

Intervenor-Defendants agree with the request for a status conference, but oppose the briefing schedule set forth in this motion.³

The grounds in support of NMA's motion are as follows:

1. NMA filed the Complaint in this matter on July 20, 2010, challenging a series of federal agency actions known as the Enhanced Coordination Process and the Detailed Guidance. On September 17, 2010, NMA moved for a preliminary injunction to enjoin all challenged actions.

2. On September 27, 2010, the Federal Defendants responded to NMA's Complaint by filing a motion to dismiss the Complaint in its entirety.

3. Briefing on the two motions was completed by November 9, 2010, and the Court heard oral argument on both motions on December 15, 2010.

4. On January 14, 2011, the Court issued an Order and Memorandum Opinion denying both NMA's motion for preliminary injunction and the Federal Defendants' motion to dismiss in their entirety. Although the Court denied NMA's motion, it nevertheless found that NMA was likely to succeed on the merits of its claims.

5. Within a week of the Court's Order denying the aforementioned motions, counsel for NMA and counsel for the Federal Defendants began discussions concerning next steps for this action, in the hope that a joint proposal for further proceedings could be presented to the

Virginia and, potentially, the Commonwealth of Kentucky; (2) the need for the United States' agencies to assemble and file the administrative records for the challenged actions prior to briefing; (3) the likelihood that the Interim Guidance challenged by Plaintiff will be replaced with Final Guidance by April 1, 2011; and (4) the complexity of the issues to be briefed. The United States agrees with the motion to set a status conference, and requests that the status conference be set after the United States files its response to Plaintiff's motion and following any reply filed by Plaintiff."

³ Specifically, Intervenor-Defendants provided the following position: "[Intervenor-Defendants] concur in the position of the United States, oppose Plaintiff's proposed briefing schedule, and support a status conference to address an alternative schedule for briefing of this case and the similar case transferred from West Virginia."

Court. Given all the briefing and documents that the Court has received to date in this matter, NMA believes it is appropriate to move forward promptly to summary judgment briefing on all claims, as all claims involve pure questions of law arising under the Administrative Procedure Act, Clean Water Act, and other federal law (and therefore should not require any further factual or record development). Federal Defendants, however, contend that briefing the claims related to the Detailed Guidance is inappropriate and a waste of resources, as Defendant U.S. Environmental Protection Agency (“EPA”) is preparing a “final” Detailed Guidance document that will replace the current “interim” Detailed Guidance. EPA contends that such “final” Detailed Guidance will be issued by April 1, 2011 and that its issuance will moot NMA’s claims. EPA refuses, however, to provide a firm, binding assurance that the current “interim” Detailed Guidance will be withdrawn and replaced by April 1, 2011, thus causing uncertainty as to whether and when the challenged Detailed Guidance will be rescinded.

6. Prompt briefing of all of NMA’s claims should not be delayed in the face of the uncertainty surrounding the future of the challenged Detailed Guidance. NMA’s members need prompt resolution of the questions raised in NMA’s Complaint regarding the legality of the challenged Detailed Guidance. NMA should not be forced to wait until April 1, 2011 (or later) to see whether the current Detailed Guidance will be superseded or withdrawn. If EPA does not meet the April 1 target, NMA’s claims against the Detailed Guidance enter some form of regulatory purgatory, where EPA can continue to promise a new guidance document in the near term, yet the challenged Detailed Guidance continues to remain in effect and utilized by the agency in NMA’s members’ permitting proceedings. In this scenario, NMA has neither the opportunity to have the court decide the merits of its current claims, nor the ability to amend its

complaint challenging whatever agency action would eventually replace the current Detailed Guidance.

7. EPA continues to apply the Detailed Guidance as a binding legislative rule to the detriment of NMA's members, as described in the declarations that NMA has submitted to the court to date.⁴ Moreover, third parties are utilizing the Detailed Guidance in other state and federal proceedings against NMA members, invoking the Detailed Guidance and its substance as though it were a binding legislative rule. *See, e.g., Sierra Club v. Fola Coal Co., LLC*, No. 10-cv-1199 (S.D. W.V. filed Oct. 11, 2010); *Sierra Club v. WV Dep't of Env'tl. Protection & Patriot Mining Co., Inc.*, W.V. Env'tl. Quality Board Appeal No. 10-34-EQB (filed Sept. 3, 2010); Letter from Mary Varson Cromer, Appalachian Citizens' Law Center, to William G. Feltner, ICG Hazard, LLC (Dec. 3, 2010), at 7 (60-day notice of intent to file citizen suit under the Clean Water Act, which references EPA's Interim Detailed Guidance and the conductivity standard therein) (appended hereto as Attachment A). A determination from this Court on the legality of the Detailed Guidance would assist those adjudicative bodies in their decisionmaking and would bring certainty to NMA's members who are currently defending against the third party claims. Indefinite delay of summary judgment briefing of NMA's claims against the Detailed Guidance (as urged by Defendants) would merely perpetuate the status quo (in which NMA's members are facing application of the Detailed Guidance in permitting proceedings and third party actions) with no certainty that the challenged Detailed Guidance will indeed be withdrawn and no vehicle for this Court to resolve NMA's claims.

8. In sum, the path forward for this action should not depend on the Defendants' speculation and non-binding assurances regarding future events, *i.e.*, the issuance of "final"

⁴ NMA is prepared to proffer additional declarations from its members and the state of the Virginia on the current application of the Detailed Guidance should the Court require such statements to resolve this motion.

Detailed Guidance and the withdrawal of the current “interim” Detailed Guidance. There is no reason to delay proceeding to prompt consideration of all of NMA’s claims.

Accordingly, NMA respectfully requests that the Court hold a status conference at its earliest convenience in order to discuss prompt resolution of this action, or, in the alternative, NMA requests that the Court adopt the following briefing schedule for the remainder of this action:

- Within 20 days of the Court’s order adopting a briefing schedule: NMA files a motion for summary judgment on all claims (“MSJ”).
- Within 20 days after the filing of NMA’s motion for summary judgment: Federal Defendants file their opposition to NMA’s MSJ .
- Within 10 days after the filing of Federal Defendants’ opposition: Intervenor-Defendants file their opposition to NMA’s MSJ.
- Within 10 days after the filing of Intervenor-Defendants’ opposition: NMA files reply brief in support of its MSJ.
- NMA respectfully requests a hearing date on the motion for summary judgment at the Court’s earliest convenience after the close of briefing.

For the foregoing reasons, NMA respectfully requests that its motion be granted.

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Respectfully submitted,

Katie Sweeney
Of Counsel
Karen C. Bennett, No. 477151
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W.
Suite 500 East
Washington, DC 20001
(202) 463-2600

/s/ Kirsten L. Nathanson
John Martin, No. 358679
Kirsten L. Nathanson, No. 463992
David Y. Chung, No. 500420
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

ATTORNEYS FOR PLAINTIFF NATIONAL MINING ASSOCIATION