and the applicants' duty to supply information without omission or obfuscation. *See, e.g.*, Hearing Exhibit JE 96, JE 96-019, ¶31 (certification that information submitted is true, accurate and complete). The Executive Director thus concludes that significant changes in the facts relevant to water quality considerations existed based on the record evidence and a reasonable interpretation of the burden of proof provision under Regulation 61.7(d)(ii).

The Executive Director also rejects Mountain Coal's contention that the ALJ's finding—that the Division did not review the 1999 application specifically to determine whether the new culvert markings were present and possible point sources—was based on improper inferences. As part of the 1999 application, the form entitled "Application for Permit to Discharge Storm Water Discharges Associated with Industrial Activity" is blank. *See* Hearing Exhibit JE 96, Appendix D at JE 96-027–031. The Executive Director thus concludes that the 1999 application does not establish the lack of significant changes in the facts relevant to water quality considerations.

Therefore, the Executive Director concludes that Mountain Coal properly bears the burden of proof under Regulation 61.7(d)(ii).⁴

⁴ Even if the ALJ had incorrectly found that Mountain Coal was to bear the burden of proof, the Executive Director further concludes that substantial record evidence establishes and justifies the permit conditions as discussed below.

C. The Contested Outfalls are subject to, and not exempt from, regulation, as well as effluent limitations.

Mountain Coal challenges whether the Division is authorized to require a permit for the Contested Outfalls and whether the Contested Outfalls are subject to the effluent limitations in the Federal Effluent Limitation Guidelines (ELGs) and Colorado's Water Quality Based Effluent Limitations (WQBELs). The Executive Director addresses these contentions in turn, below, and concludes that the Contested Outfalls are properly subject to, and not exempt from, permitting and effluent limitations.

1. The Contested Outfalls are “associated with industrial activity” within the meaning of Regulation 61.3(2)(e)(ii) and thus point source discharges requiring a permit.

Mountain Coal contends that the Contested Outfalls are not “associated with industrial activity” within the meaning of Regulation 61.3(2)(e)(ii) and, thus, are not point source discharges subject to permitting.⁵ It asserts that, contrary to the ALJ's conclusions, the Contested Outfalls are not properly included under subsection (B) of the Regulation and the record evidence instead establishes that its activities are exempted under subsection (C) of the Regulation. The Executive Director disagrees.

The phrase “stormwater discharge associated with industrial activity” is defined in Regulation 61.3(2)(e)(ii)(A) as “discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.”

⁵ See 5 Code of Colo. Regs. § 1002-61, Reg. 61.3(2)(e)(ii); *see also* 33 U.S.C. § 1342(p)(2)(B).

5 Code of Colo. Regs. § 1002-61, Reg. 61.3(2)(e)(ii)(A). Its meaning is further explained in subsections (B) and (C). Subsection (B) provides an open-ended, non-exclusive list of what the phrase includes, such as stormwater discharge from roads and rail lines used for transporting materials and products, and sites used for storage and maintenance of material handling equipment. Reg. 61.3(2)(e)(ii)(B). Subsection (C) explains that areas separate from industrial activities are excluded and provides office buildings and accompanying parking lots as examples. Reg. 61.3(2)(e)(ii)(C).

Here, the undisputed facts establish that the Sylvester Gulch Outfalls⁶ convey stormwater discharge associated with activities and facilities that support mining operations and are associated with Mountain Coal's industrial activity. Specifically, the Sylvester Gulch Outfalls convey stormwater discharge from the Sylvester Gulch Facilities Area, which contains an access road, electrical substation, dewatering stations, and ventilation and exhaust fans, *see* Initial Decision, Findings of Fact ¶¶23-28 (addressing flows to outfalls in relation to road and facilities in Sylvester Gulch Facilities Area)—facilities which exclusively support mining operations at the West Elk Mine, *see* Initial Decision, Findings of Fact ¶¶57-58, 72, 79, 80, 84, 85 (addressing uses of facilities), Discussion pp.15-19; Transcript V.1: 82-83, 86-89, 183-84 (discussing ventilation for miners underground and exhaust fan, dewatering facility, and electrical substation that powers the

⁶ Outfalls 26, 26, 27, 30, 32, 33, 34. *See* Stipulated Exceptions, p. 2.

mine); V.2:305-06, 313-15 (acknowledging that ventilation fans, dewatering boreholes, and electrical substation are used and necessary for active mining).

The Executive Director is not persuaded by Mountain Coal's contention that when finding its activities were included under Subsection (B), the ALJ ignored testimony about what does not take place, and what is not present, at the Sylvester Gulch Facilities Area. Because the list in subsection (B) is open-ended, evidence that the stormwater discharge is not associated with the listed activities—such as manufacturing or waste material—is not dispositive. *See Nat. Res. Def. Council, Inc. v. EPA*, 966 F. 2d 1292, 1304 (9th Cir. 1992) (“[T]he language ‘discharges associated with industrial activity’ is very broad. The operative word is ‘associated.’ It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.”). The Executive Director thus concludes that the ALJ's rationale does not fail on this basis.

The Executive Director also rejects Mountain Coal's contention that the Sylvester Gulch Outfalls are in an “area located on plant lands separate from the plant's industrial activities” excluded under subsection (C). As discussed, the facilities in the Sylvester Gulch Facilities Area are part of and thus not separate from the Mine's industrial activities. *See Reg. 61.3(2)(e)(ii)(C); see also Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1304 (9th Cir. 1992) (“[T]he examples given—parking lots and administrative buildings—indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.”).

For the foregoing reasons, the Executive Director determines that the ALJ's conclusion—that the Sylvester Gulch flows are associated with industrial activity—is supported by substantial record evidence and a reasonable interpretation of the law.

As to Outfall 35 at the main mine site, having concluded above that Findings of Fact ¶¶101-103 in the Initial Decision are supported by the weight of the evidence in the record, the Executive Director adopts the ALJ's rationale and discussion and concludes that the stormwater flows to Outfall 35, located in a ditch at the end of the driveway for the train loadout area, *see* Initial Decision, Finding of Fact ¶99, are associated with industrial activity.

2. The Contested Outfalls are not exempt from permitting under Regulation 61.3(2)(c).

Mountain Coal challenges the ALJ's determination that the stormwater flows to the Contested Outfalls have contact with overburden or coal products such that the exemption contained in Regulation 61.3(2)(c)⁷ does not apply. Mountain Coal contends that the ALJ incorrectly interpreted the language of Regulation 61.3(2)(c) and that the exemption applies because the stormwater flows are not contaminated by contact with overburden or coal products. Mountain Coal also asserts that the stormwater flows do not have contact with overburden or coal products. The Executive Director rejects these arguments and concludes that the ALJ's determination is based on a reasonable interpretation of Regulation 61.3(2)(c) and supported by substantial record evidence.

⁷ *See* 5 Code of Colo. Regs. § 1002-61, Reg. 61.3(2)(c); *see also* 33 U.S.C. § 1342(l)(2).

Regulation 61.3(2)(c) exempts from permitting outflows that are not contaminated by contact with or do not have contact with overburden or coal products:

The Division may not require a permit for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and *which are not contaminated by contact with or that have not come into contact with*, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

Code of Colo. Regs. § 1002-61, Reg. 61.3(2)(c) (emphasis added). Under the plain language of Regulation 61.3(2)(c), the exemption does not apply if stormwater runoff is either contaminated by or has contact with overburden or coal products. *See also* H.R. Rep. No. 99-189 at p. 37 (July 2, 1985) (exemption designed for situations where stormwater runoff is diverted around mining operations to avoid contact and, thus, contamination by process water or materials).

The Executive Director is not persuaded by Mountain Coal's arguments interpreting Regulation 61.3(2)(c) to the contrary. The Executive Director concludes that the ALJ correctly interpreted the word "or," as it is used in the regulation, in the disjunctive. *See People v. Pellegrin*, 2021 COA 118, ¶ 69 (1A Norman J. Singer & Shambie Singer, Sutherland Statutory Construction § 21:14, Westlaw (7th ed. database updated Nov. 2020) ("[W]hen the word 'or' is used in a statute, it is presumed to be used in the disjunctive sense, unless legislative intent is clearly to the contrary."); *see also* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47991, 48032 (Nov. 16, 1990) (replacing contamination with contact as the trigger to require permits: "[A] permit application will be required when discharges of storm water runoff from mining operations come into contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site.").

The Executive Director also determines that substantial record evidence supports the ALJ's determination that the stormwater flows to the Sylvester Gulch Outfalls have contact with overburden. "Overburden" is defined as "any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations." 5 Code of Colo. Regs. § 1002-61, Reg. 61.2(71). Thus, overburden includes ground disturbed by mining operations where that ground overlies a mineral deposit. *See also* National Pollutant Discharge

Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47991, 48033 (Nov. 16, 1990) (the definition of “overburden” is “designed to exclude undisturbed lands from permit coverage as industrial activity”).

Here, it is undisputed that the ground was disturbed to build the road and facilities in the Sylvester Gulch Facilities Area that support mining operations at the West Elk Mine. *See* Initial Decision, Findings of Fact ¶¶ 64-98. Additionally, the Sylvester Gulch Facilities Area is located over the E-Seam, a fact substantiated by the record as discussed above. *See* Initial Decision, Finding of Fact ¶50. Therefore, the Executive Director determines that stormwater flowing over the disturbed ground in the Sylvester Gulch Facilities Area to the Sylvester Gulch Outfalls has contact with overburden and, thus, the exemption does not apply.

As to Outfall 35 at the main mine site, having concluded above that Findings of Fact ¶¶101-103 in the Initial Decision are supported by the weight of the evidence in the record, the Executive Director adopts the ALJ’s rationale and discussion and concludes that the stormwater flows to Outfall 35, located in a ditch at the end of the driveway for the train loadout area, *see* Initial Decision, Finding of Fact ¶99, are not exempt under Regulation 61.3(2)(c).

3. The Contested Outfalls are properly subject to the ELGs and WQBELs.

Mountain Coal contests the ALJ’s determination that the effluent limitations in the EPA’s Effluent Limitation Guidelines (ELGs) and Colorado’s Water Quality-based Effluent Limitations (WQBELs) apply to the Contested Outfalls. The Executive Director rejects this challenge and concludes that the ALJ’s

determinations that the Subpart B ELGs apply to Outfall 35 and the Subpart D ELGs apply to the Sylvester Gulch Outfalls are supported by substantial evidence and a reasonable basis in the law.

Generally, the Subpart B ELGs apply to discharges from coal preparation plants and coal preparation plant association areas. 40 Code of Fed. Regs. § 434.20.⁸ The Subpart D ELGs apply to “mine drainage from an active mining area resulting from the mining of coal of any rank.” 40 Code of Fed. Regs. § 434.40. An “active mining area” is defined as “the area, on and beneath land, used or disturbed in activity related to the extraction, removal, or recovery of coal from its natural deposits,” excluding “coal preparation plants, coal preparation plant associated areas and post-mining areas.” 40 Code of Fed. Regs. § 434.11(b).

Because it is undisputed that coal products from the preparation plant are transported to the train loadout area by conveyor where they are loaded for transit to a consuming facility, *see* Initial Decision, Finding of Fact ¶100, Discussion, p. 19, the Executive Director agrees with the ALJ’s determination that the train loadout area is associated with the coal preparation plant. Because stormwater flows from the train loadout area to Outfall 35, a fact substantiated by the record as discussed above, *see* Initial Decision, Finding of Fact ¶103, the Executive Director adopts the ALJ’s analysis and conclusion that the flows discharged through Outfall 35 are subject to the Subpart B ELGs.

⁸ *See also* 5 Code of Colo. Regs. § 1002-62, Reg. 62.4(2) (Federal ELGs to be applied).

Likewise, Executive Director adopts the ALJ's analysis and conclusion that the flows discharged through the Sylvester Gulch Outfalls are subject to the Subpart D ELGs. First, the Executive Director agrees with and adopts the ALJ's analysis and determination that the Sylvester Gulch Outfalls are in an active mining area. The Executive Director further determines that the flows through the Sylvester Gulch Outfalls are mine drainage. *See* 40 Code of Fed. Regs. § 434.1(h) (mine discharge is any drainage from an active mining area). Additionally, because the facilities in the Sylvester Gulch area support the mining of coal, the Executive Director concludes that the drainage into the Sylvester Gulch Outfalls results from the mining of coal.

Given the foregoing conclusions, the Executive Director concludes that the Contested Outfalls are properly subject to the Subpart B and Subpart D ELGs and, for the same reason, rejects Mountain Coal's contention that Outfalls 25, 26, 27, 30, 32, 34, and 35 are not subject to the WQBELs.

D. The Division was not required to consider economic reasonableness before including the Contested Outfalls in the renewal permit.

Mountain Coal contends that the Division was required to consider economic reasonableness before including the Contested Outfalls in the renewal discharge permit. Mountain Coal argues that (1) the legislative declaration in the Colorado Water Quality Control Act created a requirement to consider economic reasonableness prior to issuing each permit and (2) the presumption of economic reasonableness in Regulation 61.11(a)⁹ is not applicable. For the reasons stated in

⁹ 5 Code of Colo. Regs. § 1002-61, Reg. 61.11(a).

the ALJ's analysis and conclusions on these points, the Executive Director concludes that the Division had no legal obligation to consider economic reasonableness at this stage before including the Contested Outfalls in the permit.

E. The Division has jurisdiction over the flows from the Contested Outfalls.

The Executive Director rejects Mountain Coal's challenge to the ALJ's conclusion that the Division, rather than the Colorado Division of Reclamation, Mining, and Safety (DRMS,) has jurisdiction over the flows from the Contested Outfalls. The Division's authority to issue discharge permits is expressly granted in section 25-8-202(7)(b)(I). Given the conclusions above that the flows from the Contested Outfalls are "point source discharges to surface waters of the state affected by such discharges" under Regulation 61.3(2), they are not "other activities" regulated by DRMS for the purposes of subsection 25-8-202(7)(b)(II).

IV. ORDER

Subject to the modifications and discussion above, the Executive Director adopts and incorporates the Initial Decision, including all Findings of Fact and Conclusions of Law. For the reasons stated above, the Executive Director affirms the terms and conditions of the stormwater discharge renewal permit.

DONE and ORDERED this 7th day of November 2022.

FOR THE EXECUTIVE DIRECTOR



Ann Hause, Director
Office of Legal and Regulatory Compliance

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **FINAL AGENCY ORDER** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this **9th** day of **November**, 2022, addressed as follows, and by electronic mail to the electronic mail addresses as follows:

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| STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203 | ▲ COURT USE ONLY ▲ | |
| MOUNTAIN COAL COMPANY, LLC, Petitioner, v. COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, WATER QUALITY CONTROL DIVISION, Respondent, And CENTER FOR BIOLOGICAL DIVERSITY, WILDEARTH GUARDIANS, HIGH COUNTRY CONSERVATION ADVOCATES, and SIERRA CLUB, Intervenors. | | |
| INITIAL DECISION | | |

Petitioner appeals portions of the August 30, 2019 discharge permit issued by the Water Quality Control Division of the Colorado Department of Public Health and Environment (Division). The hearing was held May 17 through 20, 2021, before Administrative Law Judge (ALJ) Heidi L. Kutcher by video conferencing via Google Meets. Assistant Attorney General, Stefanie Neale, Esq., represented the Division. Respondent. Mountain Coal Company, LLC (MCC) was represented by Gabe Racz, Esq. and Justine C. Beckman, Esq. of Vranesh and Raisch, LLP. The Intervenors, Center for Biological Diversity, WildEarth Guardians, High Country Conservation Advocates, and Sierra Club (Conservation Groups) were represented by Allison Melton, Esq. and Daniel Timmons, Esq.

The parties stipulated to the admissibility and the Court admitted exhibits JE 1-10, JE 12-27, JE 29-31, JE 33-38, and JE 56-95. At hearing, the Division offered and the Court admitted exhibits D 8, D 14-15, and D 20 (except tab labeled 25235). The Division also offered and the Court admitted exhibit D 19, which is subject to a protective order. MCC offered and the Court admitted exhibits M 32, M 35, M 46 – 47,

M 50 – 52, M 54 – 55, M 58, M 60, M 67, M 70, M 75, M 80 – 81, M 92 - 94, M 115, M 139, M 146, M 164 – 166, and M 168- 170. MCC offered exhibits M 3, M 116, and M 154 but the Court did not admit them. Exhibits JE 28, JE 43, JE 46 (pages 1-4 only), JE 48 and JE 96 were admitted into evidence at hearing. Margaret “Poppy” Staub, Jeffrey Kurtz, and Peter Kowalewski testified as expert witnesses on behalf of MCC. Kathleen Rosow testified as an expert witness on behalf of the Division. The hearing was digitally recorded.

Case Summary

MCC appeals portions of the discharge permit issued by the Division on August 30, 2019.¹ The Division transmitted the appeal to this Court on June 12, 2020 with two identified issues. The Initial Decision is limited in scope to the Issues transmitted by the Division on June 12, 2020 and have been restated below. The Court has no jurisdiction to address any other issues in the Initial Decision.

Issues

Whether the Division violated any applicable laws and regulations when it required a discharge permit for Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 because: i) Outfalls 25, 26, 27, 30, 32, 33, 34, and 035 are not point source discharges to a state surface water, ii) Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 fall under the permitting jurisdiction of DRMS; or iii) the Division failed to take into account the economic reasonableness or environmental benefits of including Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 in the permit, contrary to the requirements of the Water Quality Control Act.

Whether the Division violated any applicable laws and regulations when it included effluent limitations and monitoring for Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 because these are not outfalls, but if they were, they would be stormwater.

For reasons explained below, the ALJ concludes by a preponderance of the evidence that the Division did not violate any applicable statute or regulation when it included Outfalls 25, 26, 26, 30, 32, 33, 34, and 35 in the August 30, 2019 discharge permit. The ALJ further concludes by a preponderance of the evidence the Division did not violate any applicable statute or regulation when it included effluent limitations and monitoring for Outfalls 25, 26, 26, 30, 32, 33, 34, and 35 in the August 30, 2019 discharge permit. Accordingly, the ALJ concludes Outfalls 25, 26, 26, 30, 32, 33, 34, and 35 are to remain in the permit with the designated effluent limitation standards and monitoring requirements.

¹ Since the Division issued the August 30, 2019 discharge permit, it has been in consultation with MCC and issued four modifications to the permit, the last of which was on December 31, 2020. None of the modifications alter the two issues identified for this matter. The Court will refer to the August 30, 2019 discharge permit since the request for administrative hearing was based on the August 30, 2019 permit.

Findings of Fact

Stipulated Facts

1. MCC is a Delaware limited liability company authorized to do business in Colorado.
2. MCC operates the West Elk Mine.
3. The West Elk Mine is located at 5174 Highway 133 in Somerset, Gunnison County, Colorado.
4. The West Elk Mine is an active underground coal mine.
5. The Division is the Water Quality Control Division within the Colorado Department of Public Health and Environment, an administrative agency of the State of Colorado.
6. The Conservation Groups are 501(c)(3) non-profit corporations that have members, staff, offices, and/or are based in Colorado.
7. On September 29, 1982, the Division issued CDPS Permit No. CO0038776 to MCC for the West Elk Mine.
8. On April 21, 1995, the Division issued renewal CDPS Permit No. CO0038776.
9. On November 18, 1999, MCC submitted an application requesting renewal of CDPS Permit No. CO0038776.
10. CDPS Permit No. CO0038776 was administratively extended on April 30, 2000.
11. On April 19, 2004, the Division issued renewal CDPS Permit No. CO0038776.
12. On November 26, 2008, MCC submitted an application requesting renewal of CDPS Permit No. CO0038776.
13. CDPS Permit No. CO0038776 was administratively extended on May 31, 2009.
14. In September 2018, the Division requested information from MCC about its site, and requested a site visit.
15. On October 22, 2018, the Division performed a site visit of the West Elk Mine.
16. On May 10, 2019, the Division publicly noticed a draft renewal permit, fact sheet, and water quality assessment (WQA) for CDPS Permit No. CO0038776.
17. On July 10, 2019, MCC submitted comments to the draft CDPS Permit No. CO0038776.
18. On August 30, 2019, the Division issued the renewal permit, fact sheet, and water quality assessment for CDPS Permit No. CO0038776, effective October 1, 2019.

19. The August 30, 2019, renewal permit for CDPS Permit No. CO0038776 lists as outfalls features designated Outfalls 025, 026, 027, 030, 032, 033, 034, and 035.

20. The features permitted as Outfalls 025, 026, 027, 030, 032, 033, and 034 are located in the Sylvester Gulch Facilities Area of the West Elk Mine site.

21. The feature permitted as Outfall 035 is located along the driveway near the Train Load-Out area at the main West Elk Mine site.

22. The feature identified in Permit No. CO0038776 as Outfall 035 conveys stormwater runoff that flows to the North Fork of the Gunnison River.

23. Flows that reach the feature identified in Permit No. CO0038776 as Outfall 025 include "Stormwater only from Drainage Basin 49A4 & 47B; undisturbed/native lands with a short segment of graveled road and the Sly Gulch fan building and pad."

24. Flows that reach the feature identified in Permit No. CO0038776 as Outfall 026 include "Stormwater only from Drainage Basin 49A3; undisturbed/native lands with a short segment of graveled road and revegetated subsoil stockpile."

25. Flows that reach the feature identified in Permit No. CO0038776 as Outfall 027 include "Stormwater only from Drainage Basin 49A2; undisturbed/native lands with a short segment of graveled road, revegetated subsoil stockpile and electrical substation."

26. Flows that reach the feature identified in Permit No. CO0038776 as Outfall 030 include "Stormwater only from Drainage Basins 46B1 & 46B2; undisturbed/native lands with a short segment of graveled road, a portion of topsoil pile #4 and the dewatering borehole building and pad"

27. Flows that reach the feature identified in Permit No. CO0038776 as Outfall 032 include "Stormwater only from Drainage Basins 43A & 43F; undisturbed/native lands with a short segment of graveled road and a portion of the shaft #3 fan building and pad."

28. Flows that reach the feature identified in Permit No. CO0038776 as Outfall 033 include "stormwater only from Drainage Basins 43D & 43E; undisturbed/native lands with a short segment of revegetated two-track road and a portion of the shaft #3 fan building and pad."

29. The August 30, 2019 renewal permit for Permit No. CO0038776 applied numeric effluent limitations to Outfalls 025, 026, 027, 030, 032, 033, 034, and 035.

30. On October 31, 2019, the Division issued Modification #1 to CDPS Permit No. CO0038776.

31. No party challenged Modification #1.

32. On December 17, 2019, the Division issued Modification #2 to CDPS Permit No. CO0038776.

33. No party challenged Modification #2.

34. On April 28, 2020, the Division issued Modification #3 to CDPS Permit No. CO0038776.

35. MCC installed half-culverts at several of the Contested Outfalls to facilitate the sampling required by the March 2020 settlement agreement and Modification #3.

36. No party challenged Modification #3.

37. On December 31, 2020, the Division issued Modification #4 to Permit No. CO0038776.

38. No party challenged Modification #4.

Additional Findings of Fact – Previous Legal Proceedings involving the same permit

39. On August 30, 2019, the Division issued a final renewal permit to MCC for the West Elk Mine in Gunnison County, CDPS Permit No. CO0038776, authorizing discharges to the North Fork of the Gunnison River, Sylvester Gulch, and other state waters.

40. On September 27, 2019, MCC filed a request for an administrative hearing for a number of terms and conditions in CDPS Permit No. CO0038776 under the Colorado Discharge System Permitting Regulations, 5 CCR 1002-61, Regulation 61.7(a).

41. The Division issued a hearing order on October 7, 2019 granting MCC's hearing request in part.

42. On the same day that MCC submitted its Request for Hearing to the Division, MCC filed suit against the Division in the District Court for Gunnison County.

43. On October 23, 2019, MCC amended and supplemented its District Court Complaint, such that MCC now sought judicial review of the Division's partial denial of MCC's Request for Hearing and a judicial stay of all contested permit terms and conditions.

44. On March 3, 2020, the Division and MCC agreed to a partial settlement pursuant to which MCC was to seek a permit modification and, if that modification was finally issued, to withdraw its request for an administrative hearing as to all but two of the claims set out in its original Request for Hearing. Specifically, the parties agreed that MCC would withdraw its Request for Hearing except for its request for an administrative adjudicatory hearing on the following permit terms and conditions, upon the stated grounds:

1. "Whether the Division violated any applicable laws and regulations when it required a discharge permit for [Outfalls 025, 026, 027, 030, 032, 033, 034, and 035] because: i) [Outfalls 025, 026, 027, 030, 032, 033, 034, and 035] are not point source discharges to a state surface water; ii) [Outfalls 025, 026, 027, 030, 032, 033, 034, and 035] fall under the permitting jurisdiction of DRMS; or iii) the Division failed to take into account the economic reasonableness or environmental benefits of including [Outfalls 025, 026, 027, 030, 032, 033, 034, and 035] in the permit, contrary to the requirements of the [Water Quality Control Act]." Hearing Order ¶ 39.A.

2. “Whether the Division violated any applicable laws and regulations when it included effluent limitations and monitoring for [Outfalls 025, 026, 027, 030, 032, 033, 034, and 035] because these are not outfalls, but if they were, they would be stormwater.” *Id.*

Additional Findings of Facts

45. On October 13, 2020, the Conservation Groups requested party status pursuant to 5 C.C.R. 1002-21.4(D) and Colo. Rev. Stat. Section 25-8-401(2).

46. On November 2, 2020, after considering the Parties fully briefed positions, the Court granted the Conservation Groups party status in this matter.

47. The West Elk Mine is a coal mine removing coal eight miles underground.

48. The West Elk Mine has identified three coal seams, which are layered over each other separated by non-coal layers. F Seam is the top layer. E Seam is the middle layer. B Seam is the bottom layer.

49. The West Elk Mine is located in a mountainous, semiarid area that receives little precipitation.

50. Outfalls 25, 26, 27, 30, 32, 33, and 34 are located in an area referred to as Sylvester Gulch, which is over coal seam identified as E Seam.

51. Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 were in existence at the time of the 1999 renewal permit application.

52. The F Seam is accessed in another area of the West Elk Mine and has the main tunnel used by people and equipment to remove the coal from all of the seams.

53. Removed coal does not travel on the road (Sylvester Gulch haul road) located adjacent to Outfalls 25, 26, 27, 30, 32, 33, and 34.

54. The West Elk Mine has not started the process of reclamation and has not requested nor received back any of its bond.

55. MCC’s 1999 permit application item 28 “Stormwater Discharges” states “The Division is in receipt of this information – the requirement [is] waived by the Division, November 16, 1999.” Ex. JE 96.

56. MCC’s 1999 permit application includes maps of the West Elk Mine. Ex. JE 96 pp. 51 – 59.

57. The Sylvester Gulch haul road was constructed by MCC to gain access to the Sylvester Gulch area and used during the construction and on-going maintenance of the facilities located on the Sylvester Gulch haul road. The facilities along the Sylvester Gulch haul road include several fan buildings providing ventilation for the underground mining operations, an electrical substation providing power to the underground mining operations, dewatering stations providing water removal from the underground mining operations, and storage of equipment.

58. Without the facilities along Sylvester Gulch haul road, the West Elk Mine would not be able to safely or effectively operate.

59. The West Elk Mine is Standard Industrial Classification of 12.

60. The Environmental Protection Agency (EPA) develops Effluent Limitation Guidelines (ELGs) to set national standards for specific industrial categories, including coal mining operations. In developing the ELGs, the EPA, consistent with the requirements in the Clean Water Act (CWA), considers the nature of the industry, the best available technology, and conducts an analysis, which includes economic reasonableness prior to setting the ELGs.

61. Water Quality Based Effluent Standards (WQBELs) are effluent levels established by the State of Colorado in accordance with 5 C.C.R. Section 1002-31 and 1002-41.

62. The ELGs for coal mines are located in 40 C.F.R. Section 434.

63. Kathleen Welt testified on behalf of MCC that each time there is a rain event and MCC must conduct monitoring of the stormwater, it takes several employees all day to collect the required samples from each of the outfalls and the costs of gathering, packaging, and testing the samples each time is in the thousands of dollars range.

Additional Findings of Facts – Outfall 25

64. Outfall 25 is a ditch located on the side of the Sylvester Gulch haul road with a metal half culvert. Exs. JE 61-63.

65. Upstream from Outfall 25 is a fan building constructed by MCC by cutting into a rock outcropping and removing topsoil to level the ground. Exs. JE 64-65.

66. The fan building supports the mining operations by providing ventilation and exhaust from inside the mine. The fan is needed to support a safe and healthy environment for the mine workers and if it malfunctions, the mining must stop operating.

67. The fan building sits on a foundation pad.

68. The area around the fan building has gravel not from the area, over the area where the topsoil was removed in order to build the fan building.

69. The Sylvester Gulch haul road runs along the fan building and water flows from the hillside, around the fan building, and down the road and ditch to Outfall 25, which continues until it reaches Sylvester Gulch riverbed.

Additional Findings of Facts – Outfall 26

70. Outfall 26 is in a ditch with a metal half culvert that moves water under the Sylvester Gulch haul road to a catch basin with another culvert directing water further downstream. Exs. JE 67 – 71.

71. The area around Outfall 26 has been revegetated and large rocks and boulders are located where topsoil was removed to create the ditch and catch basin. Exs. JE 67 – 71.

72. On the opposite side of the Sylvester Gulch haul road from Outfall 26 is a subsoil stockpile created when soil was removed from other areas along the road to level areas for buildings, including for the electrical substation and mine dewatering borehole, which are used for the operation of the mine. Ex. M-165.

73. The subsoil stock pile will be used in the reclamation process when the mine ceases operation.

74. Water flows over the subsoil pile through the culvert for Outfall 26.

75. Water from Outfall 26 continues until it reaches Sylvester Gulch riverbed.

Additional Findings of Facts – Outfall 27

76. Outfall 27 is a ditch with a metal culvert that directs water under the Sylvester Gulch haul road to the Sylvester Gulch riverbed. Exs. JE 72-73.

77. Upstream from Outfall 27 is an electrical substation used to power the systems used in the mining process.

78. Water flows from the same subsoil pile near Outfall 26 into the culvert for Outfall 27.

79. The area for the electrical substation was leveled by removing topsoil and placing gravel obtained from outside the area. The area is also used to store new equipment for use by MCC in mining operations. Exs. JE 74 – 77.

80. The electrical substation is used to power the underground mining and without the power, the mining operation would not be efficient or cost effective as it would be reliant on manpower to extract and transport the coal from the mine.

81. Water from Outfall 27 continues until it reaches Sylvester Gulch riverbed.

Additional Findings of Facts – Outfall 30

82. Outfall 30 consists of two sets of metal half culvert in a ditch that allows water to flow along Sylvester Gulch haul road. Exs. JE 78 – 81.

83. Around the ditch and culverts is revegetated land and rocks to slow the water flow and assist against erosion. Ex. JE 78-81.

84. Outfall 30 is below an area of the hillside flattened to accommodate two buildings: 1) a quonset hut that serves as temporary storage for new equipment used in the mining operations and 2) a building housing the dewatering borehole used in the mining operation. Ex. JE 78.

85. The dewatering borehole is used in case the mine needs to remove water quickly from the mine in an emergency.

86. The flattened area was achieved by removing topsoil, leveling the ground, and adding the buildings and gravel over top.

87. Water flows over the flattened area for the buildings and down a hill to the ditch to Outfall 30.

88. Water from Outfall 30 continues until it reaches Sylvester Gulch riverbed.

Additional Findings of Facts – Outfall 32

89. Outfall 32 is a metal half culvert located in a ditch along Sylvester Gulch haul road located below the road to fan building 3. Exs. JE 82 – 83.

90. Fan shaft 3 building is located in an area leveled by removing topsoil. The area consists of a level graveled area, a building to house fan shaft 3, and a topsoil stock pile in the process of being revegetated. Exs. JE 84 – 86; M186.

91. The fan shaft 3 building sits on a foundation pad.

92. The fan is currently idle, but fresh air still goes into the mine to support the mining operations underground.

93. The area behind the building consists of a cut slope where the various layers of rock making up the hillside have been exposed and “benches” were created to slow the flow of water. The flat area of the benches has been revegetated.

94. Water from Outfall 32 continues until it reaches Sylvester Gulch riverbed.

Additional Findings of Facts – Outfalls 33 & 34

95. Outfalls 33 and 34 are two full metal culverts that direct water under Sylvester Gulch haul road and empty to the same catch basin where water is comingled. Ex. JE 87.

96. Upstream from Outfall 34 is a natural spring that runs through revegetated land that was affected by the building of Sylvester Gulch haul road.

97. Upstream from Outfall 33 and 34 is the fan shaft 3 building area to the topsoil stockpile.

98. Water from Outfalls 33 and 34 combine before water continues to the Sylvester Gulch riverbed.

Additional Findings of Facts – Outfall 35

99. Outfall 35 is located in a ditch at the end of the driveway for the train loadout area. Exs. JE 88 – 91.

100. The train loadout area consists of two sets of railroad tracks, a retaining pond for most water run-off (permitted outfall 8 pond under Subpart B), and a tall building that accepts the enclosed conveyor belt transporting coal, and the mechanism used to put the finished coal into the trains.

101. Coal fines from the train loadout area are visibly present in the ditch along the driveway leading to Outfall 35. Ex. JE 93

102. Coal fines from the train loadout area are visibly present at the top of the driveway leading to Outfall 35. Ex. JE 94.

103. Water flows in the ditch along the driveway to Outfall 35 before flowing across the highway into the north fork of the Gunnison River. Ex. JE 93.

Discussion and Conclusions of Law

Congress enacted the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (CWA), “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. Section 1251(a). The CWA tasks the Environmental Protection Agency (EPA) to

in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes.

Id. at Section 1252(a). In order to accomplish its purpose, the CWA works to restrict the kinds and amounts of pollutants from industrial and other activities into the nation’s waters through the issuance of permits that set effluent limitation guidelines (ELG) based on technology-based discharge limits. *See generally, id. at Sections 1251(a); 1342-46.*

The CWA allows for a state to be designated as the authority to review and issue permits. *Id.* at Section 1342(b). In 1975, the EPA delegated authority to the State of Colorado to implement the Clean Water Act, within its borders, with a Memorandum of Agreement (MOA) receiving its final signature on March 27, 1975. <https://www.epa.gov/sites/default/files/2013-09/documents/co-moa-npdes.pdf> (last visited Aug. 5, 2021). In the MOA, a permit is required to contain maximum and average ELG levels for discharges and the State is required to monitor, record, inspect and report regarding the implementation of the permits it issues to ensure compliance with the CWA and its current implementing regulations. *Id.*

Congress amended the CWA in 1987 to address stormwater discharges. The revisions “clarified and amended the requirements for permits for stormwater discharges in the new CWA Section 402(p)(3). The Act clarified that permits for discharges associated with industrial activity must meet all of the applicable provisions of section 402 and section 301 including technology and water quality-based standards.” 55 Fed. Reg. 47,990, 47992-93. (Nov. 16, 1990).

Additionally, the General Assembly enacted the Water Quality Control Act (WQCA) in 1987 in order to

conserve state waters and to protect, maintain, and improve, where necessary and reasonable, the quality thereof for public water supplies, for protection and propagation of wildlife and aquatic life, for domestic, agricultural, industrial, and recreational uses, and for other beneficial uses, taking into consideration the requirements of such uses; to provide that no pollutant be released into any state waters without first receiving the treatment or other corrective action necessary to reasonably protect the legitimate and beneficial uses of such waters; to provide for the prevention, abatement, and control of new or existing water pollution; and to cooperate with other states and the federal government in carrying out these objectives.

Colo. Rev. Stat. Section 25-8-102(2). The General Assembly further declared the agencies designated in the act “shall be the final authority in the administration of water pollution prevention, abatement, and control.” *Id.* at Section 102(4). The Water Quality Control Commission (Commission) was established in the WQCA and specified the Water Quality Control Division of the Colorado Department of Public Health and Environment (Division) to be “solely responsible for the issuance and enforcement of permits authorizing point source discharges to surface waters of the state affected by such discharges.” Colo. Rev. Stat. Section 25-8-202(7)(b)(I).

The Commission’s regulations for implementation and requirements for permits are found at 5 C.C.R. Section 1002-61 *et. seq.* See Colo. Rev. Stat. Section 25-8-501(3); see also Colo. Rev. Stat. Section 24-4-103. The Division is responsible for issuing permits and renewal of permits for stormwater discharged from point sources into state waters. Colo. Rev. Stat. Section 25-8-501; 5 C.C.R. Section 1002-61.3(1)(a). The Division has jurisdiction over the permit in question and the matters related to this proceeding. 5 C.C.R. Section 1002-61.3(2). On August 30, 2019, the Division issued the final discharge permit for West Elk Mine. On September 27, 2019, MCC requested an administrative hearing pursuant to 5 C.C.R. Section 1002-61.7(a). Subsequently, MCC filed a matter in the District Court of Gunnison County challenging the August 30, 2019 discharge permit. MCC and the Division engaged in discussions that resulted in four modifications to the August 31, 2019 permit, the last of which was implemented on December 31, 2020. The Division transmitted two remaining issues for administrative hearing on June 12, 2020 pursuant to 5 C.C.R. Section 1002-61.7(a).

Burden of Proof

MCC seeks to shift the burden of proof to the Division and asserts that the Division had sufficient information prior to the 2019 permit renewal to identify the contested outfalls and thus, the addition of the contested outfalls is not based on significant changes in facts or new changes to applicable statutes and regulations. MCC first sought to shift burden to Division in its Motion for Determination of a Question of Law as to Burden of Proof filed on February 27, 2021. The party that bears the burden of proof is established in the regulation states:

The person requesting the adjudicatory hearing shall have the burden of proof in all hearings held pursuant to this section, except that the Division shall have the burden of proof under the following circumstances:

- (i) Where the Division initiated the permit revocation or modification; and
- (ii) Where the Division denies renewal of a permit or changes the terms of a renewed permit and that denial or change is not based either upon significant changes in the facts relevant to water quality considerations or upon changes in the applicable statutes or regulations.

5 C.C.R. Section 1002-61.7(d). MCC requested the adjudicatory hearing. However, the question remained whether the Division's modification of the permit to include the contested outfalls was based on significant changes in facts or changes in the applicable statutes or regulations.

After the matter was fully briefed, the Court held a hearing May 11, 2021. After argument from the parties, the Court determined the Division did not have sufficient information to determine the contested outfalls could be point sources until its site visit in 2018, in which it gained significant new factual information. Therefore, the Court denied MCC's Motion, leaving the burden of proof with MCC.

At the hearing on May 17 through 20, 2021, MCC renewed its motion and indicated it had located a previously unfound copy of its 1999 renewal application. The Court took testimony and subsequently admitted Exhibit JE 96, the complete 1999 permit renewal application. The 1999 permit renewal application notes that the stormwater discharge information normally required as part of the application was waived by the Division. Consequently, the Division did not modify any of the previously determined stormwater discharge points. While there are several maps updated from previous applications of the West Elk Mine included in the 1999 permit renewal application, the Court is not persuaded that the new maps provided the Division with sufficient information to determine the identified discharges were point sources requiring permitting in 1999. Specifically, the culverts were identified, however, not all of the facilities and soil stockpiles are indicated and waterflow is not noted on the maps or elsewhere on the application. Additionally, since the Division waived the stormwater discharge portion of the 1999 permit renewal application, it is fair to conclude that the Division did not review the information specifically to determine whether new culvert markings were present and possible point sources.

Ultimately, the Court is unpersuaded that the Division knew the necessary facts to determine whether the identified outfalls could be point sources prior to its 2018 site visit, and therefore, maintains its decision to deny MCC's Motion for Determination of a Question of Law as to the Burden of Proof. The burden remains upon MCC as it is the party that requested the adjudicatory hearing.

*Contested Outfalls are Point Sources Associated with Industrial Activities
that Discharge Stormwater to State Waters*

The first issue for consideration is whether the contested outfalls are point sources associated with industrial activities requiring a permit for stormwater discharge. 5 C.C.R. Section 1002-61.3(2)(a) states “[e]xcept as noted in sections 61.3(2)(b) and (c), discharges of stormwater as set forth in 61.3(2) and 61.4(3) are point sources requiring a permit.” It further clarifies,

Stormwater Discharges for Which a Permit is Required - Phase I: The following discharges composed entirely of stormwater are required to obtain a permit. . . .

(ii) A stormwater discharge associated with industrial activity.

(A) “Stormwater discharge associated with industrial activity” means the discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.

5 C.C.R. Section 1002- 61.3(2)(e).

To determine whether the Outfalls require a permit, the Court must determine whether stormwater discharge flows through a (1) point source conveyance (2) in an area that is associated with industrial activity (3) into state waters.

Point Source

The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. See 33 U.S.C. Section 1362(14); 40 C.F.R. Section 401.11 (d); Colo. Rev. Stat. Section 25-8-103(14); and 5 CCR 1002-61.2 (75)

The ALJ concludes Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 are all either a discernible ditch or culvert meant to convey stormwater that may discharge pollutants and are not related to agricultural use.

Associated with Industrial Activity

The term “[s]torm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” 40 C.F.R. Section 122.26(b)(14)(iii).

The following categories of facilities are considered to be engaging in “industrial activity” for purposes of this subsection:

- (B) For the categories of industries identified in subparagraphs (iii)(A) through (K) of this subsection, the term “stormwater discharge associated with industrial activity” **includes, but is not limited to**, stormwater discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters; sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to stormwater.

5 C.C.R. 1002-61.3(2)(e)(ii)(B) (*emphasis added*).

- (C) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including **active** or **inactive** mining operations . . .; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator, inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

5 C.C.R. 1002-61.3(2)(e)(iii)(C) (*emphasis added*). The term “‘associated with industrial activity’ excludes areas located on plant lands separate from the plant’s industrial activities, such as office buildings and accompanying parking lots, as long as the drainage from the excluded areas is not mixed with stormwater drained from the above described areas.” 5 C.C.R. Section 1002.61.3(2)(e)(ii)(C).

MCC argues that Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 are not associated with industrial activity since the Sylvester Gulch area does not serve as an area that is directly related to the manufacturing, processing or raw materials storage of the coal since the coal is removed underground and exits through a different area of the mine never traveling along the Sylvester Gulch haul road. The Division argues that Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 are associated with industrial activity since the term is

defined broadly and the facilities along the Sylvester Gulch haul road directly support the extraction of the coal.²

The ALJ concludes Outfalls 25, 26, 27, 30, 32, 33, and 34 are associated with industrial activity directly related to the manufacturing or processing of coal. The activities that take place along the Sylvester Gulch haul road where Outfalls 25, 26, 27, 30, 32, 33, and 34 are located directly support the industrial part of the mining operations; without the electrical substation, the extraction of the coal would be impractical and not cost effective; without the ventilation fans, the human beings needed for the extraction of the coal could not be in the mine; without the dewatering boreholes, the mine could flood and coal could not be extracted or if used, would discharge water contaminated with coal. The facilities along the Sylvester Gulch haul road are industrial in nature and directly related to the manufacturing and processing of coal. The ALJ recognizes that the activities of the facilities along the Sylvester Gulch haul road are not specifically identified in 5 C.C.R. Section 1002-61.3(2)(e)(ii)(B), however, the regulation clearly states “including, but not limited to” and subsequently sets out a discrete limitation. The discrete limitation in the regulation of office buildings and parking lots clearly separates out activities/facilities that are not present amongst the facilities along the Sylvester Gulch haul road. Therefore, the ALJ concludes that Outfalls 25, 26, 27, 30, 32, 33, and 34 are associated with industrial activity directly related to the manufacturing and processing of coal.

The ALJ further concludes that Outfall 35 is associated with industrial activity directly related to the manufacturing, processing, or raw material storage since it is located just below the driveway for the train loadout area. The driveway of the trainload area clearly has coal fines surrounding the train tracks and spilling on and down the driveway, including the ditch along the side of the driveway ending in Outfall 35. The ALJ also notes that Outfall 8 in the train loadout area is not being contested and is subject to the discharge permit. Therefore, the ALJ concludes Outfall 35 is associated with industrial activity.

State Waters

Finally, the ALJ must determine whether Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 discharge the stormwater into state waters. State Water is defined as “any and all surface and subsurface waters which are contained in or flow in or through this State, but does not include waters in sewage systems, waters in treatment works of disposal systems, waters in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed.” 5 C.C.R. Section 1002-61.2 (102). Stormwater is defined as “stormwater runoff, snow melt runoff, and surface runoff and drainage.” 5 C.C.R. Section 1002-61.2 (103). It is uncontested that Outfalls 25, 26, 27, 30, 32, 33, 34 all direct stormwater discharge to the Sylvester Gulch riverbed that is

² “We note that the language ‘discharges associated with industrial activity’ is very broad. The operative word is “associated.” It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.” *NRDC v. E.P.A.*, 966 F. 2d 1292, 1304 (9th Cir. 1992).

then received by the north fork of the Gunnison at segment 6a. It is uncontested that Outfall 35 directs stormwater discharge to segment 2 of the north fork of the Gunnison River.

Therefore, the ALJ concludes that Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 require a stormwater discharge permit since they are each (1) point sources that (2) discharge stormwater associated with industrial activity directly related to the manufacturing, processing, or raw materials of coal mining (3) into state waters.

Exception

MCC argues that if Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 are found to require a permit, that an exception applies since the stormwater is not contaminated by and does not have contact with overburden and cites 5 C.C.R. Section 1002-61.3(2)(c). The Division argues that Outfalls 25, 26, 27, 30, 32, 33, and 34 have contact with overburden and Outfall 35 has contact with coal fines and thus, the exception does not apply. The regulation at 5 C.C.R. Section 1002-61.3(2) sets out several exceptions to permits for discharges of stormwater runoff for mining operations. The relevant exception states:

The Division may not require a permit for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

5 C.C.R. Section 1002-61.3(2)(c); See 40 C.F.R. Section 122.26(a)(2)(i).

First, MCC misstates the plain language of the regulation. The exception requires that stormwater is not contaminated by contact **OR** does not come into contact with overburden, raw material, intermediate products, finished products, byproduct or waste product located on the site of such operations. The Division does not advance the argument that Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 are in fact contaminated, but rather relies upon the contact portion of the regulation. Consequently, at issue here is whether the stormwater discharge from Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 comes in contact with overburden or coal products. The answer for Outfall 35 is a simple yes; the stormwater is in contact with finished or byproduct of coal as clearly evidenced by the presence of coal fines in the coal loadout area above Outfall 35 and along the driveway and ditch leading to Outfall 35.

As for Outfalls 25, 26, 27, 30, 32, 33, and 34, the question is whether the stormwater discharge has contact with overburden. The ALJ was presented with no

evidence of coal being present along the Sylvester Gulch haul road and thus will limit the discussion to contact with overburden. Overburden is defined as “any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.” 5 C.C.R. Section 1002-61.2 (71); 40 C.F.R. Section 122.26(b)(10). It is undisputed that Outfalls 25, 26, 27, 30, 32, 33, and 34 are located above the mineral deposit (Coal Seam E).

Outfall 25 receives stormwater that flows over an area where topsoil was removed, a fan building was built, and gravel was placed on top of the exposed area where topsoil was removed. The fan building supports the mining operation. The gravel is not an otherwise naturally occurring surface material since it is brought in from another location. Therefore, stormwater that flows to Outfall 25 has contact with overburden.

Outfalls 26 and 27 receives stormwater that flows over an area of subsoil storage, an area where topsoil was removed to place an electrical substation, and gravel was placed on top of the exposed area where topsoil was removed. The electrical substation supports the mining operation since it provides required electricity for the mine to function. The subsoil stockpile supports the mining operation by storing soil for later use when the mining operation ceases and the mine reclaims the land. The gravel is not an otherwise naturally occurring surface material since it is brought in from another location. Therefore, stormwater that flows to Outfalls 26 and 27 has contact with overburden.

Outfall 30 receives stormwater that flows over an area where topsoil was removed, a quonset hut and dewatering borehole were built, and gravel was placed on top of the exposed area where topsoil was removed. The buildings support the mining operation by storing equipment until needed in the mine and the dewatering borehole is available for use in an emergency if the mine floods. The gravel is not an otherwise naturally occurring surface material since it is brought in from another location. Therefore, stormwater that flows to Outfall 30 has contact with overburden.

Outfalls 32, 33, and 34 receive stormwater that flows over an area where topsoil was removed, a fan building was built, the hillside was cut, subsoil is stored, and gravel was placed on top of the exposed area where topsoil was removed. The fan building supports the mining operation by providing needed air to the miners. The subsoil stockpile supports the mining operation by storing soil for later use when the mining operation ceases and the mine reclaims the land. The gravel is not an otherwise naturally occurring surface material since it is brought in from another location. Therefore, stormwater that flows to Outfalls 32, 33, and 34 have contact with overburden.

MCC argues that its efforts to revegetate the land where topsoil was disturbed and to add gravel means that the stormwater does not have contact with overburden. The ALJ disagrees. The revegetation and addition of gravel are well established and

accepted best management practices (BMPs) that are used to mitigate the effects from disturbing the topsoil. The use of the BMPs are to assist with preventing erosion and to minimize the release of soil contaminants and by their very use, bolster the fact that the topsoil has been disturbed and is not naturally occurring.

Therefore, the ALJ finds that Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 do not qualify for the exception in 5 C.C.R. Section 1002-61.3(2)(c) since the stormwater discharge from all of those outfalls has contact with either overburden or coal products.

The Division must set Effluent Limitation Measures for Permitted Outfalls

MCC argues the Division should have included effluent limitation measures in the permit. Under the CWA, the EPA is charged with formulating and enforcing effluent limitations for water pollution point sources. The regulations implementing the ELGs for the Coal Mining Point Source categories for “discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated areas” are found at 40 C.F.R. Section 434. 40 C.F.R. Section 434.10. The application of the ELGs to stormwater discharge permits from Colorado are required by the CWA, the 1975 MOA (page 6), Colo. Rev. Stat. Section 25-8-304-305, and 5 C.C.R. Section 1002-62.4(2).

Effluent Limitation is defined as “any restriction or prohibition established under this article or Federal law on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into state waters, including, but not limited to, standards of performance for new sources, toxic effluent standards and schedules of compliance.” 5 C.C.R. Section 1002-61.2(26). The ELG requirements are categorized based on the type of area the stormwater is in contact with and associated activities of the coal mine. The applicable regulations for the contested outfalls in this matter are Subparts B and D. In addition to applying the Federal ELGs, the Division considered and applied the more stringent of either the Federal ELGs, or the Water Quality Based Effluent Limitations (WQBELs) which are effluent limitations developed by the Water Quality Commission regarding the specific needs of Colorado’s waterways.

The Division applied Subpart B ELGs to Outfall 35. Subpart B applies to discharges from coal preparation plants and coal preparation plant association areas, as indicated, including discharges which are pumped, siphoned, or drained from the coal preparation plant water circuit and coal storage, refuse storage, and ancillary areas related to the cleaning or beneficiation of coal of any rank including, but not limited to, bituminous, lignite, and anthracite.

40 C.F.R. Section 434.20. A “‘coal preparation plant’ means a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and this is loaded for transit to a consuming facility.” 40 C.F.R. Section 434.11(e). A “‘coal preparation plant associated areas’ means the

coal preparation plant yards, immediate access roads, coal refuse piles and coal storage piles and facilities.” 40 C.F.R. Section 434.11(f).

The ALJ concludes the Division correctly determined Subpart B applies to Outfall 35. Outfall 35 is located just below the train loadout area where Outfall 8 is also located. Outfall 8 is not being contested and the permit applies Subpart B to Outfall 8. The train loadout area is associated with the coal preparation plant as it is where coal is loaded for transit to a consuming facility.

Based on the information the Division had at the time the permit was drafted it applied Subpart D ELGs to Outfalls 25, 26, 27, 30, 32, and 33. Subpart D applies to “alkaline mine drainage from an active mining area resulting from the mining of coal of any rank including, but not limited to, bituminous, lignite, and anthracite.” 40 C.F.R. Section 434.40. “‘Alkaline, mine drainage’ means mine drainage which, before any treatment, has a pH equal to or greater than 6.0 and total iron concentration of less than 10 mg/l.” 40 C.F.R. Section 434.11(c). “‘Active mining area’ means the area, on and beneath land, used or disturbed in activity related to the extraction, removal, or recovery of coal from its natural deposits. This term excludes coal preparation plants, coal preparation plant associated areas and post-mining areas.” 40 C.F.R. Section 434.11(b).

The ALJ concludes that based on the information the Division had at the time the permit was drafted, the Division correctly determined Subpart D applies to Outfalls 25, 26, 27, 30, 32, and 33. Outfalls 25, 26, 27, 30, 32, and 33 are located in active mining areas since they are located along the Sylvester Gulch haul road where land were disturbed to construct facilities needed to support the mining activities occurring underground, including several fan buildings for needed ventilation, an electrical substation needed for mining operations, and dewatering boreholes needed for emergencies if the mine floods. Therefore, the ALJ concludes the Division correctly applied Subpart D ELGs for Outfalls 25, 26, 27, 30, 32, and 33.

The Division did not apply ELGs to Outfall 34 and does not seek to add it at this time. Therefore, the ALJ will not impose ELGs for Outfall 34.

Since the ALJ concludes that Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 should be included in the permit, the Division was required to apply effluent limitations on each outfall and the evidence demonstrates the Division, considering the information available at the time the permit was drafted, applied appropriate Federal ELGs to Outfalls 25, 26, 27, 30, 32, 33, and 35. There was some testimony regarding the addition of Water Quality Based Effluent Limitations (WQBEL) effluent limitations for metals that are not included in the Federal ELGs; however, the ALJ was not presented with sufficient evidence to accurately conclude which WQBEL standards were applied to Outfalls 25, 26, 27, 30, 32, 33, 34, and 35. The ALJ concludes MCC did not meet its burden of demonstrating that the Division acted in contradiction to any statute or regulation when it included WQBEL standards in the permit.

*The Division does not have to further consider Economic Reasonableness
prior to Issuing the Permit*

MCC argues the Division must consider economic reasonableness prior to issuing the permit and that it failed to do so. MCC contends that it has investigated what it believes to be the only option for how it can comply with the permit terms and the option is both costly to construct and will have greater environmental impact than leaving the areas as they currently are.

While at the hearing, MCC argued the Division failed to determine economic reasonableness prior to determining ELGs, however, the Issue transmitted for the hearing was:

Whether the Division violated any applicable laws and regulations when it required a discharge permit for Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 because: . . . or iii) the Division failed to take into account the economic reasonableness or environmental benefits of including Outfalls 025, 026, 027, 030, 032, 033, 034, and 035 in the permit, contrary to the requirements of the Water Quality Control Act.

MCC argue Colo. Rev. Stat. Section 25-8-102(5) requires the Division to consider economic reasonableness of the action. Colo. Rev. Stat. Section 25-8-102(5) states:

It is further declared that the general assembly intends that this article shall be construed to require the development of a water quality program in which the water quality benefits of the pollution control measures utilized have a reasonable relationship to the economic, environmental, energy, and public health costs and impacts of such measures, and that before any final action is taken, with the exception of any enforcement action, consideration be given to the economic reasonableness of the action. Such consideration shall include evaluation of the benefits derived from achieving the goals of this article and of the economic, environmental, public health, and energy impacts to the public and affected persons.

The legislative declaration cited by MCC clearly connects the requirement to consider economic reasonableness to the development of the water quality program. Since the Division was created in response to the WQCA, the ALJ will not interpret the legislative directive as a threshold requirement for the Division to issue all portions of a permit. However, statutory language regarding consideration of economic reasonableness specifically related to effluent levels does require the Division to consider economic reasonableness.

The Division set the Federal ELGs in Subpart B and Subpart D for Outfalls 25, 26, 27, 30, 32, 33, and 35. The Federal ELGs are technology-based effluents levels and the EPA considers economic reasonableness when determining the Federal ELGs.

In addition to the Federal ELGs, the Division has applied WQBELs to Outfalls 25, 26, 27, 30, 32, 33, 34, and 35. Consequently, the Court considered the regulation at 5 C.C.R. Section 1002-61.11(a), which states:

Where a permit requires treatment to levels necessary to protect water quality standards and beyond levels required by technology-based limitation requirements, only for the purpose of disclosure in the record of decision, the Division must determine whether or not any or all of the water-quality-standard based effluent limitations are reasonably related to the economic, environmental, public health, and energy impact to the public and affected persons, and are in furtherance of the policies set forth in sections 25-8-102 and 25-8-104, C.R.S. Where economic, environmental, public health, and energy impact to the public and affected persons have been considered in the classifications and standards process, permits written to meet the standards **may be presumed to have taken into consideration economic factors** unless:

- (i) A new permit is issued where the discharge was not in existence at the time of the classification and standards rulemaking, or,
- (ii) In the case of a continuing discharge, additional information or factors have emerged that were not anticipated or considered at the time of the classification and standards rulemaking.

(*emphasis added*); see also, Colo. Rev. Stat. Section 25-8-503(8). Therefore, the more stringent WQBEL standards, where applied, are presumed to have considered economic reasonableness unless 1) it is for a new permit where a discharge was not in existence at the time of classification and standards rulemaking or 2) for continuing discharge for which additional factors have emerged that were not present at the time of the classification and standards rulemaking.

Here, the first condition is not met since this is not a new permit, only the inclusion of Outfalls 25, 26, 27, 30, 32, 33, and 35 is new to CDPS Permit CO0038776. The second condition is also not met since MCC has not put forth sufficient evidence of any factors that have emerged after the classification of these types of outfalls or rulemaking regarding the WQBELs.

Therefore, the ALJ, consistent with Colo. Rev. Stat. Section 25-8-102 and 5 C.C.R. Section 1002-61.11(a) presumes the Division considered economic reasonableness when it drafted the permit and included Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 with the designated effluent limitations.

The Division has Authority to Permit Stormwater Discharges

MCC contends the ALJ should consider the Surface Mining Control and Reclamation Act along with its associated Federal regulations and Colorado Division of Reclamation, Mining and Safety (DRMS) statutory and regulatory authority. Specifically, MCC argues for the consideration of the small area exemptions granted to

them by the DRMS and the definitions utilized the DRMS's permitting process. The Court is not persuaded by MCC's argument and specifically concludes sufficient definitions exist within the CWA and the WQCA making it unnecessary to consider definitions. The ALJ also concludes that DRMS does not have authority to issue stormwater discharge permits under the CWA or WQCA.

Initial Decision

It is the Initial Decision of the ALJ that the Division correctly applied the applicable laws and regulations when it required a discharge permit for Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 because Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 are point source discharges to a state surface water and do not fall within the permitting jurisdiction of DRMS. It is also the Initial Decision of the ALJ that the Division is presumed to have taken into account the economic reasonableness or environmental benefits of including Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 in the permit and MCC may utilize the variance process within the regulations after the final permit is issued to address any established economic or environmental reasonableness concerns. Finally, it is the Initial Decision of the ALJ that the Division correctly applied effluent limitations and monitoring in the permit for Outfalls 25, 26, 27, 30, 32, 33, 34, and 35 consistent with the requirements of the Clean Water Act and its authority given to the Division by the Environmental Protection Agency in issuing stormwater discharge permits.

Dated this 6th day of August 2021.

/s/ Heidi L. Kutcher
HEIDI L. KUTCHER
Administrative Law Judge