United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1417 **September Term, 2017**

FILED ON: MARCH 6, 2018

SUNNYSIDE GOLD CORPORATION,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

On Petition for Review of Agency Action of the
United States Environmental Protection Agency

Before: HENDERSON, *Circuit Judge*, and EDWARDS and GINSBURG, *Senior Circuit Judges*.

J U D G M E N T

The court considered this petition for review on the record from the United States Environmental Protection Agency, and on the briefs and oral argument of the parties. The court has given the issues full consideration and determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be **DENIED**.

Sunnyside owns a mine located within the Animas River watershed in San Juan County, Colorado. The parties refer to this area — that is, the headwaters of the Animas River — as the Bonita Peak Mining District (BPMD). As its name suggests, the BPMD is a locus for mining activity within Colorado's Mineral Belt; mining has been ongoing in the area since the 1870s.

Pollution is, unsurprisingly, a potential problem; specifically, water can flow through mines and mining byproducts, dissolving heavy metals such as aluminum and flowing into the creeks and rivers in the BPMD and then into the Animas River. The EPA refers to this heavy metal-laden water as "acid mine drainage."

The CERCLA, 42 U.S.C. § 9601 *et seq.*, and a series of delegations from the President require the EPA to create a "National Priorities List" (NPL) of the nation's most polluted sites. In order to measure the pollution level of a given site, the EPA uses the Hazard Ranking System

(HRS). 40 C.F.R. Pt. 300, App. A. Scores on the HRS range from 0 to 100; a given site that scores at or above 28.50 is eligible for inclusion on the NPL. *Id.* § 2.1.2.

In 2015, after an accidental loosing of acid mine drainage into the Animas River watershed, the EPA evaluated the BPMD pursuant to the HRS. It defined the BPMD for HRS purposes as "the result of a comingled release of hazardous substances into surface water due to ... mining-related activities in three converging drainages ... that converge in the headwaters of the Animas River." In order to assess the BPMD for potential placement on the NPL, the EPA scored 19 separate sources of contamination (the "scored sources") within the BPMD; it also noted, though did not score, 29 other sources (the "unscored sources") that might contribute to contamination. Sunnyside's mine was an unscored source.

Each of the scored sources scored above 28.50, meaning each was independently eligible for listing on the NPL. Because of this, the EPA issued a proposed rule adding the entirety of the BPMD — both the scored and unscored sources — to the NPL. 81 Fed. Reg. 20,277. After receiving comments and responding to them, the EPA then promulgated a final rule in September 2016 confirming the addition of the BPMD. 81 Fed. Reg. 62,397. Sunnyside contests the inclusion of its mine.

Sunnyside's main argument is that the EPA erred in creating a site comprising both scored and unscored sources. In its view, each individual source was in fact a separate "site," and the EPA was required to score all of them before adding the BPMD as a whole to the NPL.

The text of the HRS alone is enough to refute this assertion. The HRS measures the "site score" — that is, the "relative risks posed by a site" — in order to make an NPL listing decision. 40 C.F.R. Pt. 300, App. A, § 1.1. The HRS defines a "site" as an "[a]rea[] where a hazardous substance has been deposited, stored, disposed, or placed, or has otherwise come to be located." *Id.* A site, the HRS tells us, "may include multiple sources and may include the area between sources." *Id.* A "source," by contrast, is "[a]ny area where a hazardous substance has been deposited, stored, disposed, or placed." *Id.*

There is, in other words, a clear distinction between a "site" and a "source." True enough, the EPA in this situation would have been required to score any site it wanted to place on the NPL, but it did so in this case — the BPMD is the site that is listed on the NPL, and the EPA scored it. The BPMD is a site composed of the 19 scored sources and the areas "between" them, as the HRS explicitly permits; Sunnyside's mine falls into the category of an "area between sources" and therefore did not need to be scored.

To buttress its case against the EPA's action, Sunnyside cites two cases — *Mead Corp. v. Browner*, 100 F.3d 152 (D.C. Cir. 1996), and *US Magnesium, LLC v. EPA*, 630 F.3d 188 (D.C. Cir. 2011). Each of them is inapposite. Each concerned the EPA's aggregation policy, *see generally Mead Corp.*, 100 F.3d 152; *US Magnesium*, 630 F.3d 188, but in this case there was no aggregation: the EPA explicitly disavowed any reliance upon its aggregation policy. The EPA created a site composed of sources and the areas between them and referred to that entire area as a comingled release, which the HRS permits. There was no aggregation involved.

Sunnyside's other arguments do not merit extended discussion. First, Sunnyside contends that the EPA should have considered the remediated condition of its mine but, as discussed above, Sunnyside's mine, along with the other unscored sources, had no effect upon the score of the BPMD, so the EPA was not required to consider remediation efforts there. Nor did the EPA err in scoring the sources it did score; Sunnyside acknowledges as much, *see* Petitioner's Br. at 13, and Sunnyside makes no colorable argument that the EPA deviated from the HRS. Finally, Sunnyside claims the EPA failed to consider the background level of contaminants in the BPMD but, because the release here was documented by direct observation, the HRS did not require analysis of background levels of hazardous substances. 40 C.F.R. Pt. 300, App. A, § 4.1.2.1.1.

Sunnyside's real concern became apparent at oral argument. It claims its mine has been fully remediated and had no part in the present pollution of the site but it may nevertheless be required to pay for some or all of the cleanup of the BPMD. Listing on the NPL, however, is not a determination of liability; it is a preliminary action, meant "to identify, quickly and inexpensively, sites that *may* warrant further action under CERCLA." *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (emphasis added) (internal quotation marks omitted). Should the EPA later hold Sunnyside liable, Sunnyside will be able then to mount whatever defenses it may have under the CERCLA.

For the reasons stated above, we deny the petition for review.

Pursuant to D.C. Cir. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk