



Federal Judge Denies Obama Administration's Motion to Vacate the Stream Buffer Zone Rule

September 2, 2009

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The Obama Administration's efforts to rescind the revised Stream Buffer Zone Rule, enacted at the end of the Bush era, suffered a setback earlier this month. On August 12, 2009, United States District Court Judge Henry Kennedy, Jr. issued a Memorandum Opinion and Order *denying* the government's motion to vacate the Stream Buffer Zone Rule. Judge Kennedy presides over the lawsuit brought by the National Parks Conservation Association ("NPCA") contesting the validity of the revised rule. In the [opinion](#), Judge Kennedy concluded that granting the relief requested by the Administration would permit it to do what the government cannot do under the Administrative Procedures Act, 5 U.S.C. § 551*et seq.* ("APA"), "repeal a rule without public notice and comment, without judicial consideration of the merits." *National Parks Conservation Association v. Ken Salazar, Secretary of the United States Department of the Interior, et al.*, United States District Court for the District of Columbia, Civil Action No. 09-00115 (HHK).

The federal Office of Surface Mining Reclamation and Enforcement ("OSM") issued the amended Stream Buffer Zone Rule on December 12, 2008, following an extensive regulatory process that lasted nearly five years (including development of an Environmental Impact Statement). The amended rule continues to permit disposal of coal mine waste and excess spoil within 100 feet of perennial and intermittent streams, in certain defined circumstances. (For more information on the issuance of the final rule and the history of the controversy surrounding the stream buffer zone, see "[OSM Finalizes Stream Buffer Zone Rule](#)".)

The NPCA filed suit in January 2009, arguing that OSM and the Environmental Protection Agency ("EPA") did not follow proper procedures when promulgating and enacting the amended rule. The National Mining Association ("NMA") was permitted to intervene in the lawsuit as a defendant. In April 2009, the federal Defendants asked Judge Kennedy to remand and vacate the Stream Buffer Zone Rule due to what they described as legal deficiencies in the rule-making process, specifically OSM's failure to adequately consult with the U.S. Fish and Wildlife Service regarding the possible effects of the rule on threatened and endangered species. The NMA opposed the government's motion, arguing that vacating the rule at this juncture would allow the agencies to circumvent the process established under the APA for repealing an agency rule.

After distinguishing several of the cases cited by the federal Defendants and noting that they pointed to no new evidence in support of their position, Judge Kennedy denied the motion to vacate. Adopting the NMA's position, Judge Kennedy agreed that "granting the federal Defendant's Motion would wrongfully permit the federal Defendants to bypass the established statutory procedures for repealing an agency rule", specifically the notice and comment procedures. See Memorandum Opinion and Order, filed August 12, 2009, p. 4. The Department of Interior has not yet indicated whether it will appeal Judge Kennedy's ruling or simply proceed with the underlying lawsuit.

While this ruling is a victory for the NMA and the mining industry in the short term, ultimately, it may only delay the Obama Administration's efforts to repeal the amended rule. Should the NMA prevail on the merits

of the underlying lawsuit, however, Judge Kennedy's ruling ensures that the mining industry and other interested parties will be permitted to review and comment on any further changes to the Stream Buffer Zone Rule (including the repeal of the recent amendments) through appropriate APA rule-making procedures.