

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS, et al.,)	
)	
Plaintiffs,)	
)	Case No. 11-cv-2064-RJL
)	
v.)	
)	
)	
UNITED STATES ENVIRONMENTAL PROTECTION)	
AGENCY, and LISA P. JACKSON, in her Official)	
Capacity as Administrator,)	
U.S. Environmental Protection Agency,)	
)	
Defendants,)	
)	
PEABODY ENERGY CORPORATION and)	
NATIONAL MINING ASSOCIATION,)	
)	
Intervenors.)	

JOINT MOTION TO GOVERN FUTURE PROCEEDINGS

On February 13, 2013, the Court granted Plaintiffs’ and Defendants’ Joint Motion to Continue the Stay of All Proceedings until April 1, 2013, and directed the parties to file joint or separate motions to govern future proceedings on that date. *See* February 13, 2013, Minute Order. The Court subsequently extended the deadline for filing motions to govern future proceedings to April 5, 2013. *See* April 1, 2013, Minute Order. The parties hereby request that that the Court continue the stay of all proceedings until May 14, 2013, which is two weeks after EPA represents that it plans to take final action on Plaintiffs’ petition for rulemaking, which EPA believes will moot the case. *See* Declaration ¶ 2. Because no EPA action or decision has yet occurred, Plaintiffs cannot determine at this time what effect EPA’s action may have on this case. However, Plaintiffs agree that an EPA action will likely clarify the issues for litigation.

Based on EPA's representations in paragraph 14 below, Intervenors do not oppose the further stay. Intervenors reserve their position in the future based on the action EPA actually takes. The parties further propose that the Court order the parties to file joint or separate motions to govern future proceedings on May 14, 2013, which the parties believe will include either agreed or competing briefing schedules concerning the effect of EPA's action. The Court should grant this motion because doing so serves judicial economy, prevents hardship to the parties, and is in the public interest. In further support of this motion, the parties state as follows.

I. Background.

1. This case involves a claim that EPA has unreasonably delayed action on a petition for rulemaking to regulate emissions from coal mines filed with the Agency by Plaintiffs under the Clean Air Act ("CAA"). *See* Complaint, Dkt. No. 1, ¶¶ 2-3.

2. On March 5, 2012, EPA filed an answer to the complaint, denying the allegations that EPA has unreasonably delayed and denying that Plaintiffs are entitled to any relief. Dkt. No. 18.

3. On December 20, 2011, Peabody Energy Corp. and the National Mining Association filed a motion to intervene. Dkt. No. 11. By order dated July 19, 2012, the Court granted the motion to intervene. Dkt. No. 27.

4. After the complaint was filed, EPA and Plaintiffs engaged in preliminary discussions regarding the possibility of resolving this matter through settlement. However, EPA and Plaintiffs agreed to postpone further discussions until January 2013 because EPA stated at that time the Agency was not in a position to determine whether the instant matter could be resolved through settlement due to the press of other statutory and consent decree deadlines. *See*

Joint Motion to Stay All Proceedings, Dkt. No. 22; Defendants' Reply to Intervenor-Applicants' Opposition to Stay Motion, Dkt. No. 25.

5. On May 22, 2012, EPA and Plaintiffs filed a Joint Motion to Stay All Proceedings, requesting that the Court stay proceedings in this litigation until January 30, 2013. Dkt. No. 22.

6. By Minute Order dated August 28, 2012, the Court partially granted and partially denied the motion for a stay, staying all proceedings until November 30, 2012, and ordered that the parties submit a joint status report on the same date.

7. On November 30, 2012, Plaintiffs and Defendants jointly requested that the Court continue the stay until January 30, 2013. Dkt. No. 32.

8. By Minute Order dated December 6, 2012, the Court granted the motion, stayed all proceedings until January 30, 2013, and ordered that the parties submit a motion to govern future proceedings on the same date.

9. Prior to January 30, 2013, Plaintiffs and Defendants again engaged in discussions regarding the possibility of resolving this matter through settlement. However, EPA and Plaintiffs agreed to postpone further discussions until late-March 2013, because EPA stated that it remained unable to determine whether the instant matter could be resolved through settlement due to continuing budget uncertainty and the need to prioritize its work.

10. On January 30, 2013, Plaintiffs and Defendants jointly requested that the Court continue the stay until April 1, 2013. Dkt. No. 35. In that motion, EPA committed to continue to consider its resources and budget, and how to prioritize its work, including how the regulation of emissions from coal mines fits within EPA's priorities. *Id.* EPA stated that it expected that,

subject to a positive resolution of budget uncertainty, it would be in a position by April 1, 2013, to evaluate and discuss if it could agree on a date by which to act on Plaintiffs' petition. *Id.*

11. By Minute Order dated February 13, 2013, the Court granted the motion, stayed all proceedings until April 1, 2013, and directed the parties to file joint or separate motions to govern future proceedings on April 1, 2013.

12. By Minute Order dated April 1, 2013, the Court granted an extension of the deadline by which the parties were required to file motions to govern future proceedings to April 5, 2013.

II. The Parties Wish to Continue the Stay until May 14, 2013.

13. "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). In determining whether to grant a stay, "[t]he court, in its sound discretion, must assess and balance the nature and substantiality of the injustices claimed on either side." *Gordon v. Fed. Deposit Ins. Corp.*, 427 F.2d 578, 580 (D.C. Cir. 1970). Courts generally approve stays where they are "[i]n the interest of judicial economy and avoiding unnecessary litigation." *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 199 (D.D.C. 2005).

14. EPA represents that its staff is currently preparing a draft response to Plaintiffs' petition for signature by the appropriate senior agency official that would deny Plaintiffs' petition. EPA expects the response to be signed by April 30, 2013. *See* Declaration ¶ 2.

15. In EPA's view, the Agency's response to the petition will be final agency action, *id.*, and will therefore moot the case. Plaintiffs represent that it is premature at this time to judge

the effect of EPA's action, if any, on this case, and premature to judge whether what EPA does will represent final agency action. Plaintiffs wish to review the document EPA prepares in order to determine how to proceed. Intervenors believe that, assuming that EPA does deny the petition, the action may moot the case, but would also like to review the document to confirm that. Accordingly, the parties propose that the Court allow the parties two weeks after April 30, 2013 (the date by which EPA intends act on the petition) to review the action, confer, and draft joint or separate motions to govern future proceedings.

16. Plaintiffs represent that granting the stay will serve judicial economy because it will likely clarify the issues that may ultimately be litigated. EPA represents that granting the stay will serve judicial economy because it may moot the case. EPA represents that granting the stay will also prevent hardship to the public because EPA's resources, and taxpayer dollars, are better spent allowing EPA to complete the action rather than litigating a case that may ultimately become moot.

17. Therefore, the parties submit that granting a short stay to allow EPA to complete its action on Plaintiffs' petition will serve judicial economy, prevent hardship to the parties, and is in the public interest.

III. CONCLUSION

18. For the foregoing reasons, the Court should (1) continue a stay of all proceedings in this matter until May 14, 2013; and (2) order the parties to submit joint or separate motions to govern future proceedings on that same date.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

Dated: April 5, 2013

/s/ Stephanie J. Talbert
STEPHANIE J. TALBERT
Trial Attorney
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 514-2617
Fax: (202) 514-8865
Stephanie.talbert@usdoj.gov

Attorney for Defendants

/s/ Edward B. Zukoski (with permission)
Edward B. Zukoski (Colo. Bar No. 26352)
Pro hac vice
Robin Cooley (D.C. Bar No. CO0040)
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202
Telephone: (303) 623-9466
Fax: (303) 623-8083
E-mail: tzukoski@earthjustice.org
rcooley@earthjustice.org

*Attorneys for
Plaintiffs WildEarth Guardians et al.*

/s/ Merrill Hirsh (with permission)
Peter S. Glaser, D.C. Bar No. 334714
Merril Hirsh, D.C. Bar No. 366952
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004-2134
Telephone: 202.274.2950
Facsimile: 202.654.5819
peter.glaser@troutmansanders.com
merril.hirsh@troutmansanders.com


*Attorney for Intervenors Peabody Energy
Corporation and the National Mining
Association*

Air Pollutants. I supervise a staff of approximately 90 permanent full-time and part-time federal employees.

2. On or before April 30, 2013, the EPA expects to issue a final decision on the June 16, 2010 petition filed by Earthjustice, on behalf of WildEarth Guardians, Center for Biological Diversity, the Environmental Integrity Project, and Sierra Club, requesting that the EPA list coal mines under section 111(b)(1)(A) as a stationary source category that emits air pollution which may reasonably be anticipated to endanger public health and welfare and take certain other actions following that listing decision. Specifically, EPA staff is currently preparing a draft response to Plaintiffs' petition for signature by the appropriate senior agency official that would deny Plaintiffs' petition. EPA expects the response to be signed by April 30, 2013.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed on April 5, 2013



Panagiotis Tsirigotis

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA

_____)	
WILDEARTH GUARDIANS, et al.,)	
)	
Plaintiffs,)	
)	Case No. 11-cv-2064-RJL
)	
v.)	
)	
)	PROPOSED ORDER
UNITED STATES ENVIRONMENTAL PROTECTION)	
AGENCY, and LISA P. JACKSON, in her Official)	
Capacity as Administrator,)	
U.S. Environmental Protection Agency,)	
)	
Defendants,)	
)	
PEABODY ENERGY CORPORATION and)	
NATIONAL MINING ASSOCIATION,)	
)	
Intervenors.)	
_____)	

Having received the parties' Joint Motion to Continue Stay of All Proceedings on April 5, 2013, the Court hereby grants such motion. All proceeding in this litigation are hereby stayed until May 14, 2013. On May 14, 2013, the parties must file joint or separate motions to govern future proceedings.

So ordered.

Dated: _____

The Honorable Richard J. Leon
United States District Judge