

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COAL RIVER MOUNTAIN WATCH, et al.)	
and NATIONAL PARKS CONSERVATION)	
ASSOCIATION,)	
)	
Plaintiffs,)	
)	Consolidated Cases
v.)	No. 1:08-cv-2212-BJR
)	No. 1:09-cv-0115-BJR
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.)	
_____)	

**NOTICE BY COAL RIVER MOUNTAIN WATCH, ET AL.
OF INTENT TO MOVE TO LIFT THE STAY OF THIS ACTION**

The Court’s Minute Order dated Nov. 14, 2012, directed that these cases be held in abeyance for an additional 75 days from the date of the Minute Order. Plaintiffs 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 state as follows:

A. Case History

These cases concern a final rule promulgated by the Office of Surface Mining Reclamation and Enforcement (“OSM”) of the United States Department of the Interior (“DOI”), entitled “Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams” (“the 2008 SBZ Rule”) 73 Fed. Reg. 75,814 (Dec. 12, 2008), and the U.S. Environmental

Protection Agency's ("EPA's") concurrence in the rule (OSM, DOI and EPA collectively are the "Federal Defendants"). The complaint filed by Coal River Mountain Watch, et al., No. 1:08-cv-2212, alleges claims under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 33 U.S.C. § 1265, the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. The complaint filed by the National Parks Conservation Association ("NPCA"), No. 1:09-cv-0115, alleges claims under SMCRA, the APA, and section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). Both complaints seek vacatur of the 2008 SBZ Rule. The Federal Defendants have not answered either complaint. The National Mining Association ("NMA") has intervened as a Defendant in both cases.

On April 27, 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 that OSM erred by failing to initiate consultation pursuant to the ESA in connection with the 2008 SBZ rulemaking, as alleged in NPCA's complaint. (Dkt. 10 in Case No. 1:09-cv-0115-BJR). NMA opposed this motion. (Dkt. 13 in Case No. 1:09-cv-0115-BJR). The Court denied this motion in a Memorandum Opinion and Order dated August 12, 2009 (Dkt. 18 in Case No. 1:09-cv-0115-BJR), holding that vacatur of the rule, without either public notice and comment or judicial findings on the merits, would violate the APA. As a result, OSM proceeded with plans to conduct a notice and comment rulemaking to establish a new rule to amend or replace the 2008 SBZ Rule.

The Plaintiffs and the Federal Defendants reached an out-of-Court settlement under which they agreed to move this Court for a stay of judicial proceedings, and further agreed not to seek to lift the stay unless: (1) OSM failed to sign by February 28, 2011, a proposed rule to

amend or replace the 2008 SBZ Rule; or (2) OSM failed to sign by June 29, 2012, a final action on that proposed rule. To date OSM has not signed a proposed or final rule. The settlement agreement requires the plaintiffs to give the Federal Defendants thirty days notice before moving the Court to lift the stay.

On April 2, 2010, the Court ordered that the cases be held in abeyance pending further order of the Court. (Order of Judge Henry H. Kennedy, Jr., Dkt. 30). As directed by subsequent orders of the Court, the parties filed Joint Status Reports (Dkt. 32 dated July 27, 2012, Dkt.34 dated Sept. 14, 2012, and Dkt. 35 dated Nov. 13, 2012), in which the parties provided updates to the Court regarding their discussions about the status of OSM's rulemaking effort and its plans for further progress in the rulemaking.

B. Current Status and Notice of Intent to Request the Court Lift the Stay

As noted above, the parties have engaged in a series of meetings and discussions since July 2012. Those discussions have not produced an agreement between the parties that would resolve the Plaintiffs' claims in these consolidated cases.

Accordingly, Plaintiffs in Case No. 1:08-cv-2212-BJR, Coal River Mountain Watch, *et al.*, have provided the Federal Defendants the attached thirty days notice of their intent to move to lift the stay. (*See Ex. A*). Coal River Mountain Watch, *et al.* are hereby advising the Court that they intend to move the Court to lift the stay of this case on February 25, 2013.

Respectfully submitted by counsel for Plaintiffs Coal River Mountain Watch, *et al.*:

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