

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

COAL RIVER MOUNTAIN WATCH, et al.,	)	
	)	
Plaintiffs,	)	Case No. 1:08-cv-2212HHK
v.	)	(Judge Henry H. Kennedy)
	)	
KEN SALAZAR, Secretary of the United	)	
States Department of the Interior, and LISA P.	)	
JACKSON, Administrator of the United States	)	
Environmental Protection Agency,	)	
	)	
Defendants.	)	
	)	
NATIONAL MINING ASSOCIATION,	)	
	)	
Intervenor-Defendant.	)	
_____	)	

**JOINT MOTION OF PLAINTIFFS AND FEDERAL DEFENDANTS TO HOLD  
JUDICIAL PROCEEDINGS IN ABEYANCE**

All Plaintiffs in this action, along with Federal Defendants Ken Salazar, Secretary of the United States Department of the Interior (“DOI”), and Lisa P. Jackson, Administrator of the United States Environmental Protection Agency (“EPA”) (collectively, “Federal Defendants”) hereby move for an order holding further judicial proceedings in this case in abeyance pending an anticipated notice-and-comment rulemaking by DOI’s Office of Surface Mining Reclamation and Enforcement (“OSM”). Plaintiffs and Federal Defendants have reached an out-of-Court settlement, the terms of which are set forth in the attached Settlement Agreement, under which they agree to move this Court for a stay of judicial proceedings, and further agree not to seek to lift the stay unless: (1) OSM fails to sign by February 28, 2011, a proposed rule to amend or replace the final rule that is the subject of this litigation; or (2) OSM fails to sign by June 29, 2012, a final action on that proposed rule.

Federal Defendants earlier today advised Intervenor-Defendant National Mining Association (“NMA”) regarding Federal Defendants’ intent to file this motion (after first confirming that Plaintiffs and Federal Defendants were in agreement to the final terms of the attached settlement), but there was too little time remaining to confirm NMA’s position on the motion before it was filed.

In support of this motion, Plaintiffs and Federal Defendants state as follows:

1. On December 12, 2008, OSM published a final rule entitled “Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams,” 73 Fed. Reg. 75,814 (Dec. 12, 2008) (“Stream Buffer Zone Rule” or “2008 SBZ Rule”). The Complaint in this action, filed on December 22, 2008, challenges the SBZ Rule (as well as the EPA’s concurrence in the rulemaking) pursuant to a number of statutes, including the Surface Mining Control and Reclamation Act (“SMCRA”), the Clean Water Act (“CWA”), the National Environmental Policy Act (“NEPA”), and the Administrative Procedure Act (“APA”).

2. A separate lawsuit challenging the 2008 SBZ Rule also is pending before this Court. See National Parks Conserv. Ass’n (“NPCA”) v. Salazar, Civ. Action No. 09-00115 (D.D.C.). NPCA has not been consolidated with the instant action, but is currently subject to the same deadline to answer or otherwise respond to the complaint therein.

3. On April 27, 2009, Defendant Ken Salazar, Secretary of the Interior, issued a statement concerning Federal Defendants’ intent to request from this Court a remand and vacatur of the challenged 2008 SBZ Rule. Federal Defendants subsequently filed a motion in the NPCA case for voluntary remand and vacatur, attaching as Exhibit 1 thereto the Secretary’s statement, in which the Secretary determined that OSM erred in failing to initiate consultation with the U.S.

Fish and Wildlife Service under the Endangered Species Act (“ESA”) to evaluate possible effects of the 2008 SBZ Rule on threatened and endangered species. Dkt. No. 10.

4. On August 12, 2009, the Court issued a Memorandum Opinion and Order denying Federal Defendants’ motion for voluntary remand and vacatur, concluding that “granting vacatur here would allow the Federal Defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits.” Dkt. No. 14 at 5. The Court also denied Federal Defendants’ motions to dismiss the Complaint in this action, as well as the Amended Complaint in NPCA. See Coal River Dkt. No. 14; NPCA Dkt. No. 18 at 5.

5. As Federal Defendants informed the Court in the status report filed October 30, 2009, consistent with its obligations under the Interagency Action Plan (“IAP”) on Appalachian Coal Mining and this Court’s ruling regarding the proper method for enacting, amending, or repealing an agency rule, OSM intends to initiate an APA rulemaking process that would address stream buffer zones and related issues. Dkt. No. 17.

6. Since filing that status report, OSM has taken further steps intended to facilitate the rulemaking process. In particular, on or about November 30, 2009, OSM published in the *Federal Register* an “Advance Notice of Proposed Rulemaking” (“ANPR”), requesting public comments on the ANPR by December 30, 2009. OSM is presently evaluating the comments it received on the ANPR as it proceeds towards development of the new proposed rule.

7. In addition, on November 18, 2009, OSM published on its website a document entitled “Oversight Improvement Actions,” initially requesting public comments thereupon by December 18, 2009; that comment period was later extended until January 19, 2010.

8. Today, Plaintiffs in both the instant action and the NPCA case signed a settlement agreement with the Federal Defendants. The settlement agreement is filed with the Court as an attachment to this motion. As part of this settlement, the Federal Defendants agree that OSM shall make best efforts to sign no later than Monday, February 28, 2011, a proposed rule to amend or replace the 2008 SBZ Rule, which it shall promptly thereafter submit for publication in the *Federal Register*. Agreement ¶ 1. The Federal Defendants further agree that OSM shall make best efforts to sign a final action on the proposed rule described in Paragraph 1 of the Agreement no later than Friday, June 29, 2012, which it shall promptly thereafter submit for publication in the *Federal Register*. Agreement ¶ 2. Additionally, the Federal Defendants agree that in connection with the rulemaking described in Paragraphs 1 and 2 of the Agreement, OSM shall consult pursuant to the ESA as appropriate prior to signing the final action. Id. ¶ 3.

9. The Settling Parties also agreed to file joint motions with this Court to seek a stay of judicial proceedings in both cases, and further agreed that if OSM fails to sign the proposed rule referred to in Paragraph 1 by February 28, 2011, or fails to sign a final action on that proposed rule by June 29, 2012, Plaintiffs' sole remedy under the Agreement shall be to ask the Court to lift the stay and establish a schedule for further judicial proceedings. Agreement ¶ 4. Plaintiffs agree that they shall not seek to lift the stay under any other circumstance. Id.

10. The Agreement also provides: "Under no circumstance shall any provision of this Agreement be the basis for any action for specific performance, mandamus, or any other remedy seeking to compel OSM, or any other department, agency or instrumentality of the United States, to take any of the actions described in Paragraphs 1, 2 and 3." Agreement ¶ 6.

11. The Agreement provides that an award of Plaintiffs' reasonable costs of litigation, including attorney's fees, incurred through March 19, 2010 is "appropriate," and requires the parties to attempt to negotiate a reasonable amount of such fees and costs to be paid as part of the settlement. Agreement ¶ 7. If an agreed-upon amount is not successfully negotiated, the Agreement permits Plaintiffs to submit to the Court, no earlier than 30 days and no later than 60 days after March 19, 2010, an application for an award of fees and costs incurred through March 19, 2010. Id. Otherwise, the parties each reserve their rights with regard to claims for or defenses to fees and costs. Id.

12. The Agreement further provides: "Nothing in this Agreement shall be construed to limit or modify the discretion accorded to [the Federal Defendants] under SMCRA, the ESA, NEPA, the CWA, or any other applicable law or regulation." Agreement ¶ 9. Additionally, the Agreement provides: "Except as set forth in this Agreement, each Settling Party retains any and all rights, claims or defenses it may otherwise have." Id. ¶ 10.

13. Because the Settling Parties wish to resolve these cases without further litigation, and because the terms of the attached Agreement are reasonable, are consistent with DOI's publicly-stated intentions to conduct a notice-and-comment rulemaking, and contain no provision that could cause any prejudice to the interests of NMA, the Settling Parties respectfully request that the Court sign the attached Proposed Order holding further judicial proceedings in this case in abeyance. Plaintiffs have authorized the undersigned attorney for the Federal Defendants to sign this motion on their behalf.

14. As noted above, there was insufficient time prior to filing this motion to confirm Intervenor-Defendant NMA's position on the motion.

For the foregoing reasons, Plaintiffs and Federal Defendants respectfully request that the Court grant this motion and enter the attached Proposed Order.

Respectfully submitted,

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Environment and Natural Resources Division

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DATED: March 19, 2010

*Attorneys for the Federal Defendants*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

COAL RIVER MOUNTAIN WATCH, et al.,	)	
	)	
Plaintiffs,	)	Case No. 1:08-cv-2212HHK
v.	)	(Judge Henry H. Kennedy)
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KEN SALAZAR, Secretary of the United	)	
States Department of the Interior, and LISA P.	)	
JACKSON, Administrator of the United States	)	
Environmental Protection Agency,	)	
	)	
Defendants.	)	
	)	
NATIONAL MINING ASSOCIATION,	)	
	)	
Intervenor-Defendant.	)	
_____	)	

**[PROPOSED] ORDER**

Having considered the Joint Motion of Plaintiffs and Federal Defendants to Hold Judicial Proceedings in Abeyance, the Court has determined that it should grant this motion.

Accordingly, IT IS HEREBY ORDERED that this case is held in abeyance pending further order of the Court.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Henry H. Kennedy  
United States District Judge

**AGREEMENT TO SETTLE CASES SEEKING JUDICIAL REVIEW OF  
THE 2008 STREAM BUFFER ZONE RULE**

WHEREAS, on December 12, 2008, the Office of Surface Mining Reclamation and Enforcement (“OSM”) of the United States Department of the Interior (“DOI”) promulgated a final rule entitled “Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams” (“the 2008 SBZ Rule”) 73 Fed. Reg. 75,814;

WHEREAS, on December 22, 2008, a complaint seeking judicial review of the 2008 SBZ Rule was filed in the U.S. District Court of the District of Columbia by Coal River Mountain Watch, Kentucky Waterways Alliance, Ohio Valley Environmental Coalition, Save Our Cumberland Mountains, Sierra Club, Southern Appalachian Mountain Stewards, Waterkeeper Alliance, and West Virginia Highlands Conservancy (collectively, the “Coal River Plaintiffs”), under the case caption Coal River Mountain Watch, et al. v. Kempthorne, et al., Case No. 1:08-cv-02212;

WHEREAS, the Coal River Plaintiffs allege that OSM’s promulgation of the 2008 SBZ Rule violated the Surface Mining Control and Reclamation Act (“SMCRA”), 33 U.S.C. § 1265, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and that OSM’s final environmental impact statement for the rule violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332. The Coal River Plaintiffs further allege that the United States Environmental Protection Agency’s (“EPA’s”) concurrence in the rule pursuant to section 501 of SMCRA, 33 U.S.C. § 1251, violated the Clean Water Act (“CWA”), 33 U.S.C. § 1251 et seq., and the APA;

WHEREAS, on January 16, 2009, the National Parks Conservation Association (“NPCA”) filed a separate complaint in the U.S. District Court for the District of Columbia seeking judicial review of the 2008 SBZ Rule under the case caption NPCA v. Kempthorne et



al. Case No. 1:09-cv-00115, which NPCA amended on February 13, 2009. NPCA's Amended Complaint alleges that OSM's promulgation of the 2008 SBZ Rule violated SMCRA, section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), and the APA, and further alleges that EPA's concurrence in the 2008 SBZ Rule violated section 7(a)(2) of the ESA, the Clean Water Act and its implementing regulations;

WHEREAS, both complaints seek, inter alia, vacatur of the 2008 SBZ Rule and reasonable costs of litigation including attorney's fees;

WHEREAS, the complaints collectively name the Secretary of the Interior, the Director of OSM, and the EPA Administrator as defendants (collectively, "the Federal Defendants"). The National Mining Association has also intervened in both cases as a defendant;

WHEREAS, the Federal Defendants have not answered either complaint;

WHEREAS, on April 24, 2009, the Federal Defendants moved in the NPCA case for a voluntary remand and vacatur of the 2008 SBZ Rule on the grounds that the Secretary of the Interior had determined OSM erred by failing to initiate consultation pursuant to the ESA in connection with 2008 SBZ rulemaking, as alleged in NPCA's Amended Complaint. The Court denied this motion in a Memorandum Opinion and Order dated August 12, 2009, holding that vacatur of the rule without public notice and comment would, under the circumstances, violate the APA;

WHEREAS, OSM now plans to conduct a notice and comment rulemaking under SMCRA to establish a new rule to amend or replace the 2008 SBZ Rule, including a new environmental impact statement, under the schedule set forth below;

WHEREAS, OSM published in the *Federal Register* an Advance Notice of Proposed Rulemaking, for which it requested public comment by December 30, 2009, and intends to use best efforts to sign a proposed rule by February 2011; and

WHEREAS, in light of OSM's intentions, the Coal River Plaintiffs, NPCA and the Federal Defendants (collectively the "Settling Parties") wish to resolve this matter without any further litigation;

NOW, THEREFORE, the Settling Parties, each intending to be bound by this Agreement, hereby agree as follows:

1. OSM shall make best efforts to sign no later than Monday, February 28, 2011, a proposed rule to amend or replace the 2008 SBZ Rule, which it shall promptly thereafter submit for publication in the *Federal Register*.

2. OSM shall make best efforts to sign a final action on the proposed rule described in Paragraph 1 no later than Friday, June 29, 2012, which it shall promptly thereafter submit for publication in the *Federal Register*.

3. In connection with the rulemaking described in Paragraphs 1 and 2, OSM shall consult pursuant to the ESA as appropriate prior to signing the final action.

4. No later than March 19, 2010, the Federal Defendants and the Plaintiffs will file joint motions for stay of the pending complaints in Coal River Mountain Watch, et al. v. Kempthorne, et al., Case No. 1:08-cv-02212, and NPCA v. Kempthorne et al., Case No. 1:09-cv-00115, pending completion of, and subject to, the terms of this agreement. If OSM fails to sign the proposed rule referred to in Paragraph 1 by February 28, 2011, or fails to sign a final action on that proposed rule by June 29, 2012, the sole remedy under this agreement shall be to ask the Court to lift the stay and establish a schedule for further proceedings. Plaintiffs must give Federal Defendants 30 days notice before requesting that the stay be lifted. The Coal River Plaintiffs and NPCA each agree that they shall not seek lifting the stay under any other circumstance.

5. Within 30 days of OSM's completion of the actions specified in Paragraph 1 and Paragraph 2 above, Plaintiffs shall dismiss their complaints with prejudice. The Settling Parties agree that, for purposes of determining preclusive effect, such dismissal shall apply only to the claims raised in the complaints specifically challenging the 2008 SBZ Rule and EPA's concurrence therein. All other claims and defenses are specifically reserved as set forth in Paragraph 10 below.

6. Under no circumstance shall any provision of this Agreement be the basis for any action for specific performance, mandamus, or any other remedy seeking to compel OSM, or any other department, agency or instrumentality of the United States, to take any of the actions described in Paragraphs 1, 2 and 3.

7. The Federal Defendants agree that an award of Plaintiffs' reasonable costs of litigation, incurred through March 19, 2010 (the Effective Date of this Agreement), including attorney's fees, is appropriate in light of this settlement agreement, and agree to pay a reasonable amount of such fees and costs to the Coal River Plaintiffs and NPCA pursuant to the ESA, 16 U.S.C. § 1540 (g), SMCRA, 30 U.S.C. § 1270(d), and/or the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. All parties reserve their rights and defenses for any fees and costs incurred after the Effective Date. The Settling Parties agree to attempt in good faith to resolve Plaintiffs' claims for fees and costs expeditiously and without the need for Court intervention, and to that end, the Plaintiffs will submit to the Federal Defendants any claim for fees and costs incurred by the Effective Date at a time sufficient to allow good faith negotiations regarding, and resolution of, that claim before dismissal of the lawsuits. Notwithstanding dismissal of the complaints pursuant to Paragraph 5, the Court shall retain jurisdiction over each complaint for the purpose of resolving any dispute regarding Plaintiffs' claims for an award of fees and costs under the ESA or SMCRA. If either the Coal River Plaintiffs or NPCA is unable to agree with

the Federal Defendants on a reasonable amount of fees and costs incurred through March 19, 2010 under the ESA, SMCRA, and/or EAJA, an application to the Court seeking an award of such fees and costs shall be filed no earlier than 30 days, and no later than 60 days, after the Effective Date of this Agreement. By this Agreement, the Federal Defendants do not waive any right to contest fees or costs claimed by Plaintiffs, including but not limited to the claimed hourly rate, in any continuation of the present action or any future litigation.

8. The Effective Date of this Agreement shall be the date on which representatives of all of the Settling Parties have signed the Agreement.

9. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to OSM, DOI, or EPA under SMCRA, the ESA, NEPA, the CWA, or any other applicable law or regulation.

10. Except as set forth in this Agreement, each Settling Party retains any and all rights, claims or defenses it may otherwise have.

11. This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the Federal Defendants, their officers, or any person affiliated with them.

12. The commitments of the Federal Defendants in this Settlement Agreement are subject to the availability of appropriated funds applicable for those purposes. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that any department, agency or instrumentality of the United States of America obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341-44 and 1511-19, or any other applicable provision of law.

13. Any term set forth in this Agreement may be modified by written agreement of the Settling Parties.

14. Nothing in this Agreement shall bind, obligate, or otherwise create any rights or duties applicable to or enforceable by, or impose any conditions or limitations upon, any person or entity that has not signed the Agreement, nor shall the Agreement be construed to make any such person or entity a third-party beneficiary of the Agreement.

15. Any notices required or provided for by this Agreement shall be made in writing, via facsimile, electronic mail, or other means, and sent to the following:

**For the Coal River Plaintiffs:**

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16. This Agreement may be executed in any number of original counterparts, each of which shall be deemed to constitute one agreement. The execution of one counterpart by any Settling Party shall have the same force and effect as if that Settling Party had signed all other counterparts.

17. This Agreement constitutes the entire Agreement of the Settling Parties with respect to the subject matter addressed herein. There are no warranties or representations, oral or written, relating to the subject matter hereof that are not fully expressed or provided for herein.

18. The undersigned representatives of each Settling Party certify that they are fully authorized by the Settling Party that they represent to bind that Settling Party to the terms of this Agreement.

**For the Coal River Plaintiffs:**

---

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Dated:

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Dated:

---

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Dated:

**For NPCA:**

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*Counsel for Plaintiff National Parks  
Conservation Association*

Dated:

**For the Federal Defendants:**

IGNACIA MORENO  
Assistant Attorney General  
Environment and Natural Resources  
Division

By:



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Dated:

March 19, 2010



**For the Coal River Plaintiffs:**

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Dated:

---

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---

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*Counsel for Plaintiff National Parks  
Conservation Association*

Dated: *19 March 2010*

**For the Federal Defendants:**

IGNACIA MORENO  
Assistant Attorney General  
Environment and Natural Resources  
Division

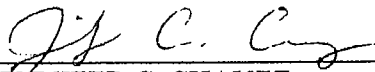
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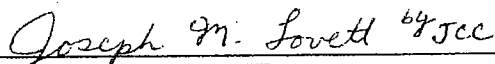
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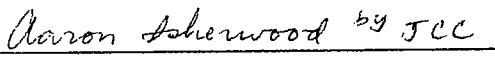
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Dated: 3-19-2010

  
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Dated: 3-19-2010

  
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Dated: 3-19-2010

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Dated:

**For the Federal Defendants:**

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Assistant Attorney General  
Environment and Natural Resources  
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By: \_\_\_\_\_  
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*Counsel for the Federal Defendants*

Dated:

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Mary Cromer by JCC

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Dated: 3-19-2010

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