COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 10-CI-01867
(CONSOLIDATED WITH 10-CI-01868)
DIVISION I

ENERGY AND ENVIRONMENT CABINET — PLAINTIFF

v. **FRASURE CREEK MINING LLC'S RESPONSE TO MOTION TO INTERVENE**

FRASURE CREEK MINING, LLC — DEFENDANT

* * * * * *

INTRODUCTION

Movants seek an extraordinary result in this case: to file a federal Clean Water Act citizen's suit in Franklin Circuit Court. As detailed below, this Court has no jurisdiction to entertain such a suit. Even if the Court had jurisdiction, intervention would be wrong procedurally under CR 24 and does not make any practical sense. Indeed, it would thwart the carefully constructed federal scheme for addressing citizens' concerns under the federal Clean Water Act -- the very Act under which these citizens gave notice of their intent to sue -- in **federal** court. For all of these reasons, the motion to intervene here should be denied.

BACKGROUND PERTINENT TO MOTION

I. THE NOTICE OF INTENT TO SUE LETTER

By letter dated October 7, 2010, the proposed Intervenors provided Frasure Creek Mining, LLC ("Frasure Creek") with a written Notice of Intent to Sue ("NOI") pursuant to Section 505(b) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(b). In the NOI letter, the proposed Intervenors set out alleged violations by Frasure Creek of 11 Kentucky Pollutant Discharge Elimination System ("KPDES") permits based upon their review of Frasure Creek's Discharge Monitoring Reports ("DMRs") that were submitted to the Kentucky Energy and

Environment Cabinet's Department for Environmental Protection (hereinafter "Cabinet"). The 11 KPDES permits covered Frasure Creek coal mining operations located in Perry, Floyd, Knott, and Pike Counties. The NOI alleged Frasure Creek violated the KPDES permits and Kentucky's underlying CWA implementing regulations: by submittal of "false/fraudulent DMR data"; through "self-reported exceedances/violations of effluent limitations"; and due to "DMR signature violations." (A copy of the NOI is attached as Exhibit 1.) The violations were alleged to have taken place during the time period from January 1, 2008 through December 31, 2009. As provided for under the "Citizen Suits" provisions of Section 505 of the CWA and the United States Environmental Protection Agency ("EPA") implementing regulations, the NOI was sent to the Administrator of EPA, EPA Region 4, and the Kentucky Department for Environmental Protection to alert the responsible enforcement authorities of the alleged CWA violations. The NOI concluded by stating that "Appalachian Voices intends to file suit in **federal** court under CWA §§ 505(b) and 301(a)" at the close of the sixty-day notice period "unless significant progress is made in remedying and preventing these violations." Id. at p. 6 (emphasis added).

II. THE CABINET'S ACTIONS IN RESPONSE TO THE NOI

After receiving the NOI, the Cabinet promptly conducted an enforcement investigation regarding Frasure Creek's compliance with its KPDES permits for its mining operations. (See Complaint lodged December 3, 2010.) Through that investigation, the Cabinet determined that additional violations had occurred at other Frasure Creek coal mining facilities. Notices of Violations were issued to Frasure Creek for KPDES permit violations at 38 of its mining operations based upon the Cabinet's review of DMRs and other records, site inspections, and self-reported information from Frasure Creek in the course of the investigation. (Complaint ¶¶ 4-11; lodged Consent Judgment at ¶¶ C-E.)

In its Complaint filed on December 3, 2010, the Cabinet alleges Frasure Creek committed violations of 38 KPDES permits for operations in six eastern Kentucky counties. The Complaint allegations address the permit violations in the NOI and additional KPDES violations at other Frasure Creek facilities. The Complaint was filed in Franklin Circuit Court based upon the Cabinet's authority under KRS 224.10-100 and KRS 224.99-010(9), which provides the Franklin Circuit Court with jurisdiction and venue over all civil and injunctive relief actions initiated by the Cabinet for enforcement of the Cabinet's authorities under KRS Chapter 224.

III. THE NEGOTIATED CONSENT JUDGMENT

Concurrent with filing its Complaint, the Cabinet lodged a Consent Judgment that it had negotiated with Frasure Creek to resolve the allegations of violations set forth in the Complaint. On December 10, 2010, the Cabinet and Frasure Creek filed a Joint Motion and Supporting Memorandum for entry of the Consent Judgment. As noted in the Joint Motion, the terms of the Consent Judgment were negotiated at arm's length in good faith by both parties and advance the goal of avoiding the necessity for extended and costly litigation while ensuring that corrective measures are promptly initiated by Frasure Creek, which measures are enforceable by the Cabinet in this Court as injunctive relief.

IV. THE MOTION TO INTERVENE

On December 14, 2010, the proposed Intervenors filed a Motion to Intervene and tendered a proposed Intervening Complaint. But, the Intervening Complaint asserts that it is brought as a federal action, pursuant to the Citizen Suits provision of Section 505 of the Clean Water Act, 33 U.S.C. § 1365(a). The KPDES permit violations asserted by the proposed Intervenors in the Intervening Complaint have already been asserted in the Cabinet's Complaint and would be resolved by the proposed Consent Judgment between the Cabinet and Frasure Creek.

On December 14, 2010, the Court held a status hearing on this case, in which the proposed Intervenors participated. On December 15, 2010, the Court entered an Order that provided an opportunity for the proposed Intervenors and other members of the public to submit comments on the tendered Consent Judgment to the Cabinet and the Court for a period of 30 days. The Order noted that the opportunity for the public to provide comment on the merits of the Consent Judgment were based on the procedures established at 28 CFR § 50.7 for commenting on federal CWA consent decrees.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THE TENDERED INTERVENING COMPLAINT.

Movants cite the CWA's Citizen Suits provisions at 33 U.S.C. §§ 1365(a)(1) and 1365(b)(1)(B) as the sole jurisdictional basis for their Intervening Complaint. These statutory provisions do not authorize private citizens to file suit in state court. This Court therefore lacks subject matter jurisdiction over Movants' claims, and the Intervening Complaint would not survive a motion to dismiss under CR 12.02. Because the Intervening Complaint could not be brought in this Court on its own merits, it does not form an appropriate basis for intervention under CR 24, and the Motion to Intervene must be denied.

Where an intervening complaint could not survive a motion for summary judgment, the trial court should deny intervention pursuant to CR 24 of the Kentucky Rules of Civil Procedure. See Webster v. Bd. of Education of Walton-Verona Independent School District, 437 S.W.2d 956, 957 (Ky. 1969). In evaluating a motion to intervene, federal courts applying Fed. R. Civ. P. 24 (which is substantially identical to CR 24) similarly look first to whether the tendered pleadings, at a minimum, "allege a legally sufficient claim or defense" and they refuse intervention where a valid claim is not stated. See Williams & Humbert Ltd. v. W & H Trade

Marks (Jersey) Ltd., 840 F.2d 72, 75 (D.C. Cir. 1988); see also Babcock v. Town of Erlanger, 34 F.Supp. 293 (D.C. Ky. 1940). The legal merits of the tendered complaint are examined with even greater scrutiny where the proposed intervention will obstruct and delay the entry of a mutually agreed consent judgment. See U.S. v. International Tel. & Tel. Corp., 349 F.Supp. 22 at n. 4 (D. Conn. 1972); aff'd sub nom Nader v. U.S., 410 U.S. 919 (1973). Thus, where a complaint tendered in support of intervention would not survive a motion to dismiss, intervention is futile and should not be granted.

Kentucky courts apply a similar concept of futility in evaluating requests for amendment of pleadings under CR 15. Numerous cases under CR 15 hold that amendment will not be allowed where the amendment is "futile" -- meaning that even after amendment of the pleadings, the plaintiff cannot state a legally cognizable cause of action. See, e.g., Kenney v. Hanger Prosthetics & Orthotics, Inc., 269 S.W.3d 866 (Ky. App. 2007). That Kentucky courts apply the concept of futility to claims under CR 15.01 (which requires that leave to amend be "freely given") reinforces the point that a Kentucky court should closely evaluate whether a complaint tendered in support of CR 24 states a legally sufficient claim. In this case, Movants' tendered complaint fails to state a claim within the subject matter jurisdiction of this Court, and is accordingly not a legally sufficient claim that can support intervention under CR 24.

(A) Federal Court Jurisdiction is Exclusive over CWA Citizen Suits.

The only jurisdictional basis cited for the Intervening Complaint is 33 U.S.C. § 1365, the Citizen Suits provision of the CWA. By its plain language, this statutory section requires that CWA citizen suits be brought exclusively in federal district courts. 33 U.S.C. § 1365(a)(2) ("the district courts *shall* have jurisdiction...") (emphasis added); see also 33 U.S.C. § 1365(c)(1) ("[a]ny action respecting a violation by a discharge source of an effluent standard or limitation may be brought under this section *only in the judicial district in which such source is located.*")

(emphasis added). The language of the statute is clear, unambiguous, and mandatory—the district courts "shall" have jurisdiction.

When read together with the Act's other enforcement provisions, the CWA citizen suit provisions express a clear Congressional intent that the federal courts have exclusive jurisdiction over citizen suits. First, federal enforcement actions are to be brought only in federal court. See 33 U.S.C. § 1319(b). Second, state and federal courts are explicitly distinguished in the citizen suit provisions, and state courts are given a limited role. In the only reference to state court action in 33 U.S.C. § 1365, Congress expressly references actions in the courts of "a State" only in the limited context of enforcement actions commenced by "a State" (*i.e.* a state agency such as the Cabinet) as being a bar to commencement of a citizen suit. Everywhere else in the enforcement provisions of the CWA (both 33 U.S.C. §§ 1319 and 1365), Congress refers to "district courts" and "judicial districts," rather than "state" courts. See, e.g., 33 U.S.C. §§ 1319(b) ("federal district courts"); 1365(a)(2) ("district court") and 1365(c)(1) ("judicial district"). This indicates that Congress intentionally carved out a limited role for state courts, allowing them only to entertain enforcement actions initiated by government agencies, and also indicates a clear intent that citizen suits be brought exclusively in federal district courts.[1]

Numerous cases hold that suits under 33 U.S.C. § 1365(a)(2), which shares the same jurisdictional language as 33 U.S.C. § 1365(a)(1), must be brought exclusively in federal district

[1] CWA Section 505(d) addresses preliminary injunctions that may be sought in a properly initiated citizen suit. 33 U.S.C. § 1365(d). It notes that security may be ordered by the court "in accordance with the Federal Rules of Civil Procedure." This further shows the clear intent that jurisdiction is exclusive in the federal courts. Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."); Rader v. Baltimore & O. R. Co., 108 F.2d 980, 986 (7th Cir. 1940), certiorari denied, 309 U.S. 682 (1940) ("It is obvious that the [federal] rules can only have application to proceedings in the Courts of the United States, and cannot be applied to the practice or procedure in State Courts, nor affect the rights of parties in such Courts."); Lang v. Social Sec. Admin., 612 F.3d 960, 966 (8th Cir. 2010) ("It is axiomatic that state rules of civil procedure apply to state court actions, and the federal rules of civil procedure do not.").

court. See Trustees for Alaska v. EPA, 749 F.2d 549 (9th Cir. 1984); Pennsylvania Dept. of Environmental Resources v. EPA, 618 F.2d 991 (3rd Cir. 1980); Natural Resources Defense Council v. EPA, 542 F.3d 1235 (9th Cir. 2008); Remington v. Mathison, 2010 WL 1233803 (N.D. Cal. March 26, 2010)[2]; Historic Garden Springs, Inc. v. EPA, 2010 WL 3855248 (W.D. Va. Sept. 29, 2010). At least one court has acknowledged that the holding in these cases also applies to cases brought under 33 U.S.C. § 1365(a)(1) as well. See Murphy v. Schwarzenegger, 2010 WL 3521958 (E.D. Cal. Sept. 8, 2010).

Exclusive federal court jurisdiction over CWA citizen suits is consistent with numerous holdings under federal environmental statutes with similar citizen suit provisions. See Fletcher v. United States, 116 F.3d 1315, 1327 (10th Cir. 1997) (RCRA)[3]; White & Brewer Trucking, Inc. v. Donley, 952 F.Supp. 1306 (C.D. Ill. 1997) (RCRA); Prairie Dog Advocates v. City of Lakewood, 20 P.3d 1203, 1208 (Colo. App. 2000) (Endangered Species Act); Ayres v. U.S., 66 Fed.Cl. 551, 561 (U.S. Fed. Cl. 2005) (Toxic Substances Control Act). Because state courts lack jurisdiction to entertain citizen suits brought under 33 U.S.C. § 1365(a)(1), intervention in this state court enforcement action to advance such claims is improper.

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[2] Copies of cases from Westlaw not otherwise reported are attached as Appendix A.

[3] One federal decision has reached a contrary conclusion regarding the RCRA citizen suit provisions. See Davis v. Sun Oil Co., 148 F.3d 606 (6th Cir. 1998). Other courts have noted that Davis is in the distinct minority and have declined to follow it. See, e.g., Interfaith Community Organization, Inc. v. PPG Industries, Inc., 702 F.Supp. 2d 295, 304, 305 (D.N.J. 2010). The dissent in Davis acknowledged that the majority's opinion was inconsistent with a lengthy line of federal precedent on the issue of exclusive federal jurisdiction under RCRA. Davis 148 F.3d at 614-615 (Boggs, J., dissenting). Moreover, the majority of the Davis panel admitted that it had not been presented with all of the arguments which might support a contrary result. Id. at n. 5.

(B) Movants Recognize Their Recourse is in Federal Court and Have Already Given Notice of Their Intention to File There.

Movants have previously acknowledged that the federal district courts are the appropriate forum for this action. Movants expressly stated in their Notice of Intent that they planned to bring their action only in *federal* court. See Notice of Intent at p. 6 (emphasis added). Having provided notice only of a potential federal court action, Movants should not be permitted to bring a duplicative federal claim in state court simply because this action is already underway.

Movants' decision to bring this suit in Franklin County, Kentucky also indicates that they know jurisdiction is appropriate only in federal court. The venue provision for citizen suits at 33 U.S.C. § 1365(c)(1) unambiguously states that "[a]ny action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located." As Movants acknowledge, Frasure Creek "owns and operates coal-mining facilities in Pike, Perry, Knott, and Floyd Counties, Kentucky" and discharges into waters located in those counties. See Intervening Complaint at ¶¶ 29 and 30. In order to adhere to the requirements of 33 U.S.C. § 1365(c)(1), the only conceivable way a citizen suit related to discharges occurring in Pike, Perry, Knott and Floyd Counties could be maintained in Franklin County is if the "judicial district" at issue is the U.S. District Court for the Eastern District of Kentucky, which includes Pike, Perry, Knott, Floyd, *and* Franklin Counties. No trial-level judicial subdivision of the Kentucky court system covers such an area. Movants should not be permitted to read 33 U.S.C. § 1365(c)(1) to refer to the jurisdictional reach of *federal* courts for purposes of venue, and then read 33 U.S.C. § 1365(a)(2)'s reference to "district courts" to refer to Kentucky trial courts. Such a reading is wholly untenable and inconsistent with the plain meaning of the text. The

CWA should be read as Congress intended -- to vest exclusive jurisdiction and venue over Intervenors' claims in the federal district courts where the discharge source is located.

(C) Venue is not Appropriate in this Court, Further Demonstrating Intervention is not Appropriate Here.

Even if a Kentucky state court could entertain Movants' Clean Water Act citizen suit claims, this Court could not, because Franklin County would be the wrong venue. As set forth above, the CWA Citizen Suits provision establishes venue in the "judicial district in which such source is located." 33 U.S.C. § 1365(c)(1). A citizen suit filed in federal district court could only be brought in the appropriate judicial district for claims arising in Pike, Perry, Knott, and Floyd Counties.[4]

Assuming arguendo that citizen suit jurisdiction exists in state courts, Section 505 of the Act does not attempt to establish the appropriate state court venue. Nor could it because "a state cannot be required to create a court with power to decide federal claims, if no court otherwise exists...." Virginia v. Browner, 80 F.3d 869, 880 (4th Cir. 1996). It follows that the venue provision of CWA Section 505(c) may only apply to citizen suits commenced in federal court, and indeed is written to only apply to federal courts. If state court venue provisions were applied, Movants would still be in the wrong court. The Kentucky statutory venue provision potentially applicable is KRS 452.405, which provides that an action for the recovery of a fine or penalty imposed by statute shall be brought in the county where the cause of action arose. All of the facts giving rise to the intervening complaint occurred where the discharges occurred, outside Franklin County. Therefore, even if citizen suit claims brought under Section 505(a) of the

[4] Importantly, the Cabinet is not subject to such a limitation, as 33 U.S.C. § 1365(c)(1) applies only to citizen suits, not state enforcement actions under state environmental laws. The Cabinet brought this action pursuant to KRS Chapter 224, not the federal Clean Water Act citizen suit provisions. See KRS 224.10-100 and KRS 224.99-010(a) (authorizing Cabinet enforcement actions in Franklin Circuit Court).

CWA could be heard by state courts, Franklin Circuit Court would be the wrong venue. This further demonstrates why intervention should be denied here: allowing intervention would disrupt the carefully crafted process, including venue, for citizen suits under the CWA and would also run counter to state court venue provisions.

II. MOVANTS DO NOT SATISFY CR 24 FOR INTERVENTION.

Even if subject matter jurisdiction existed, intervention would be procedurally wrong under CR 24.

(A) Intervention as a Matter of Right under CR 24.01 is not Supported.

Under CR 24.01, intervention as of right is authorized:

> Upon timely application . . . (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the transaction and is so situated that the disposition of the action may as a practical matter may impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

Movants have not asserted that a statute confers an unconditional right to intervene in this proceeding. In fact, it is uncontested that the Citizen Suits provision of Section 505 of the Clean Water Act only provides for a citizen to intervene as a matter of right in a Clean Water Act enforcement action initiated by the government in federal court. See 33 U.S.C. § 1365(b)(1)(B). KRS Chapter 224 does not establish any right of intervention in enforcement actions that are, as here, initiated by the Cabinet under KRS 224.99-010.[5]

In addition, Movants have not demonstrated that disposition of this action without their involvement as intervenors will, as a practical matter, impair or impede their ability to protect

[5] KRS 224.99-010 authorizes jurisdiction and venue for Cabinet initiated enforcement actions in Franklin Circuit Court. However, no other provision of KRS Chapter 224 authorizes citizen suits or creates a right of intervention by citizens in enforcement suits filed by the Cabinet.

their interest. First, the interests that Movants seek to protect are identical to the interest of the Cabinet in this matter, which is to ensure that Frasure Creek complies with its KPDES permits. Indeed, the stated jurisdictional basis of their proposed Intervening Complaint is the Citizen Suits provisions of the Clean Water Act for alleged violation of an effluent standard or limitation under the Act. In this regard, Movants' interests are necessarily no broader than the interests of the Cabinet in enforcing and ensuring compliance with effluent standards and limitations in Frasure Creek's KPDES permits.

The CWA citizen suits provisions are "merely intended to supplement, not supplant, enforcement by state and federal government agencies." See Ailor v. City of Maynardsville, 368 F.3d 587, 590 (6th Cir. 2004) (citing Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60 (1987)). The Cabinet not only clearly shares the same interest in ensuring compliance with the Clean Water Act as do citizens, it has been designated by Congress as being primarily responsible for protecting those interests. Texas Independent Producers and Royalty Owners Ass'n v. EPA, 410 F.3d 964, 975 (7th Cir. 2005); North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991); Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376, 380 (8th Cir. 1994); Kerr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007) ("The CWA gives primary enforcement authority to the EPA and the state enforcement agencies.").

Second, Movants have not shown that their interests may be impaired as a practical matter unless they are allowed to intervene. On pages 7 through 10 of their Memorandum in Support of Motion to Intervene, Movants argue that their interests are not adequately protected because they disagree with the terms of the proposed Consent Judgment. However, even where a statutory right to intervene exists in a CWA enforcement suit, such as in federal court, a

citizen's role is generally limited to merely commenting on the settlement -- an opportunity that they, along with other members of the public, have already been afforded by this Court. For example, the court in EPA v. City of Green Forest, 921 F.2d 1394 (8th Cir. 1990) provided a detailed discussion of the limited scope of an intervernor's involvement in a consent decree proceeding where intervention as of right was afforded by the Clean Water Act Citizen Suit provision. In Green Forest, the court reversed the district court's refusal to permit a citizen's group to intervene, but found that the error relating to intervention was harmless. Id. at 1402. The court found:

> [T]he citizens have the opportunity, of which they took advantage, to file their objections to the consent decree during the available public comment period. There is little else that they could have done had they formally intervened.... **Had the citizens intervened, they still would not have been able to compel a consent decree on their own terms**.

Id. (citations omitted) (emphasis added). Accord, United States v. Metro St. Louis Sewer District, 952 F.2d 1040, 1044 (8th Cir. 1992) (citing Green Forest in limiting intervention in consent decree proceeding); United States v. District of Columbia, 933 F.Supp. 42, 47 (D.C. 1996) ("it is well settled that the right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects"); see also, Williams Pipeline Co. v. Bayer Corp., 964 F.Supp. 1300, 1321-22 (S.D. Iowa 1997) (noting wide discretion is given to the government in settling enforcement actions and stressing the need to prevent intervenors from usurping the government's role in enforcement).

Accordingly, since there is no statutory right to intervene in this proceeding under Kentucky law and since the proposed citizen Intervenors have already been allowed to submit comments on the proposed Consent Judgment, their interests have been protected to the full extent they would have been protected even if state law created a statutory right to intervene.

Moreover, Movants can always pursue their claims in the federal court forum established by Congress for such claims if they contend the state has not diligently prosecuted this matter. See 33 U.S.C. § 1365(b)(1)(B). Therefore, Movants have not established, and cannot establish as required by CR 24.01, that disposition of this matter without their involvement would as a practical matter impair their ability to protect those interests.

Finally, Movants have also not overcome the strong presumption that the state "adequately represents" the Movants interests in this enforcement case. U.S. v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 984–86 (2nd Cir. 1984); Environmental Defense Fund v. Higginson, 631 F.2d 738 (D.C. Cir. 1979); Mumford Cove Ass'n, Inc. v. Town of Groton, 786 F.2d 530, 535 (2nd Cir. 1986); Green Forest, 921 F.2d at 1404 ("EPA is charged with enforcing the CWA on behalf of all citizens"). On pages 10-13 of their Memorandum in Support of Motion to Intervene, the proposed Intervenors allege their interests are not sufficiently represented by the Cabinet for various reasons -- all of which lack merit on their face.

First, the claim that the Cabinet failed to allege reckless disregard of the law or intentional false reporting is misleading as the Cabinet investigated such claims, and found no evidence to support them. (See Consent Judgment at ¶ E.) The fact that proposed Intervenors might reach a different enforcement conclusion does not establish that their interests are not sufficiently represented.[6] See Gwaltney, 484 U.S. at 61 (citizens cannot "seek the civil penalties that the [EPA] chose to forego"); Orange County Env't Inc. v. County of Orange, 923 F.Supp. 529, 540 (S.D. N.Y. 1996) (citizens cannot "overrule the judgment of the EPA and demand an additional and different type of remediation"); Ellis v. Gallatin Steel, 390 F.3d 461, 477 (6th Cir

[6] The Clean Water Act prohibits false reporting, which was alleged by the Cabinet in the Complaint. At most, this issue relates to the evaluation of the violations by the Cabinet in its determination of the appropriate civil penalty, a matter entrusted to the agency by Congress.

2004) (citizen suit provisions allow action "where the EPA has failed to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view").

Similarly, Movants' complaint that they were not personally included in the Cabinet's investigation or settlement negotiations as stated on page 12 of their Memorandum is not determinative of whether the Cabinet adequately represents their interests. As stated above, the courts have found that even where a right to intervene is granted in a government enforcement case pursuant to an environmental statute, the citizens have no right to participate in the investigation or settlement. See cases cited supra at pp. 12-13; see also United States v. Cannons Eng'g. Corp., 899 F.2d 79, 93 (1st Cir. 1990) ("So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses"). [7]

Movants' argument on page 12 of their Memorandum that their interests are not adequately represented because the Consent Judgment does not ensure that penalties that are paid will be spent in Eastern Kentucky is also baseless. As noted in their NOI, civil penalties in Clean Water Act suits in federal court provide for civil monetary penalties that "are payable to the federal treasury." (Exhibit 1 at p. 6). A court simply has no authority to direct that civil penalties be used for any particular purpose. Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 175 (2000); Ailor v. City of Maynardville, 368 F.3d 587, 590 (6th

[7] As the U.S. District Court for the Eastern District of Kentucky held in another Clean Water Act case resolved by consent decree, "The CWA and associated case law make clear that private parties should not be allowed to hijack, via intervention – even intervention by right, a government suit such as the present one. In light of the CWA's preference for administrative enforcement actions, the Court does not believe it can- or should- force the EPA, the Commonwealth, or LFUCG to include the Intervening Plaintiffs in their private settlement negotiations." U.S. v. Lexington-Fayette Urban County Government, 2007 WL 2020246 at *4 (E.D. Ky. July 6, 2007). (A copy is included in Appendix A).

Cir. 2004); Friends of the Earth v. Archer Daniels Midland Co., 780 F.Supp. 95, 101 (N.D. N.Y. 1992) (CWA case stating that "the parties have no choice, even in a consent decree, but to make [civil penalties] payable to the Treasury."). Penalties assessed under KRS Chapter 224 must similarly be paid to the Kentucky State Treasurer. KRS 224.10-250 (directing that all civil penalties collected by the Cabinet under KRS 224.99-010 be paid to the state treasury). There is no choice or option to do otherwise.

Finally, Movants' unsupported allegations that the Cabinet has a history of non-enforcement against Frasure Creek, and thus does not represent the interests of the applicants, is unavailing and illogical. If that were the case, in every enforcement action initiated by a government agency for past violations, one could argue that there was a prior agency history of non-enforcement and the agency did not adequately represent the public interest. Such a position also runs counter to Congress' recognition that citizens can play a valuable role in identifying noncompliances in notices of intent to sue that must be provided to state and federal agencies so those agencies can take appropriate enforcements. See Ellis, 390 F.3d at 475 ("notice provisions demonstrate that Congress has authorized Citizen Suits only when environmental officials fail to exercise their enforcement responsibility...."). The clear presumption under the CWA citizen suit notice provisions is that the government adequately represents the interests of the public in any environmental enforcement action, and Movants here have simply not demonstrated the opposite is true. Indeed, the Cabinet's enforcement claims are even broader and more encompassing than those asserted in the NOI, which demonstrates the Cabinet's interests encompass the citizens' interests here. Therefore, intervention as of right under CR 24.01 must be denied.

(B) The Requirements for Permissive Intervention are not Met.

Under CR 24.02, permissive intervention may be granted:

> Upon timely application . . . (a) when a statue confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. ...In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As with intervention as a matter of right, a statute does not confer a conditional right to intervene on citizens in an enforcement action initiated by the Cabinet under KRS 224.99-010.

Because a settlement has already been negotiated of the Cabinet's Complaint, this is not a situation under CR 24.02(b) where disputed claims or defenses need to be resolved on which there are common questions of law or fact because the limited inquiry that remains in the main action is whether the Consent Judgment should be entered. As set forth in the Cabinet's and Frasure Creek's Joint Motion to Enter, substantial deference must be given to the Cabinet's settlement decision and the inquiry as to whether to enter the settlement is quite limited.

Second, allowing intervention will unduly delay the rights of the original parties. Indeed, even the consideration of such intervention has already caused delay here. Such intervention could delay actions to be taken by the Cabinet with respect to the corrective action plan and thwart the benefit of a negotiated settlement of avoiding costly and drawn out litigation.

Finally, permissive intervention is not necessary for the same reasons discussed in cases cited supra at pp.11-14 regarding intervention as of right. Movants have an opportunity to comment on the proposed settlement as provided in the Court's Order of December 15, 2010. Therefore, permissive intervention should also be denied.

III. ALLOWING INTERVENTION IN THIS CASE WOULD CREATE BAD PRECEDENT IN ALL OTHER AGENCY ENFORCEMENT CASES WHERE SETTLEMENTS HAVE BEEN NEGOTIATED.

Allowing intervention in this state agency enforcement proceeding based upon a federal citizen suit cause of action would establish precedent for citizen involvement in other state agency enforcement cases. Unless the Kentucky General Assembly has created a procedural opportunity for citizen involvement in such cases by statute, the courts should refrain from doing so due to the interference with and delays in state agency enforcement that may result. For example, under what circumstances should the Cabinet or other state agencies provide for public notice and opportunities to intervene in all other settlement cases where the cause of action is available only to the state agency, as is the case under KRS 224.99-010? If citizen involvement is allowed here without statutory authorization, state agency settlements may be attacked in state courts under a variety of agency programs. The lack of statutory authorization for such procedures supports disallowing such citizen involvement (both for and against the proposed agency action) to avoid creating precedent and the uncertainty of whether and to what extent citizen intervention should be allowed or required by the state courts.

CONCLUSION

For the reasons set forth above, the Motion to Intervene should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Response to Motion to Intervene has been served upon the parties via electronic and first-class mail on this the 7 day of January, 2011:

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COUNSEL FOR DEFENDANT,
FRASURE CREEK MINING, LLC

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 10-CI-01867
(Consolidated with 10-CI-01868)
DIVISION I

ENERGY AND ENVIRONMENT CABINET — PLAINTIFF

v.

FRASURE CREEK MINING, LLC — DEFENDANT

* * * * * *

ORDER

* * * * * *

This matter having come before the Court on the motion of Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians for the Commonwealth, Inc., Kentucky Riverkeeper, Inc., Pat Banks, Lanny Evans, Thomas H. Bonny, and Winston Merrill Combs ("Applicants") for intervention in this action pursuant to CR 24.01, or, alternatively, CR 24.02, and the Court having reviewed the briefs of the parties and having heard the arguments of counsel and otherwise being fully and sufficiently advised, it is hereby ORDERED that Applicants' Motion to Intervene is DENIED.

So Ordered this ____ day of _____, 2011.

_____
Hon. Phillip Shepherd, Judge
Franklin Circuit Court

Tendered By:

John C. Bender
Anne A. Chesnut
Martin J. Cunningham, III
GREENEBAUM DOLL & MCDONALD PLLC
300 West Vine Street, Suite 1100
Lexington, KY 40507
(859) 231-8500 (phone)
(859) 255-2742 (fax)

CLERK'S CERTIFICATE OF SERVICE

I, Clerk of the Franklin Circuit Court hereby certify that a true and accurate copy of the foregoing Order has been served upon the parties via electronic and/or first-class mail on this the ___ day of _____, 2011:

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_____
CLERK, FRANKLIN CIRCUIT COURT

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

PACE UNIVERSITY SCHOOL OF LAW
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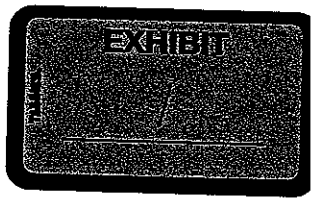


October 7, 2010

VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED

FRASURE CREEK MINING, LLC
4978 Teays Valley Road
Scott Depot, WV 25560

FRASURE CREEK MINING, LLC
c/o National Corporate Research, Ltd.
828 Lane Allen Road
Suite 219
Lexington, KY 40504

Re: Notice of Intent to Sue for Clean Water Act Violations

Dear Sir or Madam:

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians for the Commonwealth, Inc. ("KFTC"), Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonny, and Mr. Winston Merrill Combs (collectively, "Appalachian Voices") hereby place Frasure Creek Mining, LLC ("Frasure Creek") on notice of their intent to sue Frasure Creek pursuant to § 505(b) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(b), for violations of "an effluent standard or limitation" pursuant to CWA § 505(a)(1)(A) and (f), 33 U.S.C. § 1365(a)(1)(A) and (f).

Under CWA § 301(a), 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant into waters of the United States from a point source without, or in violation of, a permit issued pursuant to CWA § 402, 33 U.S.C. § 1342. In order to be in compliance with permit conditions and CWA statutory requirements, owners and operators of point sources are required to "install, use, and maintain . . . monitoring equipment or methods" to sample effluents. CWA § 308(A)(iii)-(iv), 33 U.S.C. § 1318(A)(iii)-(iv). In addition, owners and operators must "establish and maintain such records" and submit them in the form of Discharge Monitoring Reports ("DMRs") in accordance with CWA § 308(A)(i)-(ii), 33 U.S.C. § 1318(A)(i)-(ii), permit conditions, and applicable regulations.

Frasure Creek has violated, and continues to violate, "an effluent standard or limitation" under CWA §§ 505(a)(1)(A) and (f), 33 U.S.C. §§ 1365(a)(1)(A) and (f), in reference to Kentucky Pollutant Discharge Elimination System ("KPDES") Coal General Permit No.

KYG040000 (the "General Permit"),* issued by the Kentucky Department of Environmental Protection, Division of Water ("KDOW") pursuant to § 402(b) of the CWA, 33 U.S.C. § 1342(b). Violation of "an effluent standard or limitation," for purposes of a KPDES permit, is defined pursuant to CWA § 505(f), 33 U.S.C. § 1365(f), 401 K.A.R. 5:065 and 40 C.F.R. §§ 122 and 123.25.

These ongoing and continuing violations fall into one or more of the following categories:

I. Submission of False/Fraudulent DMR Data

DMRs on file with KDNR repeatedly show duplicate DMR submissions that contain exactly the same effluent data for all effluent characteristics reported on other DMRs for the same DSMRE number during different yearly quarters, or for different outfalls during the same yearly quarter. In other words, Frasure Creek merely re-filed previously submitted DMRs under a different signature and date or outfall. This pattern and practice of falsifying DMR data from one DMR to another continues over a period of at least nine months in 2008.

In addition to submitting identical effluent data for different monitoring periods or outfalls, Frasure Creek conversely submitted different effluent data for the same outfalls in the same monitoring periods. In many instances, Frasure Creek maintained multiple DSMRE numbers for a single outfall. Accordingly, Frasure Creek submitted multiple DMRs for the same outfalls for each monitoring period. In other instances, Frasure Creek submitted multiple DMRs for the same DSMRE number, outfall, and monitoring period. Although effluent monitoring data on these DMRs should be identical, there are numerous discrepancies between data on multiple DMRs submitted by Frasure Creek for the same outfall in the same monitoring period. This pattern of submitting conflicting monitoring data for the same outfalls continues over a period of at least twenty one (21) months in 2008 and 2009.

For a DMR-specific identification of Frasure Creeks's submissions of fraudulent, or otherwise false DMR data, please see the items listed under heading "I." in the attached appendix.

The repeated submission of duplicate or conflicting DMRs that are fraudulent, or otherwise false, on their face raises suspicion regarding the validity of data submitted in all of Frasure Creek's DMRs on file with the KDNR for the past five years. Therefore, Appalachian Voices has a good faith belief that Frasure Creek has failed, and continues to fail, in its obligation to submit and maintain accurate DMRs in accordance with federal and state regulations and the terms and conditions of KPDES Permit No. KYG04000.

* The current version of KPDES Coal General Permit No. KYG040000 became effective on August 1, 2009, replacing a previous version of Permit No. KYG040000 that had been in effect since January 1, 2004. Unless otherwise noted, all references to the Coal General Permit in this Notice refer to the version that became effective on January 1, 2004.

The submission by Frasure Creek of fraudulent, or otherwise false, DMR data leads to the inevitable conclusion that Frasure Creek has violated KPDES Permit No. KYGO4000 in a number of ways, as set forth below.

a. **Continuing Violations**

i. **Submission of Fraudulent DMRs Equates to an Ongoing Violation of No Submission**

KPDES Permit No. KYG040000 states, "Discharge monitoring results obtained during the previous month shall be summarized for each outfall and reported using only KDOW approved Discharge Monitoring Report (DMR) forms and formats." Part I, Page I-15, D. Also, the permit details that "Test procedures for the analysis of pollutants shall conform to all regulations published pursuant to KRS 224," which includes 401 KAR 5:065 and incorporates 40 C.F.R. §§ 122.48 and 123.25. Part I, Page I-18, F.

Therefore, Frasure Creek's filing of facially fraudulent, or otherwise false, DMRs equates to the failure to submit and maintain accurate DMRs with the KDNR. CWA §§ 308(A)(i)-(ii), (v), 33 U.S.C. §§ 1318(A)(i)-(ii), (v). *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111-1112 (4th Cir. 1988); *Menzel v. County Utilities Corporation*, 712 F.2d 91, 94 (4th Cir. 1983) ("a discharger that fails to file discharge-monitoring reports, or fails to file accurate reports, would be in violation of the provisions of its NPDES permit and would be subject to citizens' suits under 33 U.S.C. § 1365"). Failure to submit a DMR constitutes ongoing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrue civil penalties per day and per limit until the violations cease. *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1112 (4th Cir. 1988).

ii. **Submission of Fraudulent DMRs Constitutes Ongoing Violations of a Permit Condition**

In addition to the above, a violation of a permit or permit condition issued under CWA § 402, 33 U.S.C. § 142, is a violation of an "effluent standard or limitation" in accordance with CWA § 505(f), 33 U.S.C. § 1365(f). *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111-1112 (4th Cir. 1988); *Menzel v. County Utilities Corporation*, 712 F.2d 91, 94 (4th Cir. 1983). KPDES Permit No. KYG040000 states, "Samples and measurements taken in accordance with the requirements of Part I pages I-1 through I-8 shall be representative of the volume and nature of the monitored discharge." Part I, Page I-15, D.

As it is the responsibility of every owner and operator to ensure compliance with CWA permits and permit conditions, and as failure to submit accurate DMRs is a violation of a condition of KPDES Permit No. KYG040000, Frasure Creek is in a state of continuing violation of its permit. This constitutes ongoing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrues penalties per day and per limit until the violations cease.

b. Failure to Install, Use, and/or Maintain Monitoring Equipment

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on their face raises suspicion regarding the validity of monitoring data found in all of Frasure Creek's DMRs on file with the KDNR for the past five years. Therefore, Appalachian Voices has a good faith belief that Frasure Creek has failed, and continues to fail, in its obligation to "install, use, and maintain . . . monitoring equipment or methods" to sample effluents in accordance with CWA § 308(A)(iii), 33 U.S.C. § 1318(A)(iii). Additionally, this violates Standard Conditions of KPDES Permit No. KYG04000, which states that "It is the responsibility of the permittee to demonstrate compliance with permit parameter limitations by utilization of sufficiently sensitive analytical methods." KPDES Permit No. KYG04000, Part II, Page II-1.

As it is the responsibility of every owner and operator to install, use, and maintain their monitoring equipment in order to fulfill their obligations under the CWA, failure to do so equates to a violation. This constitutes ongoing violations for each day for every outfall and every effluent characteristic listed in the applicable CWA permit, which accrues penalties per day and per limit until the violations cease.

c. Failure to Accurately Sample and Test Effluent

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on its face raises suspicion regarding the validity of sampling methods used by Frasure Creek in creating its DMRs on file with the KDNR for the past five years. Therefore, Appalachian Voices has a good faith belief that Frasure Creek has failed, and continues to fail, in its obligation to sample effluent accurately and in compliance with the CWA and its permit. CWA § 308(A)(iv), 33 U.S.C. § 1318(A)(iv). In addition to requiring owners and operators to use "sufficiently sensitive analytical methods" to monitor and sample effluent, KPDES Permit No. KYG04000 also requires that "samples and measurements be taken . . . [that] shall be representative of the volume and nature of the monitored discharge." KPDES Permit No. KYG04000, Part II, Page II-1; Part I, Page I-15, D.

It is the responsibility of every owner and operator to ensure that sampling and testing is conducted accurately in order to fulfill its obligations under the CWA. Failure to do so constitutes ongoing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrues penalties per day and per limit until the violations are remedied.

II. Self-Reported Exceedances/Violations of Effluent Limitations

DMRs on file with KDNR show repeated failures by Frasure Creek to comply with effluent limitations for specific parameters set forth in KPDES Permit No. KYG040000. AI No. 35050, Fact Sheet Page 4-25. Such failures constitute violations of CWA § 301(a), 33 U.S.C. § 1311(a).

For a DMR-specific identification of Frasure Creeks's self-reported violations of daily maximum and monthly average effluent limitations, please see items listed under heading "II." in the attached appendix.

"Violations of 'average' limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 317 (4th Cir. 1986). As such, Frasure Creek violated its permit thirty-one (31) times in May, 2009 by exceeding the monthly average effluent limitation for TSS, and an additional thirty-one (31) times in March, 2009 by exceeding the monthly average effluent limitation for total recoverable manganese.

III. DMR Signature Violations

As mentioned above, a violation of a permit or permit condition issued under CWA § 402, 33 U.S.C. § 142, is a violation of an "effluent limitation or standard" in accordance with CWA § 505(f), 33 U.S.C. § 1365(f). KPDES Permit No. KYG040000 states, "Discharge monitoring results obtained during the previous month shall be summarized for each outfall and reported using only KDOW approved Discharge Monitoring Report (DMR) forms and formats." Part I, Page I-15, D. Also, the permit requires compliance with 401 KAR 5:065 and 40 C.F.R. § 123.25. Part I, Page I-18, F. This incorporates 40 C.F.R. § 122.22(b), which requires that "All reports required by permits . . . shall be signed by a person" as detailed more fully in the 40 C.F.R. § 122.22(a) to include a person that is either (1) "in charge of a principal business function" or (2) "the manager . . . authorized to make management decisions which govern the operation of the regulated facility." Moreover, the regulations require that such signature or "authorization is made in writing by a person" so described in the regulations. 40 C.F.R. § 122.22(b)(1). *See also* 40 C.F.R. § 122.22(b)(2)(c) (requiring "written authorization" or signature on submitted DMRs).

Frasure Creek has violated these provisions as at least twenty nine (29) DMRs submitted to and on file with KDNR show signatures that do not match the name listed on the form as the authorized signatory. Additionally, some DMRs have inaccurate dates next to signatures (that do not match the quarter for which the report is filed). This calls into question the validity of the DMRs, especially when the signature does not match the name of the person listed, or the signature is dated prior to the end of the monitoring period.

For a DMR-specific identification of Frasure Creeks's DMR signature violations, please see items listed under heading "III." in the attached appendix.

Each of Frasure Creek's failures to comply with the regulations regarding signatories to permit reports is a violation of KPDES Permit No. KYG040000, and these failures constitute ongoing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrues penalties per day and per limit until the violations are remedied.

IV. Additional Violations

In addition to the permit violations detailed above, Frasure Creek repeatedly failed to maintain accurate records of its discharges by submitting DMRs with missing information or inaccurate dates.

For a DMR-specific identification of Frasure Creeks's additional DMR violations, please see items listed under heading "IV." in the attached appendix.

* * *

Based on Frasure Creek's apparent pattern and practice of repeatedly falsifying data and DMR reports, Appalachian Voices reserves the right to add to the specific CWA violations set forth additional claims based on the same pattern of violations set forth herein upon determining that such claims exist. Appalachian Voices takes these violations very seriously and intends to enforce any and all violations of the CWA that have occurred within the statute of limitations.

Appalachian Voices believes that this letter provides sufficient information to place Frasure Creek on notice of our intent to sue and the grounds for a complaint. At the close of the 60-day notice period, unless significant progress is made in remedying and preventing these violations, Appalachian Voices intends to file suit in federal court under CWA §§ 505(b) and 301(a), 33 U.S.C. §§ 1365(b), 1311(a). As noted in CWA § 309(d), 33 U.S.C. § 1319(d), 40 C.F.R. § 19.4, and K.R.S. 224.99-010, violators of the CWA are subject to civil monetary penalties in amounts of up to $37,500 per violation, per day. Such civil monetary penalties, if assessed by a court, are payable to the federal treasury.

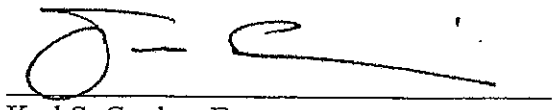
This letter is sent on behalf of: Appalachian Voices, Inc. (contact person: Ms. Willa Mays, Executive Director, 191 Howard Street, Boone, North Carolina 28607, Phone: (828) 262-1500); Waterkeeper Alliance, Inc. (contact person: Mr. Scott Edwards, Director of Advocacy, 50 South Buckhout Street, Suite 302, Irvington, New York 10533, Phone: (914) 674-0622, Ext. 13); Kentuckians for the Commonwealth, Inc. (contact person: Mr. Burt Lauderdale, Executive Director, P.O. Box 1450, London, Kentucky 40743, Phone: 606-878-2161); Kentucky Riverkeeper, Inc. (contact person: Ms. Pat Banks, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 622-3065); Ms. Pat Banks, in her capacity as Kentucky Riverkeeper, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 527-3334; Ms. Lanny Evans, 4625 Four Mile Road, Winchester, Kentucky 40391, Phone: (859) 527-0134; Mr. Thomas H. Bonny, 1548 Wisemantown Road, Irvine, Kentucky 40336, Phone (606) 723-5694; and Mr. Winston Merrill Combs, 7225 Old Boonesboro Road, Winchester, Kentucky 40391, Phone: (859) 595-9637.

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonny, and Mr. Winston Merrill Combs are

represented in this matter by Karl S. Coplan and Daniel E. Estrin, Esqs., Pace Environmental Litigation Clinic, Inc., 78 North Broadway, White Plains, New York 10603. Appalachian Voices, Inc. is also represented by Paul A. Capua, Esq., Capua Law Firm, PA, The Greenhouse, 164 Depot Street, Boone, North Carolina 28607, Phone: (828) 264-0260; and Lauren H. Waterworth, Waterworth Law Offices, PLLC, 815 West King Street, Suite 2, P.O. Box 254, Boone, North Carolina, 28607, Phone: (828) 355-9750. KFTC is represented in this matter by Mary Cromer, Esq., Appalachian Citizens' Law Center, Inc., 317 Main Street, Whitesburg, Kentucky 48158, Phone: (606) 633-3929.

If you wish to discuss the matters set forth in this Notice of Intent to Sue, please do not hesitate to contact the undersigned.

Very truly yours,



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Attachment—Appendix identifying CWA violations alleged herein

CC (via certified mail—return receipt requested):

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R. Bruce Scott, Commissioner
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Frankfort, KY 40601

Appendix: Alleged Clean Water Act Violations by Frasure Creek Mining, Inc.

I. Submission of False/Fraudulent DMR Data

DSMRE #	KPDES #	Outfall #	Monitoring Period	Nature of Violations	Description
860-0424[1]	KYG040567	4	2nd Quarter 2008 3rd Quarter 2008	42 identically repeated values for 90 days.	All 42 effluent measurements from 2nd Quarter 2008 DMR are repeated identically on 3rd Quarter 2008 DMR. Signatures on both DMRs are dated 7/15/2008 (prior to the end of the 3rd Quarter 2008 monitoring period).
860-0424[1]	KYG040567	11	3rd Quarter 2008 4th Quarter 2008	42 identically repeated values for 90 days.	All 42 effluent measurements from 3rd Quarter 2008 DMR are repeated identically on 4th Quarter 2008 DMR. Signatures on both DMRs are dated 10/15/2008 (prior to the end of the 4th Quarter 2008 monitoring period).
860-0424[1]	KYG040567	10	4th Quarter 2008	42 identically repeated values for 90 days.	All 42 effluent measurements are identical to 4th Quarter 2008 data for a different outfall (Outfall #10, DSMRE #s 860-0466 and 860-9014)
836-8061 836-8062	KYG04[2]	2	2nd, 3rd, 4th Quarters 2008; 2nd, 4th Quarters 2009	42 identically repeated values for 90 days.	Identical effluent data submitted for 2nd Quarter 2009 only. If both DSMRE #s refer to the same outfall, then data for other monitoring periods should also be identical.
860-0466 860-0468 860-0470 860-9014	KYG042947 KYG040567 KYG041006 KYG045277	10	4th Quarter 2008	Conflicting data for same outfall.	860-0466 and 860-9014 have different data than 860-0468 and 860-0470. All four DSMRE #s relate to the same outfall, and should have identical effluent data on each corresponding DMR.
898-0810 898-0811	KYG04[2]	59	4th Quarter 2008; 1st, 2nd, 4th Quarters 2009	Conflicting data for same outfall.	Different effluent data on each DMR. Both DSMRE #s relate to the same outfall, and should have identical effluent data on each corresponding DMR.
897-0499	KYG044971	119	1st Quarter 2008	Conflicting data for same outfall.	Two different DMRs with different effluent data submitted for the same outfall, same DSMRE #, and same monitoring period. Sampling dates are identical on both DMRs.
860-0468	KYG040567	10	1st Quarter 2008	Conflicting data for same outfall.	Two different DMRs with different effluent data submitted for the same outfall, same DSMRE #, and same

[1] Name given on DSMRE is "Big Elk Mining, LLC," however it is believed that Fraser Creek Mining, LLC owned and operated this mine at the time of the violation.

[2] Complete KPDES # not recorded on DMR.

					monitoring period. Sampling dates are identical on both DMRs.

II. Self-Reported Exceedances/Violations of Effluent Limitations

DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge
897-0503	KYG045657	SS5	2nd Quarter 2009	TSS	35.0 mg/l (monthly av.)	61.0 mg/l (monthly av. for 5/2009)[3]
					70.0 mg/l (daily max.)	112 mg/l (5/28/2009)
860-0469	KYG040567	4	1st Quarter 2009	Total Recoverable Manganese	2.0 mg/l (monthly av.).	83.9 mg/l (monthly av. for 3/2009)[3]
					4.0 mg/l (daily max.)	166 mg/l (3/14/2009)

III. DMR Signature Violations

DSMRE #	KPDES #	Outfall #	Monitoring Period(s)	Description
860-0424[4]	KYG040567	4	2nd Quarter 2008 3rd Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops. Signature on 3rd Quarter 2008 DMR is dated 7/15/2008, prior to the end of the 3rd Quarter 2008 monitoring period.
860-0424[4]	KYG040567	11	3rd Quarter 2008 4th Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops. Signature on 4th Quarter 2008 DMR is dated 10/15/2008, prior to the end of the 4th Quarter 2008 monitoring period.
860-0424[4]	KYG040567	10	4th Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops.
836-8061	KYG04[5]	2	2nd, 3rd, 4th Quarters 2008; 2nd, 4th Quarters 2009	Jody Salisbury signed for Jeffrey A. Hoops.
836-8062	KYG04[5]	2	2nd, 3rd, 4th Quarters 2008; 2nd, 4th Quarters 2009	Jody Salisbury signed for Jeffrey A. Hoops.
860-0466	KYG042947	10	4th Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops.
860-0468	KYG040567	10	4th Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops.
860-0470	KYG041006	10	4th Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops.
860-9014	KYG045277	10	4th Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops.
898-0810	KYG04[5]	59	4th Quarter 2008; 1st, 2nd, 4th Quarters 2009	Jody Salisbury signed for Jeffrey A. Hoops.

[3] Monthly averages determined by calculating arithmetic mean of all sample values recorded for each calendar month, as specified in KPDES Permit No. KYG04000, Part I, Page I-14, § E(22).

[4] Name given on DSMRE is "Big Elk Mining, LLC," however it is believed that Frasure Creek Mining, LLC owned this mine at the time of the violation.

[5] Complete KPDES # not recorded on DMR.

898-0811	KYG04[5]	59	4th Quarter 2008; 1st, 2nd, 4th Quarters 2009	Jody Salisbury signed for Jeffrey A. Hoops.
897-0499	KYG044971	119	1st Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops.
860-0468	KYG040567	10	1st Quarter 2008	Jody Salisbury signed for Jeffrey A. Hoops.

IV. Additional Violations

DSMRE #	KPDES #	Outfall #	Monitoring Period	Nature of Violation(s)	Description
877-0182	KYG04	1	3rd Quarter 2009	42 inaccurate or deficient discharge monitoring data entries for 90-day period; Incomplete KPDES #.	Monitoring period listed as "3rd Quarter 2009," but "Date" column contains first quarter dates. Missing facility-specific KPDES #.
877-0182	KYG04	14	3rd Quarter 2009	42 inaccurate or deficient discharge monitoring data entries for 90-day period; Incomplete KPDES #	Monitoring period listed as "3rd Quarter 2009," but "Date" column contains first quarter dates. Missing facility-specific KPDES #.
877-0182	KYG04	16	3rd Quarter 2009	42 inaccurate or deficient discharge monitoring data entries for 90-day period; Incomplete KPDES #.	Monitoring period listed as "3rd Quarter 2009," but "Date" column contains first quarter dates. Missing facility-specific KPDES #.

APPENDIX A

2010 WL 1233803
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
N.D. California,
Eureka Division.

Bruce REMINGTON, Plaintiff,
v.
John MATHSON, Joy Mathson, et al., Defendants.

No. CV 09-4547 NJV. March 26, 2010.

Attorneys and Law Firms

Bruce Remington, Eureka, CA, pro se.

John Michael Vrieze, Paul A. Brisso, Russell Scott Gans, Mitchell, Brisso, Delaney & Vrieze, Eureka, CA, for Defendants.

Opinion

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY STAY (Doc. No. 12)

NANDOR J. VADAS, United States Magistrate Judge.

*1 Defendants John and Joy Mathson have moved to dismiss, or alternatively to stay, the complaint filed by pro se Plaintiff Bruce Remington. (Doc. No. 12) Plaintiff opposes dismissal. (Doc. No. 20) Having considered all of the papers filed by the parties, the Court **DENIES IN PART** and **GRANTS IN PART** Defendants' motion to dismiss, and **STAYS** the state claims raised in this federal action pending resolution of certain claims in the state court action, *Remington v. Mathson* (No. DR080678, Humboldt County Superior Court).

I. BACKGROUND

This is a federal environmental claim between neighbors based on alleged violations of the Resource Conservation and Recovery Act ("RCRA") for hazardous waste disposal, Clean Water Act ("CWA"), Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for the clean up of hazardous wastes, and Emergency Planning and Community Right to Know Act ("EPCRA") for the failure to follow reporting requirements. Plaintiff owns real property at 832 Westgate Drive in Eureka, California, and his neighboring Defendants own real property at 778 Westgate Drive. Plaintiff raises eight claims in his complaint, which was filed on September 25, 2009: 1) CWA violation for discharges from five water point sources; 2) RCRA violation for discharge of hazardous wastes under 42 U.S.C. § 6972(a)(1)(A); 3) RCRA violation for handling, storage, treatment, transportation or disposal of solid or hazardous waste presenting an imminent and substantial danger to health or the environment under 42 U.S.C. § 6972(a)(1)(B); 4) CERCLA violation for discharging hazardous materials; 5) EPCRA violation for failing to report the release of hazardous substances; 6) trespass for dumping substances onto Plaintiff's property and the resulting discharge into Plaintiff's surface and groundwater; 7) nuisance resulting from Defendants' contamination of Plaintiff's property and construction of a fence partially on Plaintiff's property; and 8) negligence and negligence per se from Defendants' contamination of Plaintiff's property in violation of state and county codes and the CWA, failure to remove leaning trees near Plaintiff's property, and from Defendants' drainage pipes. (Doc. No. 1) Plaintiff requests a declaration that Defendants violated the CWA, RCRA, CERCLA, and EPCRA. Plaintiff also requests that the Court order Defendants to clean up their property and Plaintiff's property; enjoin Defendants from storing, disposing, or discharging hazardous substances; order Defendants to comply with CERCLA and EPCRA reporting requirements; impose civil penalties for CWA and RCRA violations; and enjoin other conduct by Defendants.

Both parties consent to jurisdiction of this Court as required by 28 U.S.C. § 636(c).

There are two actions between the parties that are pending in state court in Humboldt County. Defendants filed a complaint against Plaintiff and his wife on July 18, 2008 in Humboldt County Superior Court for trespass, quiet title, and nuisance (No. DR080669, *Mathson v. Remington*). Defs.' Request for Judicial Notice ("RJN"), Ex. J (Doc. No. 16). Plaintiff filed a complaint in the same court against Defendants a few days later on July 21, 2008 for nuisance, trespass, water pollution and environmental damage, unfair competition, deceit, fraudulent concealment, false promise, intentional misrepresentation, quiet title, conversion, breach of the covenant of good faith and fair dealing, common counts, harassment, and negligence (No. DR080678, *Remington v. Mathson*). Defs.' RJN, Ex. A (Doc. No. 14). The state court sustained demurrers to and granted Defendants' motions to

strike various causes of action in Plaintiff's complaint and First Amended Complaint. Defs.' RJN, Exs. B-F (Doc. No. 15). In Plaintiff's state action against Defendants, *Remington v. Mathson,* the following causes of action remain: nuisance, nuisance per se, trespass, water pollution and environmental damage, negligence, negligence per se, and quiet title due to adverse possession. Defs.' RJN, Exs. D-F (Doc. No. 15).

II. DISCUSSION

*2 Defendants move to dismiss on three grounds[1]: 1) insufficient service of process under Federal Rule of Civil Procedure 12(b)(5); 2) lack of subject matter jurisdiction under Rule 12(b)(1); and 3) abstention under *Younger v. Harris,* 401 U .S. 37 (1971) and *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)[2] based on the pending state action filed by Plaintiff against the same Defendants.[3] In the alternative, Defendants request the Court to stay this action pending resolution of the state action. If the Court does not dismiss or stay the action, Defendants request that the Court decline to exercise supplemental jurisdiction over the state law claims, arguing that the state law claims substantially predominate over the federal claims. Defendants also request that the Court take judicial notice of documents from the state court proceedings. Plaintiff opposes dismissal on all grounds and opposes a stay. Plaintiff also asserts that the Court has jurisdiction over his state law claims.

A. Request for Judicial Notice

Defendants request that the Court take judicial notice of documents filed and orders from two cases between Plaintiff and Defendants in Humboldt County Superior Court: 1) No. DR080669, *Mathson v. Remington,* filed July 18, 2008 by Defendants against Plaintiff and his spouse; and 2) No. DR080678, *Remington v. Mathson,* filed July 21, 2008 by Plaintiff against Defendants. (Doc. Nos.14-16) Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of papers filed in state court. *See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank,* 136 F.3d 1360, 1364 (9th Cir.1998). The state court documents requested by Defendants are relevant to the present matter. Therefore, the Court grants Defendants' request for judicial notice.

B. Legal Standard

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). We construe the complaint liberally because it was drafted by a pro se plaintiff. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990). When granting a motion to dismiss, the court is generally required to provide pro se litigants with "an opportunity to amend the complaint to overcome deficiencies unless it is clear that they cannot be overcome by amendment." *Eldridge v. Block,* 832 F.2d 1132, 1135-36 (9th Cir.1987). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc.,* 912 F.2d 291, 296 (9th Cir.1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. *Id.* at 296-97.

1. Rule 12(b)(5) Service of Process

The summons and complaint must be served together. Fed.R.Civ.P. 4(c)(1). This Court's local rules also require the plaintiff to serve supplementary material including a copy of the Initial Case Management Conference and ADR deadlines order; the assigned judge's standing orders; and a copy of the assigned judge's order and instructions, if any, for the preparation of a Case Management Statement. Civ. L.R. 4-2. Any non-party at least 18 years old may serve the summons and complaint in a federal action. Fed.R.Civ.P. 4(c)(2). For actions brought in California, an individual defendant may be served by delivery to the defendant personally, delivery to another person at the defendant's dwelling, delivery to an authorized agent, mail service coupled with acknowledgment of receipt, mail requiring return receipt for persons outside California, and by publication. Fed.R.Civ.P. 4(e)(2) & (1); Cal.Code of Civ. P. §§ 415.30, 415.40, & 415.50.

*3 Unless some defect in service is shown on the face of the return of service, a Rule 12 motion to dismiss for improper service must be supported by declaration or other admissible evidence establishing the improper service. *See* Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* (2009) § 5:350. Where the validity of service is properly contested in a motion to dismiss, the burden is on the plaintiff to establish validity of service or to create an issue of fact requiring an evidentiary hearing to resolve. *See Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc.,* 635 F.2d 434, 435 (5th Cir.1981); *Naufahu v. City of San Mateo,* 2008 WL 2323869, *1 (N.D.Cal.2008) (relying on *Aetna Business Credit); see also Fed. Civ. Proc. Before Trial* §§ 5:348 & 5:351. The plaintiff normally meets this burden

by producing the process server's return of service, which is generally accepted as prima facie evidence that service was effected, and of the manner in which it was effected. *See, e.g., Blair v. City of Worcester,* 522 F.3d 105, 112 (1st Cir.2008); *see also Fed. Civ. Proc. Before Trial* § 5:349; *S.E. C. v. Internet Solutions for Business Inc.,* 509 F.3d 1161, 1166 (9th Cir.2007) (signed return of service constitutes prima facie evidence of proper service in context of default judgment).

If a Rule 12(b)(5) motion is granted, the court may either dismiss the action or retain the action and simply quash the service. *See Umbenhauer v. Woog,* 969 F.2d 25, 30-31 (3d Cir.1992); *see also Fed. Civ. Proc. Before Trial* § 5:353; Charles Alan Wright & Arthur R. Miller, *5B Fed. Prac. & Proc. Civ.* § 1354 (3d ed.2009). If effective service can be made and there has been no prejudice to the defendant, the court will generally quash service rather than dismiss the action. *See Umbenhauer,* 969 F.2d at 30-31; *see also Fed. Civ. Proc. Before Trial* § 5:354.

The Ninth Circuit has recognized, however, that defective service by a pro se plaintiff does not necessarily warrant dismissal under Rule 12(b)(5). "This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." *Balistreri,* 901 F.2d at 699 (citing *Borzeka v. Heckler,* 739 F.2d 444, 447 n. 2 (9th Cir.1984) (defective service of complaint by pro se litigant does not warrant dismissal)).

2. Rule 12(b)(1) Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). They may only adjudicate cases involving a federal question, diversity of citizenship, or where the United States is a party. A federal court has jurisdiction to determine whether it has subject matter jurisdiction. *See United States v. United Mine Workers of America,* 330 U.S. 258, 292 n. 57, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

A complaint must be dismissed if there is a "lack of jurisdiction over the subject matter." Fed.R.Civ.P. 12(b)(1). A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence disputing the truth of the allegations. *Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1139 (9th Cir.2003). Here, Defendants facially attack the pleadings. "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir.2004). In evaluating a facial attack, a district court must accept all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Wolfe v. Strankman,* 392 F.3d 358, 362 (9th Cir.2004).

**4* The plaintiff bears the burden of demonstrating that subject matter jurisdiction exists over the complaint when challenged under Rule 12(b)(1). *Tosco Corp. v. Communities for a Better Env't,* 236 F.3d 495, 499 (9th Cir.2001). "A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect [can] be corrected by amendment." *Id.* (quoting *Smith v. McCullough,* 270 U.S. 456, 459, 46 S.Ct. 338, 70 L.Ed. 682 (1926)).

3. Abstention

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River,* 424 U.S. at 813. As the Supreme Court explained:

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

Id. (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-89, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959)). Two doctrines of abstention are raised here-*Younger* and *Colorado River.*

a) Younger Abstention

Abstention "is the exception, not the rule." *Ankenbrandt v. Richards,* 504 U.S. 689, 705, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (quoting *Colorado River,* 424 U.S. at 813). Under the *Younger* abstention doctrine, in recognition of the principles of comity and federalism, a federal court should not interfere with ongoing state judicial proceedings by granting injunctive or declaratory relief unless such interference is necessary to

prevent substantial and immediate irreparable harm. *Younger,* 401 U.S. at 43-54 (creating abstention doctrine for state criminal proceedings); *Samuels v. Mackell,* 401 U.S. 66, 68-74, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (extending *Younger* to requests for declaratory relief); *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 10-11, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (extending *Younger* doctrine to pending state civil proceedings between private parties). The Ninth Circuit has held that *Younger* abstention also applies to claims for money damages, not just actions for injunctive or declaratory relief "because a determination that the federal plaintiff's constitutional rights have been violated would have the same practical effect as a declaration or injunction on pending state proceedings."[4] *Gilbertson v. Albright,* 381 F.3d 965, 968 (9th Cir.2004) (en banc).

Younger abstention has also been extended to cases that might interfere with state "administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate" his or her federal claim. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.,* 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986). In addition, the rationale of Younger applies throughout appellate proceedings, requiring that state appellate review of a state court judgment be exhausted before federal court intervention is permitted. *See Huffman v. Pursue, Ltd.,* 420 U.S. 592, 607-11, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). *Younger* does not, however, apply to all civil cases. It does not apply to pending state judicial proceedings reviewing legislative or executive action because these proceedings are not judicial in nature. *New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350, 367-70, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (*"NOPSI"*).

*5 *Younger* abstention is required when: 1) state proceedings, judicial in nature, are pending; 2) the state proceedings involve important state interests; and 3) the state proceedings afford adequate opportunity to raise the federal issue. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). The "mere existence of parallel proceedings is not sufficient" to establish the first factor. *Gilbertson,* 381 F.3d at 974 (describing *NOPSI*).

Where *Younger* abstention is appropriate as to a request for declaratory or injunctive relief, the court may not retain jurisdiction, but should dismiss the action. *Juidice v. Vail,* 430 U.S. 327, 348, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Beltran v. State of California,* 871 F.2d 777, 782-83 (9th Cir.1988) (*Younger* abstention requires dismissal of federal action). "However, federal courts should not dismiss actions where damages are at issue; rather, damages actions should be stayed until the state proceedings are completed." *Gilbertson,* 381 F.3d at 968.

b) Colorado River Abstention

In addition to abstention under *Younger,* federal courts may also abstain under *Colorado River* from hearing a federal action when there is parallel or duplicative litigation in state court. Unlike other jurisdictions, the Ninth Circuit does not require exact parallelism between the federal and state actions and only requires substantial similarity between the actions. *Nakash v. Marciano,* 882 F.2d 1411, 1416 (9th Cir.1989) (affirming *Colorado River* abstention to prevent piecemeal litigation, because the "state case has progressed far beyond" the federal case, the actions were substantially similar, and the state court could adequately protect the plaintiff's rights). The existence of a parallel or duplicative state action alone is insufficient to justify dismissing or staying a federal action. To abstain under *Colorado River,* courts examine the following factors: 1) whether the state court or federal court first assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which the forums obtained jurisdiction; 5) whether federal or state law controls the decision on the merits; and 6) whether the state court can adequately protect the rights of the parties. *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.,* 460 U.S. 1, 23-24, 26-27, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Colorado River,* 424 U.S. at 818-19; *40235 Washington Street Corp. v. Lusardi,* 976 F.2d 587, 588 (9th Cir.1992). The *Colorado River* factors are not a "mechanical checklist," but require careful balancing by the district court. *Moses H. Cone,* 460 U.S. at 16. "The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case." *Id.*

C. Rule 12(b)(5) Service of Process

Defendants argue that the "initial" service was improper because on or about October 2, 2009, Plaintiff delivered a copy of the complaint in the mail box of defense counsel before counsel was authorized to accept service on Defendants' behalf. This argument is frivolous. Defendants do not disclose, however, that Defendants were personally served just a few weeks later on October 26, 2009. (*See* Doc. No. 10) Defendants do not challenge the return of service, which is prima facie evidence that service was effected. *See*

Civ. Proc. Before Trial § 5:349; *S.E. C. v. Internet Solutions for Business Inc.*, 509 F.3d 1161, 1166 (9th Cir.2007). This service was proper and timely where the complaint was filed on September 25, 2009. The Court denies this ground of Defendants' motion.

D. Jurisdiction

*6 Federal courts have subject matter jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Unlike diversity jurisdiction, there is generally no minimum monetary amount in controversy required. A federal claim must be colorable to establish subject matter jurisdiction, and not immaterial, insubstantial, or frivolous. *See Bell v. Hood,* 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *see, e.g., Hoye v. Sullivan,* 985 F.2d 990, 991-92 (9th Cir.1993) (mere allegations of a due process violation do not raise a colorable constitutional claim to establish subject matter jurisdiction). The complaint needs to clearly set forth the nature of the federal right to establish federal question jurisdiction. *See North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-34 (2d Cir.1978). The complaint's failure to refer to federal law or its erroneous reference to federal law does not, however, determine whether federal question jurisdiction is established. *See id.*

The Court has federal question jurisdiction over this action based on Plaintiff's federal environmental claims under RCRA, CWA, CERCLA, and EPCRA. Despite Defendants' unsupported arguments to the contrary, the majority of courts have held that federal courts have exclusive jurisdiction over RCRA, CWA, and CERCLA citizen suits.[5] 42 U.S.C. § 6972(a) (RCRA); 33 U.S.C. § 1365(a)(CWA); 42 U.S.C. § 9613(b) (CERCLA); *see Natural Resources Defense Council v. U.S. E.P.A.*, 542 F.3d 1235, 1242 (9th Cir.2008) (district courts have exclusive jurisdiction over private citizen suits under the CWA, 33 U.S.C. § 1365(a)(2));[6] *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1235 (10th Cir.2006) (citing CERCLA, 42 U.S.C. § 9613(b)) ("granting federal district courts 'exclusive original jurisdiction' of CERCLA actions"); *U.S. v. Gurley,* 434 F.3d 1064, 1068 (8th Cir.2006) ("district courts have exclusive jurisdiction over controversies arising under CERCLA, see 42 U.S.C. § 9613(b)"); *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 434 (3d Cir.2005) ("The District Court had jurisdiction over this case under 42 U.S.C. § 9613(b), which vests exclusive jurisdiction of CERCLA claims in the federal courts ..."); *Fletcher v. U.S.*, 116 F.3d 1315, 1327 (10th Cir.1997) (in tribal jurisdiction case, describing Eighth Circuit's rationale in *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1097-98 (8th Cir.1989) as based on "RCRA's exclusive federal jurisdiction provision and its legislative history, which expressed a congressional preference for prompt federal adjudication of citizen suits under RCRA"); *Reservation Telephone Co-op. v. Three Affiliated Tribes of Fort Berthold Reservation,* 76 F.3d 181, 185 (8th Cir.1996) ("the RCRA placed exclusive jurisdiction for suits brought under the RCRA in the federal courts"); *City of Waukegan v. Arshed,* 2009 WL 458621, *1, 3 (N.D.Ill.2009) ("Indeed, although not entirely a settled matter, most courts have held that RCRA actions are exclusively federal."); *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F.Supp.2d 272, 282 (D.Puerto Rico 2009) (same); *K-7 Enterprises, L.P. v. Jester,* 562 F.Supp.2d 819, 827 (E.D.Tex.2007) (same); *see also* cases cited in Section E.1 below.[7] The Court denies Defendants' motion to dismiss for lack of subject matter jurisdiction.

*7 Defendants argue in the alternative that the Court should decline to exercise supplemental jurisdiction over the state law claims. Under 28 U.S.C. § 1367(c), the district court may decline to exercise supplemental jurisdiction if: "1) the claim raises a novel or complex issue of State law, 2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; 3) the district court has dismissed all claims over which it has original jurisdiction; or 4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Defendants argue that supplemental jurisdiction is not proper because the state law claims substantially predominate over the federal claims. Defendants are incorrect. Plaintiff's federal environmental claims, not his state law claims of trespass, nuisance, and negligence, predominate in this federal action. At the heart of the complaint in this action, Plaintiff challenges Defendants' alleged dumping of hazardous and toxic substances and the resulting effects of the dumping in violation of the RCRA, CWA, CERCLA, and EPCRA. In addition, trespass and nuisance claims are common state law claims raised in a federal environmental suit. *See, e.g.,* Thomas F.P. Sullivan, *Environmental Law Handbook* at 102 (20th ed.2009). The other factors for declining to exercise supplemental jurisdiction are also not present here, nor do Defendants argue otherwise. The state law claims do not raise novel or complex issue of state law. As discussed in more detail below, the Court has not dismissed all claims over which it has original jurisdiction. And, no exceptional circumstances establishing other compelling reasons to decline to exercise supplemental jurisdiction are present. The Court denies Defendants' request that it decline

to exercise supplemental jurisdiction over the state law claims.

E. Abstention

Even though federal question jurisdiction is clear here, the Court must address whether abstention is nevertheless proper. Defendants contend that the Court should dismiss, or alternatively stay, this action under the *Younger* and/ or *Colorado River* abstention doctrines. Defendants argue that this action is primarily a boundary dispute between the parties and therefore an action based on state, not federal law. Plaintiff responds that resolution of the boundary dispute in state court is immaterial to his federal environmental claims because the clean-up of the alleged toxins must be done before Plaintiff's fence is replaced at an agreed upon location. As described above, the federal environmental claims predominate in this federal action. The focus of both parties is misplaced.

1. Abstention and Federal Court Jurisdiction

The Supreme Court has not resolved the difficult issue of whether federal court abstention is proper when there are claims raised within the federal court's exclusive jurisdiction. Though presented with the issue, the Supreme Court did not resolve it. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666-67, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978). The Ninth Circuit has, however, held that the "*Colorado River* doctrine is inapplicable" to claims within the exclusive jurisdiction of the federal courts. *Minucci v. Agrama*, 868 F.2d 1113, 1115 (9th Cir.1989); *see Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co.*, 39 F.3d 951, 956 (9th Cir.1994) ("The district court followed binding Ninth Circuit precedent which precludes *Colorado River* abstention where federal jurisdiction is exclusive."); *City and County of San Francisco v. U.S.*, 930 F.Supp. 1348, 1352 (N.D.Cal.1996). The Ninth Circuit has not addressed *Younger* or *Colorado River* abstention within the context of the federal environmental claims raised here.

**8* The courts that have addressed whether *Younger* or *Colorado River* abstention is appropriate for the federal environment claims raised here appear to generally conclude that such abstention is not appropriate.[8] *See, e.g., Snellback Properties, L.L.C. v. Aetna Development Corp.*, 2009 WL 1606945, *2 (N.D.Ill.2009) (*Colorado River* abstention for RCRA claims is not appropriate because RCRA claim can only be resolved in federal court); *Spillane v. Commonwealth Edison Co.*, 291 F.Supp.2d 728, 735 (N.D.Ill.2003) (same); *Space Age Fuels, Inc. v. Standard Oil Co. of California*, 1996 WL 160741, *5 (D.Or.1996) (not reported) (*Younger* abstention is not appropriate for RCRA claims because federal courts have exclusive jurisdiction over RCRA claims and such claims cannot be raised in state court); *Silgan White Cap Americas, LLC v. Alcoa Closure Systems*, 2009 WL 1177090, *11 (W.D.Pa.2009) (improper to abstain or stay under *Colorado River* or *Younger* where the federal court has exclusive jurisdiction over CERCLA claims, state court action is currently in discovery, and no motions are pending before the state court); *Morton College Bd. of Trustees of Illinois Community College Dist. No. 527 v. Town of Cicero*, 18 F.Supp.2d 921, 929-30 (N.D.Ill.1998) (despite parallel state litigation and the interest in avoiding piecemeal litigation, *Colorado River* abstention for CERCLA claims is not appropriate because state courts cannot adjudicate CERCLA claims); *S.W. Shattuck Chemical Co., Inc. v. City and County of Denver, Colo.*, 1 F.Supp.2d 1235, 1237 (D.Colo.1998) (*Younger* abstention not proper because state forum is inadequate for CERCLA claims, which are subject to exclusive federal jurisdiction); *Long Island Soundkeeper Fund, Inc. v. New York City Dept. of Environmental Protection*, 27 F.Supp.2d 380, 385 (E.D.N.Y.1998) (*Colorado River* abstention improper for CWA citizen suit and staying "would effectively rewrite the citizen suit provision of the CWA"); *Mutual Life Ins. Co. of New York v. Mobil Corp.*, 1998 WL 160820, *5 (N.D.N.Y.1998) (*Colorado River* abstention not proper of CWA and RCRA claims where federal subject matter jurisdiction was present, the state action would not resolve or affect the federal issues, and the state action involved distinct questions of state law); *Pirgim Public Interest Lobby v. Dow Chemical Co.*, 1996 WL 903838, *6-7 (E.D.Mich.1996) (not reported) (*Colorado River* abstention of CWA action not appropriate where interpretation of CWA is based on federal law, state officials did not file state suit during 60 day notice period required for CWA citizen suits, and "citizen input is specifically contemplated and provided for under the Clean Water Act"). Defendants fail to cite to any authority where federal courts abstained under *Younger* or *Colorado River* where the federal action was based on RCRA, CWA, CERCLA, or EPCRA claims.

As described below, the Court concludes that *Younger* and *Colorado River* abstention is not proper for federal actions based on RCRA, CWA, CERCLA, or EPCRA claims because 1) under *Younger*, the state proceedings do not afford an adequate opportunity to raise Plaintiff's federal environmental claims; and 2) under *Colorado River*, the federal and state actions are not substantially similar, federal law controls

the determination of Plaintiff's federal environmental claims, and the state court cannot adequately protect the rights of a federal litigant raising RCRA, CWA, CERCLA, or EPCRA claims. In addition, following the majority approach that federal courts have exclusive jurisdiction over RCRA, CWA, and CERCLA claims and applying Ninth Circuit precedent in *Minucci, Colorado River* is not applicable to these claims because they are within the exclusive jurisdiction of the federal courts. *See Minucci,* 868 F.2d at 1115; *Legal Economic Evaluations,* 39 F.3d at 956.

*9 The Court now turns to each of the abstention doctrines at issue.

2. Younger Abstention

Abstention under *Younger* is required when: 1) state proceedings, judicial in nature, are pending; 2) the state proceedings involve important state interests; and 3) the state proceedings afford adequate opportunity to raise the federal issue. *Middlesex County,* 457 U.S. at 432. Here, the state action was filed first in July 2008, proceedings in the state action are pending and are further advanced than this federal action. The state court action has proceeded beyond the pleading stage after multiple rounds of demurrers and motions to strike and discovery is well underway, including the retention of experts by both parties. *See* Defs.' RJN, Exs. A-J; Decl. of Russell S. Gans In Support of Motion to Dismiss, ¶¶ 1-2 (Doc. No. 13). The state proceedings, however, do not afford an adequate opportunity to raise Plaintiff's federal environmental claims because, as described above, Plaintiff cannot bring his RCRA, CWA, CERCLA, or EPCRA claims in state court. While the first *Younger* factor weighs in favor of abstention, the absence of the third factor is dispositive and requires the Court to conclude that abstention under *Younger* is inappropriate.

3. Colorado River Abstention [9]

To abstain under *Colorado River,* courts must first determine whether the federal and state actions are substantially similar. *Nakash,* 882 F.2d at 1416. Courts then examine and carefully balance the following factors: 1) whether the state court or federal court first assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which the forums obtained jurisdiction; 5) whether federal or state law controls the decision on the merits; and 6) whether the state court can adequately protect the rights of the parties. [10] *Moses H. Cone,* 460 U.S. at 23-24; *Colorado River,* 424 U.S. at 818-19; *40235 Washington Street Corp.,* 976 F.2d at 588.

a) Substantial Similarity Lacking Between the State and Federal Actions

Under the first step of the *Colorado River* inquiry, this federal action is not substantially similar to the state action. While the same parties appear in both the state and federal actions, and there are some overlapping claims, the two actions are substantively different in other respects. In terms of similarity, the trespass, nuisance, negligence, and negligence per se claims are raised in both the state and federal actions, and the state law claims raised in the federal action are substantially similar to the claims raised in the state action. [11]

In terms of differences, the federal action raises federal environmental claims under RCRA, CWA, CERCLA, and EPCRA that are not raised, and could not be raised, in the state action. The federal action seeks injunctive and declaratory relief based on violations of the federal environmental laws, as well as civil penalties under RCRA and CWA; relief that cannot be provided in state court. The state action also raises three additional state law claims that are not raised in the federal action: 1) nuisance per se based on violations of various state codes; 2) water pollution and environmental damage; and 3) quiet title. While there may arguably be some overlap between the nuisance per se claim and the nuisance claim in the federal action, and the state water pollution and environmental damage claim and the federal environmental claims, the quiet title claim is unique to the state action and of substantial significance to the state action. While resolution of the quiet title claims in state court, which have been raised by both parties, [12] would not affect Plaintiff's standing to bring his federal environmental claims, an argument Defendants do not raise, the state court's resolution of the quiet title claims may affect Plaintiff's state law claims raised in this federal action. *See* Defs.' RJN, Exs. D & J. Therefore, the state and federal actions are not substantially similar to permit application of the *Colorado River* doctrine.

b) Colorado River Factors

*10 Despite the lack of substantial similarity between the actions, the Court now turns to balancing the *Colorado River* factors. The first, third, and fourth *Colorado River* factors weigh in favor of abstention. Under the first *Colorado River* factor, the state has in rem jurisdiction because the state action includes a quiet title claim. *See* Defs.' RJN, Ex. D; *40235 Washington Street Corp.,* 976 F.2d at 589. While the

first factor weighs in favor of abstention and was held to be dispositive in *40235 Washington Street Corp.*, the situation here is distinguishable from *40235 Washington Street Corp.* because no quiet title claim was brought in this federal action. In addition, avoiding piecemeal litigation and the fact that the state action was filed over a year before the federal action, and is already in discovery, also weigh in favor of abstention.

The remaining *Colorado River* factors weigh against abstention, and ultimately, are dispositive. The second factor weighs against abstention because the federal forum, which is located in Eureka, California, is convenient for the parties. More importantly, the fifth and sixth factors weigh heavily against abstention. Federal law controls the determination of Plaintiff's federal environmental claims and the state court cannot adequately protect the rights of a federal litigant raising RCRA, CWA, CERCLA, or EPCRA claims because these claims cannot be raised in state court. In addition, the Ninth Circuit has held that when "there is substantial doubt that a final determination in the [state] proceeding will resolve all of the issues in [the plaintiff]'s federal" proceeding, dismissal or staying under *Colorado River* is not appropriate. *Holder v. Holder,* 305 F.3d 854, 868 (9th Cir.2002). Here, like in *Holder,* there is substantial doubt that a final determination in the state action (*Remington v. Mathson,* No. DR080678) will resolve all of the issues in this federal action. A final determination in the state action may resolve the state law claims of trespass, nuisance, negligence, and negligence per se, but not the federal environmental claims. Therefore, abstention under *Colorado River* is not appropriate here.

4. Staying State Law Claims Pending Resolution in State Court

As discussed above, resolution of the quiet title claim in state court may affect Plaintiff's state law claims of trespass, nuisance, negligence, and negligence per se in this federal action. For example, if the state court determines that the disputed property belongs to Defendants, Plaintiff's state law claims may be moot. In addition, resolution of the trespass, nuisance, nuisance per se, negligence, and negligence per se claims in the state action raises the possibility of inconsistent judgments resulting from resolving the same claims in the federal action, inefficient use of judicial resources, and piecemeal litigation. Staying the state law claims of trespass, nuisance, negligence, and negligence per se in this action does not prejudice the parties, nor impact the ability of the parties to litigate the federal environmental claims. The Court also notes that to the extent possible, discovery should be coordinated between the federal and state actions to promote efficiency and effectuate the speedy resolution of both cases. *See* Fed.R.Civ.P. 1. The Court therefore stays the state law claims of trespass, nuisance, negligence, and negligence per se in this action pending resolution of the quiet title, trespass, nuisance, nuisance per se, negligence, and negligence per se claims in the state court action.

III. CONCLUSION

11* The Court **DENIES IN PART and **GRANTS IN PART** Defendants' motion to dismiss, and **STAYS** the state law claims of trespass, nuisance, negligence, and negligence per se raised in this federal action pending resolution of the quiet title, trespass, nuisance, nuisance per se, negligence, and negligence per se claims in the state court action, *Remington v. Mathson* (No. DR080678, Humboldt County Superior Court). The Court directs the parties to provide periodic updates to the Court, at least every 60 days, regarding the progress of the state court action and whether resolution has been reached on the quiet title, trespass, nuisance, nuisance per se, negligence, and/or negligence per se claims in the state court action. As noted above, Defendants referred to Rule 12(b)(6) grounds for dismissal, but did not present any argument on this basis. Defendants must file their answer to the complaint, or a Rule 12(b)(6) motion to dismiss on the federal environmental claims, within twenty (20) days of the filing of this order.

IT IS SO ORDERED.

Footnotes

1 Defendants refer to a Rule 12(b)(6) challenge for failure to state a claim upon which relief can be granted, but make no argument on this ground.

2 "The *Colorado River* doctrine is not technically an abstention doctrine, although it is sometimes referred to as one." *Holder v. Holder,* 305 F.3d 854, 867 n. 4 (9th Cir.2002). The Court refers to the *Colorado River* doctrine as an abstention doctrine because the cases upon which the Court relies in this order, and the parties in this action, have done so.

3 Typically, the failure to raise an argument in an opening brief constitutes waiver of the argument where the movant raises a new argument for the first time in his or her reply. Here, though Defendants did not raise their argument for abstention under *Colorado River* in their opening brief, the argument has not been waived because Defendants raised it in their reply in response to Plaintiff's opposition. Plaintiff, therefore, had the opportunity to address the *Colorado River* abstention argument.

4 The Supreme Court, however, has not resolved whether *Younger* abstention applies to claims for money damages. *Gilbertson,* 381 F.3d at 969-70; *see Deakins v. Monaghan,* 484 U.S. 193, 202, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988) (district court should have stayed, not dismissed the federal claims for monetary relief because the state court could not have awarded damages); *Quackenbush v. Allstate Insur. Co.,* 517 U.S. 706, 728, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (abstention power derives from court's equitable powers, suggesting that *Younger* abstention may not apply to claims for money damages). The lower courts are split on this issue.

5 The parties have not identified any cases addressing whether federal courts have exclusive jurisdiction over EPCRA claims and the Court has also not identified any on point cases. The EPCRA citizen suit provision uses similar language as the other citizen suit provisions at issues, stating that EPCRA citizen suits *"shall be brought in the district court* for the district in which the alleged violation occurred." 42 U.S.C. §§ 11046(b)(1) & 11046(c) (emphasis added).

6 Section 1365(a)(1) authorizes CWA private citizen suits against non-EPA defendants and *shares* the same language as Section 1365(a)(2) regarding jurisdiction: "[t]he district courts shall have jurisdiction...."

7 A minority of courts have found concurrent jurisdiction exists with state courts over some of these federal environmental claims. *See Davis v. Sun Oil Co.,* 148 F.3d 606, 612 (6th Cir.1998) (state courts have concurrent jurisdiction over RCRA claims); *Hooker v. Chickerling Properties, LLC,* 2007 WL 1296051, *2 (M.D.Tenn.2007) (federal courts do not have exclusive jurisdiction over CWA, state courts have concurrent jurisdiction).

8 Some federal courts have found that abstention of federal environmental claims to be proper under *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), a different abstention doctrine to prevent federal interference with state policy. *See Space Age Fuels,* 1996 WL 160741 at *2-4 (RCRA); *Chico Service Station, Inc. v. Sol Puerto Rico Ltd.,* 677 F.Supp.2d 523, 2009 WL 4730779, *4-5 (D.Puerto Rico 2009) (RCRA). Defendants have clearly stated that they do not claim *Burford* abstention here. Reply at 8-9.

9 Under Ninth Circuit precedent in *Minucci, Colorado River* is not applicable to the RCRA, CWA, and CERCLA claims because these claims are within the exclusive jurisdiction of the federal courts. *See Minucci,* 868 F.2d at 1115; *Legal Economic Evaluations,* 39 F.3d at 956. Even if federal jurisdiction were not exclusive, after conducting the full *Colorado River* analysis, the Court concludes that the *Colorado River* doctrine is inapplicable here.

10 Defendants present the Seventh Circuit's ten *Colorado River* factors. Though analysis of abstention under *Colorado River* is not a rigid or mechanical test, the Ninth Circuit has generally enumerated six, not ten, factors for the analysis. *See 40235 Washington Street Corp.,* 976 F.2d at 588; *Nakash,* 882 F.2d at 1415-16.

11 Plaintiff's trespass claim, like his trespass claim in state court, is based on Defendants' alleged dumping of hazardous substances onto plaintiff's property and the discharge into Plaintiff's surface and groundwater. *See* Compl. at ¶¶ 58-62 (Doc. No. 1); Defs.' RJN, Ex. D at ¶¶ 38-46 (Doc. No. 15).

Plaintiff's nuisance claim is substantially similar to, and almost identical to, his nuisance claim under Cal. Civil Code § 3479 raised in state court. *See* Compl. at ¶¶ 63-67; Defs.' RJN, Ex. D at ¶¶ 29-35. Both nuisance claims are based on Defendants' contamination of Plaintiff's property and construction of a fence partially on Plaintiff's property. In his state action, Plaintiff also raises a nuisance per se claim based on violations of various state codes, which is not raised in this federal action. Defs.' RJN, Ex. D at ¶¶ 36-37.

Plaintiff's negligence and negligence per se claims are substantially similar to Plaintiff's negligence and negligence per se claims raised in state court. *See* Compl. at ¶¶ 68-77; Defs.' RJN, Ex. D at ¶¶ 54-67. Both claims raised in this action and the state action are based on Defendants' contamination of Plaintiff's property in violation of state and county codes, failure to remove leaning trees near Plaintiff's property, and from Defendants' drainage pipes. The federal complaint even directly incorporates negligence allegations made in the "state complaints." *See* Compl. at ¶ 69, 75. The federal complaint also refers to violations of the CWA in its negligence and negligence per se claim, *see* Compl. at ¶ 69, but this does not transform this traditional state law claim for negligence and negligence per se to a federal claim.

12 Defendants also raise a quiet title claim in their state action against Plaintiff. Defs.' RJN, Ex. J.

End of Document

2010 WL 3855248
Only the Westlaw citation is currently available.
United States District Court, W.D. Virginia,
Charlottesville Division.

The HISTORIC GREEN SPRINGS, INC., Reginald Murphy, Jane Stuart Murphy, Sergio Sobral, and Gail Fleury Sobral, Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Lisa P. Jackson, as Administrator of the United States Environmental Protection Agency, William C. Early, as Acting Regional Administrator of the United States Environmental Protection Agency, Region III, and Louisa County Water Authority, Defendants.

Case No. 3:09-CV-00075. Sept. 29, 2010.

Synopsis

Background: Land conservation organization brought action against Environmental Protection Agency (EPA) under Clean Water Act (CWA) and Administrative Procedure Act (APA), alleging EPA unlawfully approved issuance of National Pollution Discharge Elimination System (NPDES) permit to waste water treatment plant. EPA moved to dismiss.

Holdings: The District Court, Norman K. Moon, J., held that:
1 court would not abstain under *Colorado River* from considering organization's action;
2 state court's interpretation of National Historic Preservation Act (NHPA) was not binding upon parties in organization's federal action;
3 review was not available to organization under Administrative Procedure Act (APA).

Motion granted.

West Headnotes (23)

1 **Environmental Law** ⇐ Discharge of Pollutants

Under the National Pollution Discharge Elimination System (NPDES) program of the CWA, requiring a permit for the discharge of a pollutant from any point source, the Environmental Protection Agency (EPA) initially is charged with the permitting system for each state, unless and until a state applies for a transfer of that permitting authority and the transfer is approved. Clean Water Act, § 301(a), 33 U.S.C.A. § 1311(a).

2 **Environmental Law** ⇐ Discharge of Pollutants

Following the Environmental Protection Agency's (EPA) approval of a state-run National Pollution Discharge Elimination System (NPDES) program requiring a permit for the discharge of a pollutant from any point source, the EPA has continuing oversight responsibilities, in that the State must advise the EPA of each permit it proposes to issue, the EPA may object to any permit, and if the State cannot address the EPA's concerns, authority over the permit reverts to the EPA. Clean Water Act, § 301(a), 33 U.S.C.A. § 1311(a).

3 **Federal Civil Procedure** ⇐ Pleading, Defects In, in General

Federal Civil Procedure ⇐ Fact Issues

A motion to dismiss tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

4 **Federal Civil Procedure** ⇐ Conclusions in General

Federal Civil Procedure ⇐ Claim for Relief in General

Federal Civil Procedure ⇐ Insufficiency in General

Although a complaint does not need detailed factual allegations to survive a motion to dismiss, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

5 **Federal Civil Procedure** ⇦ Matters Deemed Admitted; Acceptance as True of Allegations in Complaint

On a motion to dismiss, a court need not accept the legal conclusions drawn from the facts or accept as true unwarranted inferences, unreasonable conclusions, or arguments. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

6 **Federal Courts** ⇦ Nature and Grounds in General

Federal Courts ⇦ Constitutional and Federal Questions, Abstention

Under the *Younger* abstention doctrine, a federal court is required to abstain from interfering in ongoing state court proceedings, even if the federal court has jurisdiction, where the following test is met: (1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity to raise federal claims in the state proceedings.

7 **Federal Courts** ⇦ Particular Cases and Subjects, Abstention

Land conservation organization did not have adequate opportunity to raise its federal Clean Water Act (CWA) claims in state court action challenging issuance of water discharge permit, and trial court thus was not required to abstain under *Younger* from interfering in ongoing state court proceeding, where federal district courts had exclusive jurisdiction over suits claiming that Environmental Protection Agency (EPA) failed to perform nondiscretionary duty created by CWA. Clean Water Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

8 **Federal Courts** ⇦ Procedure as to Abstention; Reserving or Retaining Jurisdiction

Solely as a matter of judicial administration, an abstention under *Colorado River* permits dismissal of a duplicative federal action when wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, clearly favors abstention.

9 **Federal Courts** ⇦ Nature and Grounds in General

Court is to weigh the following factors in its assessment of whether a *Colorado River* abstention is appropriate: (1) whether the subject matter of the litigation involves property where the first court may assume in rem jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights.

10 **Federal Courts** ⇦ Particular Cases and Subjects, Abstention

District court would not abstain under *Colorado River* from considering land conservation organization's action against Environmental Protection Agency (EPA) and Virginia county water authority, even though organization filed state action 10 months before federal action and state court had already made ruling concerning merits at issue in federal court action, where organization only brought federal causes of action against EPA in federal action, organization could not have raised claims at issue in federal action in state court, and state proceeding was not adequate to protect rights of organization.

11 **Courts** ⇦ Vacating or Annulling Decisions

The *Rooker-Feldman* doctrine generally serves to bar district courts from sitting in direct review of state court decisions.

12 **Courts** ⇦ Vacating or Annulling Decisions

Federal Courts ⇐ Supreme Court, Exclusive or Concurrent Jurisdiction

The *Rooker-Feldman* doctrine ensures that federal district courts only exercise original jurisdiction, and guarantees that state court judgments are reviewable only upon direct appeal by superior state courts, and eventually, the United States Supreme Court.

13 **Courts** ⇐ Vacating or Annulling Decisions

The *Rooker-Feldman* doctrine, which generally serves to bar district courts from sitting in direct review of state court decisions, does not stop a district court from exercising subject matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court.

14 **Courts** ⇐ Vacating or Annulling Decisions

Federal Courts ⇐ Judgments

If a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is federal court jurisdiction despite the *Rooker-Feldman* doctrine, and state law determines whether the defendant prevails under principles of preclusion.

15 **Courts** ⇐ Vacating or Annulling Decisions

Rooker-Feldman doctrine did not bar federal court jurisdiction over land conservation organization's action against Environmental Protection Agency (EPA) and Virginia county water authority under CWA, since, if district court were to find for organization, it would need to find that approval of permit by EPA constituted "undertaking" within meaning of the NHPA, and this would deny legal conclusion reached by state court in case to which organization was party. National Historic Preservation Act, § 101 et seq., 16 U.S.C.A. § 470a et seq.; Clean Water Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

16 **Judgment** ⇐ Conclusiveness in General

Under Virginia preclusion law, the following conditions must be met in order to serve as a bar to a plaintiff from litigating issues in federal court previously decided in the state court: (1) the parties to the two proceedings must be the same; (2) the factual issue sought to be litigated must have been actually litigated in the prior proceeding; (3) the factual issue must have been essential to the judgment rendered in the prior proceeding; and (4) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied.

17 **Judgment** ⇐ Identity of Parties and Issues in General

Under Virginia preclusion principles, state court's interpretation of NHPA in land conservation organization's action appealing decision of Virginia Department of Environmental Quality (DEQ) to grant water discharge permit to waste water treatment plant was not binding upon parties in conservation organization's federal action against Environmental Protection Agency (EPA) and Virginia county water authority, challenging process by which wastewater treatment plant was issued water discharge permit under CWA, where DEQ was defendant in state but not federal action, EPA was defendant in federal but not state action, and DEQ and EPA were not in privity, since their interests were not identical. National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Clean Water Act, § 301(a), 33 U.S.C.A. § 1311(a).

18 **Judgment** ⇐ Mutuality of Estoppel

Under Virginia preclusion law, the principle of "mutuality" holds that a litigant is generally prevented from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result.

19 **Judgment** ⇦ What Constitutes Privity in General

Generally, in order for privity to exist, for purposes of Virginia preclusion law, a party's interests must be so identical with another that he can be said to represent the same legal right, and the court's privity analysis must take into account all relevant circumstances in any given case.

20 **Judgment** ⇦ Government, State, or Municipality, and Officers, Citizens, or Taxpayers

In order to bind the United States to an adjudication in a prior case or controversy under res judicata principles, a court must find that the United States pulled a laboring oar in that controversy.

21 **United States** ⇦ Nature of Action in General

Alleged failure of Environmental Protection Agency (EPA) to object to issuance of Virginia Pollutant Discharge Elimination System permit for waste water treatment plant, if proven, was not failure to perform non-discretionary duty, such that sovereign immunity would be waived as to land preservation organization's action against EPA under CWA, inasmuch as CWA regulation listing federal laws that might apply to issuance of permits did not mandate application of National Historic Preservation Act (NHPA) to National Pollution Discharge Elimination System (NPDES) permit process when EPA merely reviewed draft NPDES permit transmitted by state. National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Clean Water Act, §§ 101 et seq., 301(a), 33 U.S.C.A. §§ 1251 et seq., 1311(a); 40 C.F.R. § 122.49(b).

22 **United States** ⇦ Particular Departments, Officers, or Agencies, Suits Against

Suits against the Environmental Protection Agency (EPA) and EPA Administrators are barred by sovereign immunity unless there has been a specific waiver thereof.

23 **Environmental Law** ⇦ Water Pollution

Alleged failure of Environmental Protection Agency (EPA) to object to issuance of Virginia Pollutant Discharge Elimination System permit for waste water treatment plant, if proven, was not failure to perform non-discretionary duty, and review thus was not available under Administrative Procedure Act (APA) to land preservation organization challenging issuance of permit, where EPA's failure to object did not satisfy definition of "approval" in context of NHPA, and, thus, NHPA did not necessitate action on part of EPA. 5 U.S.C.A. § 701(a)(2); National Historic Preservation Act, § 110(f), 16 U.S.C.A. § 470h-2(f); Clean Water Act, § 301(a), 33 U.S.C.A. § 1311(a).

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Opinion

MEMORANDUM OPINION

NORMAN K. MOON, District Judge.

*1 This matter is before the Court upon the Motion of Defendant Louisa County Water Authority to Dismiss under Rule 12(b)(6) for Failure to State a Claim and Failure to Join a Required Party, and the accompanying memorandum in support thereof, (docket nos. 12 and 13), Plaintiffs' Brief in Opposition to Motion of Defendant Louisa County Water Authority to Dismiss under Rule 12(b) (docket no. 14), Defendant Environmental Protection Agency's Modon to Dismiss, and the accompanying memorandum in support thereof (docket nos. 15 and 16), Plaintiffs' Memorandum

in Opposition to Motion to Dismiss of the Defendant Environmental Protection Agency (docket no. 22), and Defendant Environmental Protection Agency's Reply in Support of its Motion to Dismiss (docket no. 26). This matter is also before the Court upon the Nodce of Filing Certain State Court Records at the Request of the Court (docket no. 30), the Court's Order dated May 26, 2010, directing additional briefing by the parties on preclusion and abstention issues potentially raised by the related state court proceedings in Louisa County Circuit Court (docket no. 33), and the parties' subsequent responses thereto (docket nos. 34, 36, 37 and 40), and the additional memoranda filed by the parties with leave of Court concerning the related state court proceedings (docket nos. 32, 39 and 42).

After full consideration of the arguments and authorities set forth in the aforementioned papers, as well as those presented at the May 17, 2010 hearing on the pending motions to dismiss, for the following reasons, the Court will GRANT Defendant Environmental Protection Agency's Motion to Dismiss (docket no. 15), and will DENY AS MOOT Defendant Louisa County Water Authority's Motion to Dismiss (docket no. 14) in an accompanying Order, to follow.

I. BACKGROUND

Historic Green Springs, Inc. (hereinafter "HGS") is a not for profit land conservation organization established in 1970 and incorporated under the laws of Virginia. The purpose of HGS is to preserve approximately two hundred and fifty 18th and 19th century structures and the properties in the Green Springs National Historic Landmark District (hereinafter "the Green Springs Landmark District"), which is a 14,000-acre area of land administered by the National Park Service. The private landowners in the Green Springs Landmark District have voluntarily placed 13,000 of the 14,000 acres in conservation easements. Several thousand acres of conservation easements in the Green Springs Landmark District are held by HGS, and the National Park Service holds easements on approximately 8,000 acres. The purpose of the conservation easements was to "forego most or all development rights in favor of preservation of agricultural land uses and [to] protect the integrity of historic structures" within the Green Springs Landmark District. Complaint, at ¶ 9. In fulfilling its mission, HGS is charged not only with monitoring and enforcing its easements, but also protecting against any threat that may undermine the value or effectiveness of the other easements.

*2 HGS is aggrieved by the Zion Crossroads Wastewater Treatment Plant (hereinafter "Zion Crossroads WWTP") and the treated sewage allegedly discharged from that plant into an impoundment of Camp Creek, which is a small tributary to the South Anna River, York River, and the Chesapeake Bay. There are at least two properties in the Green Springs Landmark District upon which HGS holds land conservation easements through which Camp Creek allegedly flows. [1] Since the time the Zion Crossroads WWTP began discharging into Camp Creek, it is alleged that the Virginia Department of Environmental Quality (hereinafter "DEQ") found evidence of pollution at the location where Camp Creek flowed into Wheeler Creek. The treated sewage discharge into Camp Creek, as well as several other actions taken or in contemplation by Louisa County, [2] allegedly have had, and will continue to have, an adverse impact upon the agricultural and residential land uses of these properties.

1 2 The process by which Zion Crossroads WWTP was issued its water discharge permit is now challenged by HGS. Under the Clean Water Act, 33 U.S.C. §§ 1251-1387, it is unlawful for any party to discharge a "pollutant" from any "point source," without previously having obtained, and complying with the terms of, a National Pollution Discharge Elimination System (hereinafter "NPDES") permit. *See* 33 U.S.C. §§ 1311(a); 1342. The program is designed "to prevent harmful discharge into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 650, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007). Under the NPDES program, the EPA initially is charged with the permitting system for each state, unless and until a State applies for a transfer of that permitting authority and the transfer is approved. *Id.* at 650, 127 S.Ct. 2518. In Virginia, the EPA ceased administering the program in 1975 "pursuant to a memorandum of understanding and the establishment of a state permit program by the State Board." *Chesapeake Bay Found., Inc. v. United States,* 445 F.Supp. 1349, 1352 n. 3 (E.D.Va.1978). Following the approval of a state-run NPDES program, the EPA has continuing oversight responsibilities, in that "[t]he State must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit," and "[i]f the State cannot address the EPA's concerns, authority over the permit reverts to the EPA." *Nat'l Ass'n of Home Builders,* 551 U.S. at 650 n. 1, 127 S.Ct. 2518.

The first Virginia Pollutant Discharge Elimination System (hereinafter "VPDES") permit that was issued to the Zion Crossroads WWTP in 2002 by the Virginia State Water Control Board expired on March 28, 2007, and is not the

subject of the instant suit. *See* Complaint, at ¶¶ 2, 47. The permit application for a reissued permit was completed on August 8, 2007, and on June 5, 2008, DEQ staff transmitted to the EPA by electronic mail a draft permit and fact sheet, which is a document containing the data and rationale underlying an action of the DEQ. *See* Complaint, at ¶¶ 61-65. In the email, DEQ staff stated: "We are trying to get this permit processed quickly, so I'm hoping you can expedite your review. We are trying to get the public comment period started during the week of June 23; it would be helpful if you can get your review completed as early as possible during the week of June 16." *Id.* at ¶ 66. While the Complaint raises several alleged deficiencies in the transmittal to the EPA, it principally alleges that neither the draft permit nor the fact sheet "disclose [d] ... the material fact that the subject sewage treatment plant is located on the boundary of a National Historic Landmark District that is administered by the National Park Service, and which sewage discharge flows through the Historic District." *Id.* at ¶ 70. On June 12, 2008, the EPA responded by email, stating that "based on our review, we have no objection to the issuance of the permit." *Id.* at ¶ 71. The State Water Control Board subsequently issued the VPDES permit for the Zion Crossroads WWTP on December 4, 2008. *See id.* at ¶ 2.

*3 The non-discretionary duties that the EPA is alleged to have violated arise either directly or indirectly from the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (hereinafter "NHPA"). Under Section 106 of the NHPA, any federal agency that has "direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State" or "any Federal department or independent agency having authority to license any undertaking" must study ways to avoid or mitigate any adverse impacts the undertaking could have upon historic properties included in, or eligible to be included in, the National Register. *See* 16 U.S.C. § 470f; *see also Tyler v. Cuomo,* 236 F.3d 1124, 1128 (9th Cir.2000). Section 110 of the NHPA provides that "[p]rior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking." 16 U.S.C. § 470h-2(f).

HGS filed suit in Louisa County Circuit Court challenging the issuance of the permit, and filed a separate suit in this Court. In this action, HGS claims first that in the permit-approval process, the EPA had failed to perform a non-discretionary duty under the Clean Water Act because it "approved" the permit without consideration of any potential adverse effect upon the Green Springs Landmark District. Alternatively, HGS argues that the EPA failed to perform a non-discretionary duty under the NHPA and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (hereinafter "APA") on the same basis.

II. STANDARD OF REVIEW

3 4 5 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; "it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C v. Martin,* 980 F.2d 943, 952 (4th Cir.1992). Although a complaint "does not need detailed factual allegations, a plaintiffs obligation to provide the 'grounds' of his entitle [ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations omitted). A court need not "accept the legal conclusions drawn from the facts" or "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir.2000). "Factual allegations must be enough to raise the right to relief above the speculative level," *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955, with all the allegations in the complaint taken as true and all reasonable inferences drawn in the plaintiff's favor. *Chao v. Rivendell Woods, Inc.,* 415 F.3d 342, 346 (4th Cir.2005).

*4 In sum, Rule 12(b)(6) does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955. Consequently, "only a complaint that states a plausible claim for relief survives a Motion to Dismiss." *Ashcroft v. Iqbal,* 556 U.S. ----, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

III. DISCUSSION

A. EFFECT OF STATE COURT PROCEEDINGS

Following the May 17, 2010 hearing on the pending motions to dismiss, the Court directed the parties to supplement the record by filing certain pleadings from the state court action

in the Circuit Court for the County of Louisa. On May 20, counsel for Louisa County Water Authority filed the requested materials from the Louisa County action. On May 26, the Court invited the parties to submit additional briefing on the effect of the related state court proceedings (docket no. 33), and the parties have done so.

In the pending state court action, *The Historic Green Springs, Inc. v. Virginia Dep't of Envtl. Quality,* Civ. No. CL 09-20 (Va.Cir.Ct.), HGS appealed the decision of DEQ to grant the Zion Crossroads WWTP permit,[3] which is the same permit at issue in this federal action. On January 28, 2009, HGS and other petitioners filed their Petition for Appeal to the Louisa County Circuit Court, alleging five "errors assigned." The first and fifth are relevant to this case. In the first error assigned, HGS argued that DEQ "fail[ed] to provide notice to downstream riparian owners of receipt of the permit application," and that this failure was "not mere harmless error where property interests affected by the National Historic Preservation Act are at issue." Petition for Appeal, at 15 (docket no. 30). The timely notice of the permit application could have informed the National Park Service and allegedly "triggered consultation in accordance with Section 110 of the National Historic Preservation Act." *See id.* at 16. In the fifth error assigned, HGS argued that DEQ "fail[ed] to disclose information of significance in the permit documentation prior to seeking the required review by the U.S. EPA, thereby conveying defective notice and depriving the U.S. EPA of making an informed review in the exercise of its approval." *See id.* at 18. Among other alleged deprivations of "information of significance," HGS argued that DEQ was required to disclose "the fact of the existence of the Natural Historic Landmark District which omission defeated [the] U.S. EPA['s] duty to consult pursuant to Section 110 of the National Historic Preservation Act. *See id.* at 19. Similarly, HGS stated that the EPA "must consult" with the National Park Service under Section 110 of the NHPA, although the EPA was not a party to the Louisa County action. *Id.*

There was initially some uncertainty in the state court action as to whether HGS was raising any claims under the NHPA. Responding to the demurrers of Louisa County and the Commonwealth, HGS clarified that in the fifth error assigned, it was only asserting that DEQ had committed a procedural violation of Virginia law, and that no issue requiring the interpretation of the NHPA was before the state court. *See* Petitioners' Memorandum in Opposition to Demurrers of Respondents and Motion to Withdraw Assignment of Error 1, at 16 (docket no. 30). HGS also moved to withdraw its first error assigned. *See id.* at 1.

*5 On July 17, 2009, the Louisa County Circuit Court issued an oral ruling, in which it recognized "that how these counts are plead makes it less than clear whether NHPA claims are being made or not." Transcript of Court's Ruling taken on July 17, 2009, at 5 (docket no. 30). However, to the extent that such claims were made by HGS, the court sustained the demurrers as to the first and fifth errors assigned. First, the court held that "[t]he provisions of [16 U.S.C. §§ 470f and 470h-2] are by their expressed language limited to federal agencies," and "impose no duties upon the states." *Id.* Second, the court held that the "requirements [of these statutes] only apply to federally funded or federally licensed undertakings and not to undertakings that are merely subject to state or local regulation administered pursuant to a delegation or approval of a federal agency. The petition only alleges the latter." *Id.* On July 31, 2009, the Louisa County Circuit Court issued an Order sustaining the demurrers as to the first and fifth errors assigned "to the extent that such Errors Assigned state any claim under the federal National Historic Preservation Act." *See* Order on Demurrers and on Motions of Petitioners, at 1 (docket no. 30).

Responding to the Court's invitation to provide additional briefing on the effect of the state court ruling, the EPA argues in its brief that there is no basis upon which the Court should abstain from rendering a decision, and argues that neither the *Rooker-Feldman* doctrine nor collateral estoppel applies under the facts of this case (docket no. 34). HGS concurs with the EPA that the Court should render a decision on the merits of the case (docket no. 37). However, Louisa County Water Authority argues instead that the instant suit "presents a strong case for the Court's abstention" on the basis of the *Younger* and *Colorado River* abstention doctrines, as well as *Rooker-Feldman* (docket no. 36). For the following reasons, the related state court proceedings do not present an obstacle to the Court's issuance of a decision on the merits of this dispute.

1. *Younger*

6 Under the *Younger* abstention doctrine, a federal court is required to abstain from interfering in ongoing state court proceedings, even if the federal court has jurisdiction, where the following test is met: (1) "there are ongoing state judicial proceedings"; (2) "the proceedings implicate important state interests"; and (3) "there is an adequate opportunity to raise federal claims in the state proceedings." *Martin Marietta Corp. v. Maryland Comm'n on Human Relations,* 38 F.3d 1392, 1396 (4th Cir.1994) (citing *Middlesex County Ethics*

Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)); *see also Virginia Inst. of Autism v. Virginia Dep't of Educ.*, 537 F.Supp.2d 817, 820 (E.D.Va.2008). "*Younger* abstention represents an accommodation between a state's pursuit of important interests in its own forum and the federal interest in federal adjudication of federal rights." *Laurel Sand & Gravel, Inc. v. Wilson,* 519 F.3d 156, 165 (4th Cir.2008). Of course, abstention "is the exception, not the rule." *Ankenbrandt v. Richards,* 504 U.S. 689, 705, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992).

*6 7 It is uncontested that prongs one and two of the *Younger* test have been fulfilled in the instant case. *See e.g.,* EPA's Memorandum in Response to Court's May 26, 2010 Order, at 9-10 (docket no 34). However, crucially, the third factor of the *Younger* test is not met in this case, as HGS and the other petitioners did not have an adequate opportunity to raise the federal claims at issue in this case in state court. In Count One of its Complaint, HGS argues that EPA failed to perform a non-discretionary duty under the Clean Water Act. While the matter does not appear to be entirely beyond dispute, the Court is persuaded that HGS could not have raised its Clean Water Act claim against the EPA in Louisa County Circuit Court because the district courts have exclusive jurisdiction over suits claiming the EPA has failed to perform a non-discretionary duty created by the Clean Water Act. *See* 33 U.S.C. § 1365(a)(2); *see also Nat. Res. Defense Council v. EPA,* 542 F.3d 1235, 1242 (9th Cir.2008) (holding that "where a plaintiff alleges that the EPA has failed to perform a non-discretionary duty under the CWA and the plaintiff does not challenge the substance of any existing regulations, the district courts have exclusive jurisdiction"). Similarly, Count Two of the Complaint claims that EPA has committed a violation of the NHPA, which is a claim that must be raised pursuant to the APA, and therefore falls within the exclusive jurisdiction of the district courts. *See* Complaint, at ¶¶ 103-04; *see also Boron Oil Co. v. Downie,* 873 F.2d 67, 71 (4th Cir.1989) (stating that "Congress has expressly limited Administrative Procedure Act review to the federal courts, and a state court's assertion of the power of judicial review over federal agencies directly contravenes 5 U.S.C. § 702"); *Checed Creek, Inc. v. Secretary, U.S. Dept. of Housing and Urban Development,* Civil Action No. 4:06-cv-110, 2007 WL 1238592, at *4 (E.D.Va. Apr. 27, 2007) (noting that "the APA authorizes judicial review without sovereign immunity only in federal court"). Accordingly, because HGS could not have raised the claims in this suit against the EPA in the Louisa County Circuit Court action, the Court finds that a *Younger* abstention is not appropriate. *See Remington v. Mathson,* No. CV 09-4547, 2010 WL 1233803, at *9 (N.D.Cal. Mar. 26, 2010) (finding there was no adequate opportunity for the plaintiff to bring federal environmental claims in state court under, *inter alia,* the CWA, and holding the absence of this third *Younger* factor to be "dispositive" that abstention was not appropriate); *see also Silgan White Cap Americas, LLC v. Alcoa Closure Sys.,* Civil Action No. 08-939, 2009 WL 1177090, at *11 (W.D.Pa. Apr. 29, 2009) (declining to abstain under *Younger* because, *inter alia,* CERCLA claim was subject to the exclusive jurisdiction of the federal courts).

2. *Colorado River*

8 9 The Fourth Circuit has cautioned that when a district court assesses whether a *Colorado River* abstention is appropriate, it must remain mindful that this form of abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and that it should abstain only "where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Great Am. Ins. Co. v. Gross,* 468 F.3d 199, 207 (4th Cir.2006) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)). "[S]olely as a matter of judicial administration," an abstention under *Colorado River* "permits dismissal of a *duplicative* federal action when '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' clearly favors abstention." *Chase Brexton Health Servs., Inc. v. Maryland,* 411 F.3d 457, 463 (4th Cir.2005) (quoting *Colorado River,* 424 U.S. at 817, 96 S.Ct. 1236) (emphasis in original). The Court is to weigh the following factors in its assessment of whether a *Colorado River* abstention is appropriate:

> *7 (1) whether the subject matter of the litigation involves property where the first court may assume *in rem* jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights.

Chase Brexton, 411 F.3d at 463-64 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 15-16, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

10 The fourth factor undeniably counts in favor of abstention, not only because the Louisa County action was filed some ten months before the federal court action, but also because the state court has already made a ruling touching upon the first and fifth errors assigned, which concern the merits of the federal court action. This is the only factor that appears to weigh in favor of abstention, and all the remaining factors are either neutral or weigh against abstention. The first and second factors are not implicated in the Court's assessment. The fifth factor, concerning "whether state or federal law provides the rule of decision on the merits," weighs against abstention, as HGS only brings federal causes of action against the EPA in this action for alleged violations of the CWA and the NHPA. The third factor, which is the "desirability of avoiding piecemeal litigation," also weighs against abstention, because HGS could not have raised the claims at issue in this federal action against the EPA in state court. Finally, the sixth factor most strongly weights against abstention. While there was some overlap between the issues raised in the Louisa County Circuit Court action and in this Court, because HGS would not have been able to bring its federal claims against the EPA in state court, that state proceeding was not adequate to protect its rights. *See e.g., Remington,* 2010 WL 1233803, at *10 (finding *Colorado River* abstention not warranted in part because "the state court cannot adequately protect the rights of a federal litigant raising RCRA, CWA, CERCLA, or EPCRA claims because these claims cannot be raised in state court"); *Mut. Life Ins. Co. of New York v. Mobil Corp.,* No. CIVA961781, 1998 WL 160820, at *5 (N.D.N.Y. Mar. 31 1998) (finding *Colorado River* abstention not warranted for CWA and RCRA claims in part because it was "uncontested that the state and federal lawsuits involve different legal theories and statutes"). Louisa County Water Authority (the only party presently arguing in support of abstention) has not established to the satisfaction of the Court that circumstances warrant disrupting the general rule that "the pendency of an action in the state court is no bar to proceedings concerning the same subject matter in the Federal court having jurisdiction." *Colorado River,* 424 U.S. at 817, 96 S.Ct. 1236 (quoting *McClellan v. Carland,* 217 U.S. 268, 282, 30 S.Ct. 501, 54 L.Ed. 762 (1910)).

3. *Rooker-Feldman*

*8 Neither is the Court barred from hearing the claims raised by Historic Green Springs due to a lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.

11 **12** This doctrine acquired its name from the cases of *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), and generally serves to bar district courts from "sit[ting] in direct review of state court decisions." *Feldman,* 460 U.S. at 483 n. 16, 103 S.Ct. 1303. This doctrine ensures that federal district courts only exercise original jurisdiction, and guarantees that state court judgments are reviewable only upon direct appeal by superior state courts, and eventually, the United States Supreme Court. *See Brown & Root, Inc. v. Breckenridge,* 211 F.3d 194, 198 (4th Cir.2000).

Originally, the Fourth Circuit, among other courts, had given the *Rooker-Feldman* doctrine an "expansive reading," *Davani v. Virginia Dep't of Transp.,* 434 F.3d 712, 717 (4th Cir.2006), stating that the prohibition on district courts sitting in direct review of state court judgments "extends not only to issues actually decided by a state court but also to those inextricably intertwined with questions ruled upon by a state court. A federal claim is inextricably intertwined with a state court decision if success on the federal claim depends upon a determination that the state court wrongly decided the issues before it." *Id.* (quoting *Barefoot v. City of Wilmington,* 306 F.3d 113, 120 (4th Cir.2002)).

13 **14** However, the Supreme Court later significantly cabined the scope of the doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). As a result, the doctrine was "confined to cases ... brought by state court losers complaining of injuries *caused by state court judgments* rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Davani,* 434 F.3d at 718 (quoting *Exxon Mobil,* 544 U.S. at 284, 125 S.Ct. 1517) (emphasis added). Importantly, the Supreme Court clarified that *Rooker-Feldman* does not

> stop a district court from exercising subject matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party ... then there is jurisdiction and

> state law determines whether the defendant prevails under principles of preclusion.

Davani, 434 F.3d at 718 (citing *Exxon Mobil,* 544 U.S. at 284, 293, 125 S.Ct. 1517). In other words, the question is whether the losing party in state court has "repaired to federal court to undo the [state-court judgment]." *Delmarva Power & Light Co. v. Morrison,* 496 F.Supp.2d 678, 683 (E.D.Va.2007) (quoting *Exxon Mobil,* 544 U.S. at 293, 125 S.Ct. 1517).

*9 The question of whether *Rooker-Feldman* serves to dispossess the Court of subject matter jurisdiction gives it more pause than the questions raised concerning abstention. It appears likely that under prior Fourth Circuit precedent, the issues presented in this suit would be considered "inextricably intertwined with questions ruled upon by a state court." *Barefoot,* 306 F.3d at 120. The Louisa County Circuit Court ruled that the "requirements [of the NHPA] only apply to federally funded or federally licensed undertakings and not to undertakings that are merely subject to state or local regulation administered pursuant to a delegation or approval of a federal agency. The petition only alleges the latter." Transcript of Court's Ruling taken on July 17, 2009, at 5 (docket no. 30). While the state court also provided an additional basis for its decision to sustain the demurrers, and recognized that it was unclear whether HGS had raised claims under the NHPA at all, its holding that the EPA's role in the permit approval process did not amount to an "undertaking" directly addresses an issue raised in this federal suit.

15 Now, HGS simply attempts to litigate in federal court a matter that clearly has been previously litigated in state court, irrespective of whether HGS intentionally sought to have questions of the NHPA there raised. The claims brought in federal court are independent of those previously litigated in state court, because they are specifically brought against the EPA and concern the duties it owes under the CWA and the NHPA. However, were the Court to find for HGS in this case, it would need to find that the EPA's "approval" of the permit constitutes an "undertaking" within the meaning of the NHPA. *See* Complaint, at ¶¶ 90-92. This would deny a legal conclusion the state court reached in a case to which HGS was a party. Under these circumstances, it is clear that the *Rooker-Feldman* doctrine is inapplicable, the District Court possesses jurisdiction, and "state law determines whether the defendant prevails under principles of preclusion." *See Davani,* 434 F.3d at 718 (citing *Exxon Mobil,* 544 U.S. at 284, 293, 125 S.Ct. 1517).

4. State-Law Preclusion

16 Under Virginia preclusion law, the following conditions must be met in order to serve as a bar to HGS from litigating issues previously decided in the state court:

> (1) the parties to the two proceedings must be the same; (2) the factual issue sought to be litigated must have been actually litigated in the prior proceeding; (3) the factual issue must have been essential to the judgment rendered in the prior proceeding; and (4) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied.

Whitley v. Commonwealth, 260 Va. 482, 538 S.E.2d 296, 299 (2000). The question before the Court is whether the state court's adjudication of the interpretation of the NHPA, as set forth in its ruling on the first and fifth errors assigned, is binding upon the parties in this litigation. The Court concludes that it is not.

*10 17 18 19 20 The parties in the two proceedings are not the same. In the Louisa County action, HGS appealed the issuance of the permit and joined as respondents DEQ, the Virginia Water Control Board, and Louisa County Water Authority, among others. In the instant action, HGS instead brought suit principally against the EPA and its Acting Regional Administrator for Region III, but also against the Louisa County Water Authority. The instant suit is "principally" brought against the EPA because, at a minimum, the causes of action asserted in the Complaint only allege that the EPA committed violations of CWA and the NHPA, and do not allege violations on the part of Louisa County Water Authority. *See e.g.,* Complaint, at ¶¶ 101, 103. The Court, applying Virginia law, adheres to the principle of mutuality, which holds that "a litigant is generally prevented from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result." *Rawlings v. Lopez,* 267 Va. 4, 591 S.E.2d 691, 692 (2004). The only party seeking to invoke the preclusive force of a judgment is the Louisa County Water Authority, which was a defendant to the state court action. However, the central defendant in the Louisa County action was DEQ, which is not a defendant in this action, and the central defendant in this action is the EPA, which was not a defendant in the Louisa County action. Even though the EPA was not a party to the Louisa County action, the Court must

determine whether it stands in privity with DEQ. Generally, in order for privity to exist, the party's interests must be so identical with another that he can be said to represent the same legal right, *see State Farm Fire & Cas. Co. v. Mabry,* 497 S.E.2d 844 (1998), and the Court's "privity" analysis must take into account all relevant circumstances in any given case, *see Angstadt v. Atl. Mut. Ins. Co.,* 249 Va. 444, 457 S.E.2d 86, 87-88 (1995). Further, in order to "bind the United States" to an adjudication in a prior case or controversy, the Court must find that the United States pulled "a laboring oar in [that] controversy." *Drummond v. United States,* 324 U.S. 316, 318, 65 S.Ct. 659, 89 L.Ed. 969 (1945).

The Court finds that the EPA and DEQ cannot be considered to be in privity. While both parties are involved in the issuance of NPDES permits, once Virginia assumed responsibility of the permit program, "then state officials-not the federal EPA-have primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Nat'l Ass'n of Home Builders,* 551 U.S. at 650, 127 S.Ct. 2518. Therefore, EPA has an oversight role in the state-run NPDES permit issuance process, and one that is carefully circumscribed by the CWA. In fact, if the EPA decides to object to a draft permit by the DEQ and "the State cannot address the EPA's concerns, authority over the permit reverts to the EPA." 551 U.S. at 650 n. 1, 127 S.Ct. 2518. The interests of the EPA and DEQ therefore are not necessarily in alignment in the context of the permit issuance process in which both entities have a critical role. More specifically in the context of this litigation and the Louisa County proceedings, the interests of the two entities are not identical. The crux of the EPA's position is that its decision not to object to a draft NPDES permit does not result in an accompanying obligation under the NHPA. *See* EPA's Memorandum in Response to the Court's May 26, 2010 Order, at 16. The principal respondent in the Louisa County action was the DEQ, which in conjunction with the State Water Control Board, submitted the draft VPDES permit to the EPA, held public hearings on the subject, and ultimately issued the permit pursuant to Virginia's authority to do so. Further, as the EPA recognizes, DEQ raised at least one argument in its briefing in the Louisa County action that is antithetical to its position: "Moreover, EPA's involvement should only mean that EPA, as a federal agency, was required to comply with Section 106 prior to giving the concurrence." Commonwealth's Partial Demurrer and Answer, at 5 (docket no. 30). The Court cannot hold under these circumstances that there is an identity of interests. Finally, even if there was an identity of interests between DEQ in the Louisa County action and the EPA in this action, the Court has no basis upon which it could find that the United States pulled "a laboring oar in [the prior] controversy." *Drummond,* 324 U.S. at 318, 65 S.Ct. 659. Accordingly, the Court finds that the EPA, as the principal defendant in this suit, was not a party to nor was in privity with any party to the Louisa County action. Because mutuality between the parties does not exist, the Court cannot find the state court's adjudication of issues with reference to the NHPA bind the parties in this case.

**11* In sum, the Court finds that it has subject matter jurisdiction over this case, that there is no basis upon which it should abstain from rendering a decision on the merits, and that the state court's decision sustaining the demurrers as to the first and fifth errors assigned are not binding upon the parties in this case.

B. THE MERITS

The EPA raises several arguments in its Motion to Dismiss as to how Count One, which alleges violations of the Clean Water Act, is without merit.

First, the EPA argues that the Clean Water Act claim "is premised upon an alleged EPA action that never occurred as a factual matter and, from a legal standpoint, could not have occurred," EPA's Memorandum in Support of its Motion to Dismiss, at 10, which was an "approval of the VPDES permit for the Zion Crossroads WWTP." Complaint, at ¶ 92; *see also id.* at ¶¶ 94, 101. Because the EPA, by statute, had no authority to "approve" the challenged permit, but only receives notice from the State regarding permit applications and may object to the issuance thereof, 33 U.S.C. § 1342(d)(2), the EPA argues that HGS's challenge to its "approval" of the permit fails to state a claim. In response, HGS reiterates its argument in Count One that the EPA "approved" the challenged permit, and that the EPA's review "necessarily rendered a 'decision' not to object." HGS's Memorandum in Opposition to EPA's Modon to Dismiss, at 8. Furthermore, HGS cites the fact that the checklist submitted by the Commonwealth for the EPA's review of the Zion Crossroads WWTP, states that the draft permit is submitted "for Agency review and concurrence" (docket no. 22, ex. B), and argues that "approval" and "concurrence" are functionally equivalent. Notably, HGS only challenges the EPA's alleged *approval* of the permit, and does not raise any challenge to the *failure* of the EPA to object to the issuance of the permit. *See* Complaint, at ¶¶ 86-101; HGS's Memorandum in Opposition to EPA's Modon to Dismiss, at 8 ("The express allegations in Count I are that the EPA *approved* the subject state issued permit ..." (emphasis added)).

The argument that the EPA's actions (or inaction) in this case amounted to EPA "approval" of an NPDES permit is plainly without merit. Once a State is authorized by the EPA to administer the NPDES program within its borders, the EPA must within ninety days discontinue the issuance of permits. *See* 33 U.S.C. § 1342(c)(1). Thereafter, "state officials-not the federal EPA-have primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight," *Nat'l Ass'n of Home Builders,* 551 U.S. at 650, 127 S.Ct. 2518, the bounds of which are fixed by statute and cannot be reasonably read to permit EPA "approval" of an NPDES permit. *See* 33 U.S.C. § 1342(d); *see also District of Columbia v. Schramm,* 631 F.2d 854, 857 (D.C.Cir.1980) (recognizing that where a State applied to the EPA to run its NPDES program pursuant to § 1342, "Congress in this scheme thus placed on the states the burden of administering and approving NPDES applications"); *Citizens Alert Regarding the Environment v. U.S. E.P.A.,* 259 F.Supp.2d 9, 18 (D.D.C.2003) ("[O]nce a state assumes responsibility over the NPDES process, the permits that it approves are considered as having been issued by the state, not by EPA."); *United States v. Confederate Acres Sanitary and Drainage Sys., Inc.,* 767 F.Supp. 834, 836 n. 1 (W.D.Ky.1990) (noting that "NPDES permits are secured from the EPA or from a state upon EPA's approval of the State's program"). Therefore, however HGS chooses to characterize the EPA's actions with respect to the Zion Crossroads WWTP permit, it raises a challenge to the EPA's *failure to object* to the issuance of the permit. However, even so holding, the Court declines the EPA's invitation to dismiss Count One solely on the basis of HGS's "mistaken premise" that the EPA had approved the NPDES permit.

12* **21 The question is then whether Count One states a claim by alleging that the "EPA failed to perform non-discretionary duties under the Clean Water Act, and thereby the National Historic Preservation Act," Complaint, at ¶ 101, when it failed to object to the issuance of the VPDES permit for the Zion Crossroads WWTP. The Court concludes that HGS has not identified a non-discretionary duty that the EPA has failed to perform by its conduct (whether characterized as approval or a failure to object) and thus the Court must dismiss Count One for lack of subject matter jurisdiction.

22 Suits against the EPA and EPA Administrators are barred by sovereign immunity unless there has been a specific waiver thereof, *Sierra Club v. Whitman,* 268 F.3d 898, 901 (9th Cir.2001), and pursuant to 33 U.S.C. § 1365(a)(2), sovereign immunity has been waived in suits "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." HGS argues that "the EPA had a non-discretionary duty to review the permit in conformance with all applicable CWA regulations," and, "[b]y operation of 40 C.F.R. § 122.49, [the] EPA had a duty to comply with the NHPA." HGS's Opposition to EPA's Motion to Dismiss, at 11. This means, according to HGS, that the EPA was required to create a review as to mitigation of harm to the Green Springs Landmark District, which the EPA allegedly did not undertake. This regulation forms the crux of HGS's argument that the EPA failed to perform a non-discretionary duty. *See e.g.* Complaint, at ¶ 89. The regulation provides, in pertinent part, as follows:

> The following is a list of Federal laws that may apply to the issuance of permits under these rules. When any of these laws is applicable, its procedures must be followed. When the applicable law requires consideration or adoption of particular permit conditions or requires the denial of a permit, those requirements also must be followed.
>
> (b) The National Historic Preservation Act of 1966, 16 U.S.C. 470 et seq. Section 106 of the Act and implementing regulations (36 CFR Part 800) require the Regional Administrator, before issuing a license, to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places. The Act's requirements are to be implemented in cooperation with State Historic Preservation Officers and upon notice to, and when appropriate, in consultation with the Advisory Council on Historic Preservation.

40 C.F.R. § 122.49(b). Contrary to HGS's assertion, this regulation, by its plain terms, does not "mandate[ ] application of the [NHPA] to the NPDES permit process." Complaint, at ¶ 89. Instead, § 122.49 provides at the outset that the listed Federal statutes may apply "to the issuance of permits under these rules." Even more compelling, the regulation specifically provides that the NHPA "require[s] the Regional Administrator, before issuing a license," to adopt mitigating measures under the NHPA. 40 C.F.R. § 122.49(b). As the Court has previously held, because the EPA has authorized the Commonwealth of Virginia to implement the NPDES program, the permits are approved and issued by the Commonwealth. *See e.g. Citizens Alert Regarding the Environment,* 259 F.Supp.2d at 18. Accordingly, § 122.49 does not mandate the application of the NHPA where the EPA merely reviews a draft NPDES permit transmitted by a State,

because in such circumstances the Regional Administrator does not issue a license or permit.

*13 This conclusion is supported by the language, and purposes underlying, 33 U.S.C. § 1342, which draws a distinction between the role of the EPA when it is charged with "issuing" of NPDES permits in certain jurisdictions, *see e.g.*, § 1342(a)(1), and its role after it ceases "issuing" NPDES permits following the authorization of the State program, *see* §§ 1342(c)(1), 1342(d). When the State NPDES program is authorized, it is required to give a copy of each permit application to and notify the EPA of the State's proposed action. *See* 33 U.S.C. § 1342(d)(1). The EPA may then object to an NPDES permit to be issued by a State, but it is not required to do so. *See* 33 U.S.C. § 1342(d)(2); *see also Mississippi River Revival v. Administrator, U.S.E.P.A.*, 107 F.Supp.2d 1008, 1013 (D.Minn.2000) (noting that when a State is given authority to issue NPDES permits, "there is no [ ] mandatory duty for the EPA to approve or disapprove any permit application or action"). It stands to reason that where the State has thus taken "primary responsibility for reviewing and approving NPDES discharge permits," *Nat'l Ass'n of Home Builders*, 551 U.S. at 650, 127 S.Ct. 2518, the EPA would have a corresponding reduction in responsibility over NPDES permits in that State. The Court has concluded that, by its own terms, the most natural reading of 40 C.F.R. § 122.49 does not "mandate[ ] application of the [NHPA] to the NPDES permit process," Complaint, at ¶ 89, where the EPA does not "issue" NPDES permits. Further, the language and purposes underlying the CWA provisions on the transfer of authority of the NPDES permit process to States support the Court's interpretation. *Cf. Secretary of Labor, Mine Safety & Health Admin. v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C.Cir.1990) ("[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.").

Therefore, HGS has not established to the satisfaction of the Court that its CWA claim alleges the "failure of the Administrator to perform any act or duty under this chapter *which is not discretionary* with the Administrator," 33 U.S.C. § 1365(a)(2) (emphasis added), and therefore has not established a specific waiver of sovereign immunity. Accordingly, Count One of the Complaint will be dismissed for lack of subject matter jurisdiction, in an accompanying Order, to follow.

The Court must also dismiss Count Two, which alleges "that the EPA violated the [Administrative Procedure Act] (1) for failure to perform nondiscretionary duties; and (2) for performing an unlawful approval not in accordance with law, without observance of procedure required by law, and unsupported by substantial evidence." Complaint, at ¶ 103. Because the NHPA does not contain a private cause of action, HGS must bring its claim under the APA. *See Karst Envtl. Educ. & Protection, Inc. v. E.P.A.*, 475 F.3d 1291, 1295 (D.C.Cir.2007). judicial review is unavailable under the APA where the challenged "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

*14 At the outset, the Court has previously rejected its characterization of the EPA's conduct as constituting "approval" of the permit. However, again the Court will not dismiss the claim solely on the basis of HGS's "mistaken premise" that the EPA had "approved" the NPDES permit, and will proceed to address the relevance of this distinction in the circumstances of this case. The Court has also previously rejected the claim that the EPA had a non-discretionary duty to apply the NHPA to the NPDES permit process through 40 C.F.R. § 122.49. With respect to HGS's APA claim, no specific basis for why the EPA has "fail[ed] to perform nondiscretionary duties" has been alleged. Complaint, at ¶ 103. However, even assuming, *arguendo*, that HGS alleges in this paragraph that the NHPA is the source of such a duty, the Court finds no such duty in the statute.

In the context of its APA claim, HGS argues that the NHPA triggered a nondiscretionary duty on the part of the EPA. In particular, HGS cites to Section 110(f) of the NHPA, which states, in pertinent part, as follows:

> Prior to the *approval* of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

16 U.S.C. § 470h-2(f) (emphasis added). This statute is read in context of the statutory definition of the meaning of "Undertaking" under the NHPA:

As used in this Act, the term-

(7) "Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including-

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) *those requiring a Federal* permit license, or *approval;* and

(D) *those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.*

16 U.S.C. § 470w (emphasis added by HGS).

Again, the distinction between "approval" and the "failure to object" is material in the context of these two statutes, and is not merely a mater of semantics. Under the CWA, the EPA is not in a position to "issue" or "approve" proposed permits where the State has been authorized to implement the NPDES scheme, at which point the EPA's role is generally limited to review and potential objection. Similarly, the weight of persuasive authority concerning the NHPA supports the distinction between the affirmative action on the part of a Federal agency, which gives rise to the cited dudes under the NHPA, and the failure to object or intervene, which does not. *Cf. Nat'l Trust for Historic Preservation v. Dep't of State,* 834 F.Supp. 443, 450 (D.D.C.1993) (with respect to the statutory definition of "Federal undertaking" in the NHPA, the court held that "[a] judicial interpretation of 'license' as including not only explicit written permission but also a failure to veto a project when possible would read all limitations out of the Act. The Court declines plaintiffs' invitation to apply NHPA so broadly."), *aff'd in part, rev'd in part, Sheridan Kalorama Historical Ass'n v. Christopher,* 49 F.3d 750, 755 (D.C.Cir.1995) ("The State Department's failure to disapprove Turkey's proposal may have been a prerequisite to Turkey's project going forward, but it cannot itself be an undertaking within the meaning of the statute.").

15* **23 Accordingly, the Court cannot find that EPA's failure to object to the issuance of a draft NPDES permit satisfies the definition of "approval" in the NHPA context. Therefore, Section 110(f) of the NHPA does not necessitate action on the part of the EPA, irrespective of the definition of "undertaking." HGS has not identified any other potential bases for EPA's alleged failure to perform a nondiscretionary duty, and the Court finds none. Because both grounds raised supporting the APA claim are therefore found to be without merit, Count Two will be dismissed, in an accompanying Order, to follow.

Finally, considering that the only two causes of action in this Complaint are alleged solely against the EPA, and both causes have been dismissed in accordance with this Memorandum Opinion, Defendant Louisa County Water Authority's Motion to Dismiss will be denied, as moot, in an accompanying Order, to follow.

It is so ORDERED.

Footnotes

1 The first such property is owned by Plaintiffs Reginald and Jane Stuart Murphy, being 218 acres of land known as the Aspen Hill Farm that is located approximately 400 yards downstream of the impoundment on Camp Creek. The second such property is owned by Nancy Daniel Somoza as Trustee of the Nancy Daniel Somoza Revocable Trust, and is known as Fair Oaks. Also allegedly impacted by the treated sewage runoff are Plaintiffs Sergio and Gaily Fleury Sobral, who own the 255-acre property known as Green Springs Plantation. HGS initially held the conservation easement to Green Springs Plantation; it was later assigned to the United States Department of the Interior. Aspen Hill Farm and Green Springs Plantation are respectively the first and second farms downstream of the WWTP. Camp Creek is alleged to bisect and run through both properties, which are used for agricultural and recreational purposes. *See* Complaint, at ¶¶ 14, 16.

2 For example, HGS notes that Louisa County has petitioned the state to allow the additional discharge of nitrogen and phosphorus into Camp Creek, and has plans to attempt to bolster development at Zion Crossroads by increasing the area water supply by several million gallons, which will apparently result in additional WWTP discharge to the Landmark District. *See* Complaint, at ¶ 11.

3 As noted by the EPA, the distinction between the DEQ and Virginia State Water Control Board does not appear to be relevant in regard to the issuance of VPDES permits, see EPA's Memorandum in Response to Court's May 26, 2010 Order, at 2 n. 2, and thus, the Court will primarily refer to the role of DEQ concerning the issuance of this permit.

End of Document

2010 WL 3521958
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. California.

Dee Thomas MURPHY, Plaintiff,
v.
Arnold SCHWARZENEGGER, Defendant.

No. CIV S-09-2587 JAM DAD PS. Sept. 8, 2010.

Attorneys and Law Firms

Dee Thomas Murphy, Lake Havasu City, AZ, pro se.

Tom Blake, Attorney General's Office, San Francisco, CA, for Defendant.

Opinion

FINDINGS AND RECOMMENDATIONS

DALE A. DROZD, United States Magistrate Judge.

*1 This case came before the court on December 11, 2009, for hearing of defendant's motion to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 7.) Tom Blake, Esq. appeared telephonically on behalf of the moving party. Plaintiff, who is proceeding pro se in this action, appeared in court on his own behalf.

Less than an hour prior to the December 11, 2009 hearing on defendant's motion to dismiss, plaintiff filed a request to continue the hearing to February 26, 2010. (Doc. No. 11.) In his written request and in open court, plaintiff represented that he sought a continuance in order to retain counsel and allow counsel time to prepare a response to defendant's motion. Defendant did not oppose a continuance for these purposes. The court granted plaintiff's request in part and continued the hearing to February 19, 2010. In light of plaintiff's representations about retaining counsel, the undersigned ordered that if an amended complaint were filed prior to February 5, 2010, defendant's motion to dismiss would be dropped from the calendar and denied as moot. (Doc. No. 13.)

On February 4, 2010, plaintiff, still proceeding pro se, filed a document titled "First Amended Complaint." (Doc. No. 14.) By order filed February 11, 2010, the new pleading was dismissed for several reasons, including plaintiff's attempt to join and represent an entity plaintiff that can proceed only through counsel, and his attempt to add numerous defendants and allege new claims and new legal theories arising from events unrelated to those alleged in his original pleading. (*See* Doc. No. 15.) The court also took judicial notice of court records showing that the proposed new claims arising from events that occurred in Arizona are duplicative of claims already alleged by plaintiff in several lawsuits pending in federal court in Arizona. The court declined to dismiss defendant's pending motion as moot, and the hearing of defendant's motion was continued to March 5, 2010. Plaintiff was ordered to file any opposition to the motion on or before February 19, 2010. Plaintiff was cautioned that no further extension of time would be granted for filing opposition to defendant's motion. Plaintiff was also cautioned that failure to file timely opposition could result in a recommendation that this case be dismissed for lack of prosecution and as a sanction for failure to comply with court orders and applicable rules.

On February 19, 2010, plaintiff filed what he characterized as a second amended complaint and an objection to the order dismissing his first amended complaint. (Doc. No. 16.) Plaintiff did not file any opposition to defendant's motion to dismiss. By order filed March 3, 2010, plaintiff's objection to the February 11, 2010 order was overruled and the proposed second amended complaint was disregarded. (Doc. No. 19.) Defendant's unopposed motion to dismiss was taken under submission, and the hearing set for March 5, 2010 was vacated.

*2 Upon consideration of all written materials filed in connection with defendant's motion to dismiss as well as relevant portions of the file, the undersigned recommends that defendant's motion to dismiss be granted and that this action be dismissed with prejudice.

PLAINTIFF'S COMPLAINT

On September 16, 2009, the plaintiff filed a 327-page complaint and paid the required filing fee. The Clerk issued a summons for California Governor Arnold Schwarzenegger, the sole named defendant.

The complaint commences with a jurisdictional statement in which plaintiff asserts jurisdiction "under 33 U.S.C. §

1365(a) over violations of any effluent standard or limitation established pursuant to 33 U.S.C. Chapter 26-Water Pollution Prevention and Control effective July 1, 1973." (Compl.¶ 1.) Plaintiff asserts that venue is proper in the Eastern District of California because the state capital is located in this district, the defendant, as governor of the State of California, resides in this district, and all events and omissions giving rise to plaintiff's claims are the result of the defendant's failure to act in accordance with his duty as governor. Plaintiff states that his address is a residence in Los Osos, California. (Compl.¶¶ 2-4.)

In his complaint plaintiff alleges as follows. The community of Los Osos was identified as being responsible for degrading water quality along the Central Coast of California by pollutant discharges from approximately 4,500 conventional septic systems. In 1983, the Regional Water Quality Control Board (Water Board) passed a resolution prohibiting the use of onsite disposal systems, i.e., septic systems, in the Los Osos community in San Luis Obispo County (County) on Morro Bay. The resolution went into effect on November 1, 1988. Approximately 15,000 residents live in approximately 4,500 homes in the prohibition zone. Los Osos does not have a community sewage collection system or a wastewater treatment plant. In 1992 and 1993, plaintiff and others urged the County and the Water Board to consider, as a solution for the prohibition zone, the "at-source innovative and alternative control technology" developed by Advanced Environmental Systems, Inc. (AES).[1] Plaintiff believed his alternative technology would reduce nitrate discharges to an amount well within the requirements of the resolution that went into effect on November 1, 1988. The County and the Water Board requested a third-party evaluation and certification to verify the denitrification performance capability of the AES system.

In 1994, AES invested approximately $150,000 in a six-month performance evaluation. Despite certified results and federal law favorable to AES technology, the County refused to recognize federal law, refused to comply with the Water Board's prohibition resolution, and refused to consider implementing the AES alternative. By 1999 the County's efforts to develop a solution for the Los Osos prohibition zone had failed. In 1999, the Los Osos Community Service District (Service District) was formed to develop a community sewage system. The Water Board confirmed a state of emergency in the Los Osos prohibition zone in May 1999 and caused Los Osos owners and operators of sources of point-source discharge to be served with cease-and-desist orders. In 2005 the Service District obtained permits from the Water Board to build a sewer system without considering innovative alternatives. The system was funded by a $135 million loan issued by the state to the Service District. Local residents opposed to the sewer system project successfully recalled three of the five Service District board members and replaced them with members who were opposed to the project. In September 2005, the newly constituted Service District board issued stop-work notices to the contractors who were building the sewer system. In August 2006, the District filed for bankruptcy due to money owed to unpaid contractors and is now approximately $40 million in debt. In September 2006, the Water Board attempted to force the citizens of Los Osos to support the County sewer project by issuing 46 individual state cease-and-desist orders mainly to individuals who were opposed to the sewer system. The Water Board was willing to approve the AES alternative system, but the Service District and the County refused to consider the AES proposal. Authority to develop a community sewage treatment system was transferred from the bankrupt Service District to the County by state legislation. The County did not accept responsibility for the Los Osos project.

*3 In August 2007 plaintiff presented the alternative technology to the Water Board as a solution. In the fall of 2007, the County obtained voter approval, through threats and intimidation tactics, to place liens on the homes in the Los Osos prohibition zone to obtain bond funding to build a community sewer system estimated to cost about $250 million. The sustainable alternative water source (SAWS) system would cost only $25 million at most, with federal and state financial assistance. In February 2008, plaintiff installed a SAWS technology system at his residence in Los Osos. The County Planning and Building Department issued plaintiff a permit for his SAWS installation, but the Service District refused to allow plaintiff to disconnect from the publicly owned water treatment works and began to take the new water produced by plaintiff's system instead of permitting him to benefit from re-use of that water. In October 2008, AES again submitted a proposed agreement to the County, but the County disregarded it. In November 2008, AES presented a proposal to the County's Director of Public Works, but the County disregarded the proposal and continued studying the project. When the two-year study was complete, the County submitted its findings to the California Coastal Commission for acceptance, but the findings were rejected. In February 2009, the County Public Works Department sent out a questionnaire to all residents of the Los Osos prohibition zone about two different types of waste managing systems, but did not include the SAWS technology as one of the options despite the fact that plaintiff had been operating a SAWS system for about a year.

On February 9, 2009, plaintiff delivered to the Governor's Office in Sacramento draft proposed alternative requirements and regulations for water treatment, as well as a draft executive order addressing the need to control toxic discharges into drinking water. The defendant did not respond to plaintiff's written request for a meeting. On February 27, 2009, the defendant issued a State of Emergency-Water Shortage Proclamation finding California to be in an official drought condition. In March 2009, the California Coastal Commission sent a letter to the director of the County Public Works Department rejecting all options proposed. Plaintiff believes that the Service District, the County, and the Water Board do not intend to consider alternatives that would eliminate the need for an expensive and unnecessary system of sewage collection and centralized treatment, i.e., publicly owned treatment works. (Compl ¶¶ 5-43.)

In a claim titled "Negligence of Defendant," plaintiff alleges that the governor has strict liability to exercise a duty of care commensurate with the foreseeable risk of danger to public health resulting from emergencies proclaimed within his jurisdiction. 33 U .S.C. § 1370. In this regard, plaintiff claims that the governor has a duty to adopt standards that establish "a value of public water supplies." 33 U.S.C. § 1313(c)(1) and (c)(2)(A). The governor has a nondiscretionary duty to uphold federal environmental laws to protect the quality of the human environment. 33 U.S.C. §§ 1365 & 1371(c)(1). The governor has a duty to adopt and enforce effluent limitations and various other limitations and standards for control of pollutants. 33 U.S.C. §§ 26, 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, 1342, 1345, & 1370. Defendant Schwarzenegger breached his duty to protect the public health or welfare, enhance the quality of water, and protect the value of public water supplies. He was negligent for failing to recognize various federal laws, adopt and enforce various limitations and standards, establish "a value of public water supplies," uphold federal environmental laws, exercise his authority to adopt and enforce standards and limitations, and uphold other federal environmental laws. He was complicit with San Luis Obispo County and various agencies in violation of federal bankruptcy law by not paying plaintiff for new water they took from him. Defendant Schwarzenegger was acting within the scope of his duties as governor, and as a result of his negligence and complicity, plaintiff's livelihood was endangered, the cease-and-desist order on plaintiff's property could not be complied with, the prohibition zone continued, plaintiff suffered economic hardship by the placement of a lien on his property, and plaintiff was caused to be in violation of defendant's emergency drought proclamation. (Compl.¶¶ 44-57.)

*4 In his prayer for relief, plaintiff seeks orders requiring defendant Schwarzenegger to (1) pay plaintiff $580.40 for water that was produced by his alternative water system but was taken from him, (2) adopt certain standards, (3) direct San Luis Obispo County to take certain actions, (4) lift all cease-and-desist orders within the Los Osos prohibition zone, (5) lift the liens on properties located within the Los Osos prohibition zone, and (6) lift the Los Osos Prohibition. (Compl. at 13-14.)

LEGAL STANDARDS APPLICABLE TO DEFENDANT'S MOTION TO DISMISS

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir.1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990). A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the plaintiff's claims, even if the plaintiff's allegations are true.

In determining whether a complaint states a claim on which relief may be granted, the court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir.1989). In general, pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). However, the court need not assume the truth of legal conclusions cast in the form of factual allegations. *W. Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir.1981). The court is permitted to consider material which is properly submitted as part of the complaint, documents not physically attached to the complaint if their authenticity is not contested and the plaintiff's complaint necessarily relies on them, and matters of public record. *Lee v. City of Los Angeles,* 250 F.3d 668, 688-89 (9th Cir.2001).

ANALYSIS

Defendant seeks dismissal of plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the complaint fails to allege facts sufficient to support liability against defendant on any theory alleged in the pleading. Defendant also argues that the State of California and state officials are immune from suit under the Eleventh Amendment, that plaintiff's suit is barred by the *Rooker-Feldman* doctrine, and that any state law claims are barred by plaintiff's failure to allege the filing of a timely claim with the State Victim's Compensation and Government Claim Board.

Defendant requests that the court take judicial notice of the following documents filed in federal and state court cases in which plaintiff was the plaintiff or appellant: (1) in *Murphy v. U.S. Environmental Protection Agency,* Case No. 08-cv-04876-SI (N.D.Cal.2008), plaintiff's complaint for declaratory and injunctive relief, the state defendants' motion to dismiss for improper venue or to transfer the action to the Central District of California, and the order filed October 7, 2009, dismissing plaintiff's action pursuant to his motion to withdraw it; (2) in *Murphy v. State of California,* Case No. CV 080510 (San Luis Obispo County Super. Ct.2008), the order filed July 24, 2009, sustaining defendants' demurrer to plaintiff's declaratory relief cause of action and striking all other causes of action; and (3) the docket for *Murphy v. State of California, et al.,* Case No. B219046 (Cal.Ct.App., 2d App. Dist.2009), plaintiff's appeal from the ruling in Superior Court Case No. CV 080510, reflecting plaintiff's appeal being in default and subject to dismissal on October 8, 2009. (Def't's Mot. to Dismiss, Exs. A-E.) The court takes judicial notice of these documents pursuant to Federal Rule of Evidence 201. *See Lee v. City of Los Angeles,* 250 F.3d 668, 688-89 (9th Cir.2001) (on a motion to dismiss, court may consider matters of public record); *MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir.1986) (on a motion to dismiss, the court may take judicial notice of matters of public record).

*5 Below, the court examines each of defendant's arguments in support of the motion to dismiss in turn.

I. *Failure to State a Claim for Negligence*

Defendant notes that the elements of negligence under California law are (1) duty, i.e., the defendant's obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) breach of the duty, i.e., failure to conform to the standard; (3) proximate cause, i.e., a reasonably close connection between the defendant's conduct and resulting injuries; and (4) damages, i.e., actual loss to the plaintiff. Defendant argues that plaintiff's claim for negligence does not allege any actionable duty breached by defendant or any breach that proximately caused damages to plaintiff.

The court finds that plaintiff's complaint fails to allege facts stating the elements of a negligence claim. Although plaintiff asserts jurisdiction under 33 U.S.C. § 1365(a) "over violations of any effluent standard or limitation established pursuant to 33 U.S.C. Chapter 26-Water Pollution Prevention and Control effective July 1, 1973," the pleading is devoid of any link between the court's jurisdiction over violations of effluent standards or limitation and the bald allegation of negligence by defendant. Plaintiff fails to allege what the defendant's duty was relative to CWA standards or limitations, and when and how the defendant breached that duty and caused harm to plaintiff. Plaintiff's complaint reflects that any alleged harm to plaintiff had been ongoing for years, and plaintiff does not allege any facts showing that plaintiff's alleged loss-the taking of his "new water" by local water authorities-was proximately caused by a duty owed to plaintiff by defendant Schwarzenegger.

Plaintiff's vague assertion of the defendant's failure to act in accordance with his duty as governor falls far short of alleging enough facts to state a claim to relief that is plausible on its face. Although plaintiff has cited more than a dozen sections of Title 33, none supply the missing allegations regarding defendant's duty and breach thereof. *See* 33 U.S.C. §§ 1281, 1282, 1311, 1312, 1313, 1316, 1317, 1318, 1321, 1328, 1342, 1345, 1365, 1370 & 1371. For example, 33 U.S.C. § 1313(c)(1) merely provides that the governor of a state or the state water pollution control agency of the state "shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." Plaintiff has not alleged any breach of this statute. Indeed, many of the statutes cited by plaintiff in his complaint do not contain any mention of the governor of the state. *See, e.g.,* 33 U.S.C. §§ 1313(c)(2)(A) & 1371(c)(1). Plaintiff's allegation of complicity by defendant Schwarzenegger with the relevant political subdivisions is unsupported by any factual allegation, and the relief sought by plaintiff is not supported by allegations demonstrating that the requested relief is within defendant's power.

*6 The court finds that plaintiff's complaint fails to state a claim upon which relief may be granted. Defendant's motion to dismiss pursuant to Rule 12(b)(6) should therefore be granted.

II. *Eleventh Amendment Immunity*

Defendant argues that the Eleventh Amendment provides the State of California, state agencies, and state officers acting in their official capacity with immunity from suit. Defendant points to plaintiff's statement that all acts alleged were done by defendant within the scope of his duties as governor and plaintiff's demand for relief that could only be granted by the defendant in his official capacity. Defendant asserts that the Eleventh Amendment bar applies to suits seeking injunctive or declaratory relief as well as suits seeking damages.

Plaintiff has not sued the State of California or any of its agencies. He has sued the Governor of the State of California in his official capacity pursuant to the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* The statute plaintiff relies upon for jurisdiction provides that

any citizen may commence a civil action on his own behalf-

(1) *against any person (including (i) the United States, and (ii) any other government instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)* who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an

order issued by the [EPA][2] Administrator or a State with respect to such a standard or limitation ....

The district courts shall have jurisdiction,[3] without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the [EPA] Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(a) (emphasis added).

In general, the Eleventh Amendment bars suits against a state, absent the state's affirmative waiver of its immunity or congressional abrogation of that immunity. *Pennhurst v. Halderman,* 465 U.S. 89, 98-99, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Simmons v. Sacramento County Superior Court,* 318 F.3d 1156, 1161 (9th Cir.2003); *Yakama Indian Nation v. State of Washington Dep't of Revenue,* 176 F.3d 1241, 1245 (9th Cir.1999). The Eleventh Amendment also bars federal suits, whether seeking damages or injunctive relief, against state officials where the state is the real party in interest. *Pennhurst,* 465 U.S. at 101-02.

The Ninth Circuit has expressly held that states and state agencies are entitled to Eleventh Amendment immunity from suits brought under the CWA. *Natural Resources Defense Council v. California Dep't of Transp.,* 96 F.3d 420, 423 (9th Cir.1996). In general, state immunity extends to state officials. *Id.* at 421. However, in *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court held that federal courts have jurisdiction over suits against state officers to enjoin official actions that violate federal statutory or constitutional law, even if the state itself is immune from suit under the Eleventh Amendment. *Sofamor Danek Group, Inc. v. Brown,* 124 F.3d 1179, 1183-84 (9th Cir.1997) (citing *Ex Parte Young,* 209 U.S. at 155-56); *Natural Resources Defense Council,* 96 F.3d at 422-23 (citing *Ex Parte Young*). Nonetheless, the Supreme Court has explained that the *Ex Parte Young* exception to sovereign immunity must be applied with a proper appreciation of its purpose. *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269-71, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

*7 Here, the court finds that defendant is entitled to Eleventh Amendment immunity against plaintiff's requests for prospective injunctive relief as well as his request for damages. As set forth *supra,* plaintiff's claim against the defendant Schwarzenegger is one of negligence, and plaintiff has failed to allege facts that state a claim of negligence. In the absence of allegations demonstrating defendant's violation of federal statutory or constitutional law, defendant is entitled to immunity from plaintiff's suit.

III. *Rooker-Feldman Doctrine*

Defendant contends that plaintiff raised the same facts and sought the same relief in his action filed in the San Luis Obispo County Superior Court and therefore review of the matter in this court is precluded by the *Rooker-Feldman* doctrine. The court finds this argument unpersuasive.

Under the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction to review alleged errors in state court decisions. *Dist. of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (holding that review of state court determinations can be obtained only in the United States Supreme Court). The doctrine applies to "cases of the kind from which the

doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). "The purpose of the doctrine is to protect state judgments from collateral federal attack." *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir.2001). Put another way, a federal district court is prohibited from exercising subject matter jurisdiction over a suit that is "a de facto appeal" from a state court judgment. *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir.2004). A federal district court may not examine claims that are inextricably intertwined with state court decisions, "even where the party does not directly challenge the merits of the state court's decision but rather brings an indirect challenge based on constitutional principles." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 n. 4 (9th Cir.2003). *See also Ignacio v. Judges of U.S. Court of Appeals*, 453 F.3d 1160, 1165-66 (9th Cir.2006) (affirming district court's dismissal of the case "because the complaint is nothing more than another attack on the California superior court's determination in [plaintiff's] domestic case").

Here, the court is unable to find that plaintiff seeks review, directly or indirectly, of the San Luis Obispo County Superior Court's rulings. Defendant Schwarzenegger was not a defendant in the Superior Court case initially and, although he was named in plaintiff's amended complaint, the state court declined to consider new claims alleged by plaintiff without having sought prior leave of court. The court had previously dismissed plaintiff's claims of defamation, trade libel and tortious interference without leave to amend, and those claims were ordered stricken from the first amended complaint. The court had granted plaintiff leave to amend his cause of action for declaratory relief regarding invention but determined that plaintiff failed to amend the claim to allege a controversy that required a declaration of the parties' rights. (Def't's Mot. to Dismiss, Ex. D.) In the present case, the defendant and plaintiff's claim against that defendant do not require this court to review any of the rulings made by the state court. Thus, plaintiff's lawsuit in this court is not a de facto appeal from the state court judgment and is not barred under the *Rooker-Feldman* doctrine.

IV. *Futility of Amendment*

*8 The undersigned has carefully considered whether there is any possibility that plaintiff may amend his complaint to state a cognizable claim that would not be subject to dismissal for failure to state a claim or immunity under the Eleventh Amendment. "Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility." *California Architectural Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir.1988). *See also Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir.1983) (holding that, while leave to amend shall be freely given, the court does not have to allow futile amendments). It appears that leave to amend would be futile in this instance given the nature of plaintiff's complaint and the defects noted above.

In addition, this court is not the proper venue for the action plaintiff seeks to pursue. Plaintiff has relied on the general venue statute, 28 U.S.C. § 1391(a), despite the specific venue provision found in the CWA: "Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section *only in the judicial district in which such source is located.*" 33 U.S.C. § 1365(c) (emphasis added). Plaintiff's complaint begins with his allegation of jurisdiction under 33 U.S.C. § 1365(a) "over violations of any effluent standard or limitation," and the allegations of the pleading reflect that the discharge sources are located in San Luis Obispo County, which is part of the Central District of California. 28 U.S.C. § 84(c)(2).

Finally, plaintiff has demonstrated in this action and in his state court action that he cannot be relied upon to amend in good faith. In this case, he attempted, not just once, but twice, to join and represent co-plaintiffs who must be represented by counsel and to expand this suit far beyond the scope of the original pleading, adding federal defendants and numerous defendants who reside in another state.

For all of these reasons, the undersigned will recommend that plaintiff's complaint be dismissed without leave to amend.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendant's motion to dismiss (Doc. No. 7) be granted; and

2. Plaintiff's complaint be dismissed without leave to amend and this action be closed.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within

fourteen days after being served with these findings and recommendations, any party may file and serve written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Any reply to objections shall be filed and served within seven days after the objections are served. The parties are advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court's order. *See Martinez v. Ylst,* 951 F.2d 1153 (9th Cir.1991).

Footnotes

1 Exhibits to plaintiff's complaint reveal that he is the president of AES, Inc. (*See* Compl., Ex. 18 at 6, Ex. 19 at 2.)

2 A reference to "Administrator" in the CWA is a reference to the Administrator of the Environmental Protection Agency. 33 U.S.C. § 1251(d).

3 The Ninth Circuit has joined the majority of federal courts in holding that the federal courts have exclusive jurisdiction over citizen suits brought pursuant to federal environmental laws, including the CWA. *See Natural Resources Defense Council v. U.S. E.P.A.,* 542 F.3d 1235, 1242 (9th Cir.2008).

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2007 WL 2020246
Only the Westlaw citation is currently available.
United States District Court,
E.D. Kentucky,
Central Division,
at Lexington.

UNITED STATES of America, et al., Plaintiffs
v.
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, Defendant.

Civil Action No. 06-386-KSF. July 6, 2007.

Attorneys and Law Firms

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Opinion

OPINION & ORDER

KARL S. FORESTER, United States Senior Judge.

*1 This matter is before the Court on the motion of the Fayette County Neighborhood Council ("FCNC") for other relief (to compel participation of interveners in ongoing settlement negotiations) [DE # 8]. [1]

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In November of 2006, the United States, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), along with the Commonwealth of Kentucky, filed a complaint against the Lexington-Fayette Urban County Government ("LFUCG") alleging a number of violations of the Clean Water Act, 33 U.S.C. § 1300 et seq. ("CWA") in connection with the county's storm sewer system, its sanitary sewer system, and certain wastewater treatment plants. In summary, the plaintiffs allege that the LFUCG has operated these systems in violation of the CWA and permits issued pursuant thereto, because of numerous illicit cross-connections between the sewer collection system and its separate storm sewer system, which result in discharges of untreated sewage into navigable waters.

At the time the complaint was filed, the parties had already been involved in settlement negotiations. At that time, defendant LFUCG entered into an arrangement with FCNC such that FCNC would be involved in the ongoing negotiations with the plaintiffs, which arrangement was memorialized by letter dated October 19, 2006. The FCNC is a non-governmental organization made up of more than 130 neighborhood associations and interested citizens. It has a long history with sewer issues in Fayette County, including commissioning a comprehensive study in 1998 that documented numerous deficiencies and made a number of recommendations. The arrangement with LFUCG essentially gave the FCNC a "seat at the table," although FCNC was not a named party to the suit. [2]

The parties continue to negotiate terms and conditions of a potential Consent Decree. By letter dated May 4, 2007, LFUCG advised the FCNC that it would no longer agree to FCNC's involvement in the negotiations. [3] Because of a Confidentiality Agreement executed by all interested parties, the reasons for LFUCG's change in position cannot be disclosed fully. However, LFUCG states that the FCNC had gone beyond the original arrangement-which stated that the FCNC would be involved in order to "provide assistance and support to LFUCG during the negotiating process"-by taking positions adverse to the LFUCG; by making demands that, in the LFUCG's opinion, would impose substantial, unnecessary costs and burdens on the citizens of Fayette County; and by making demands that were beyond issues related to the CWA violations. The LFUCG was also of the opinion that certain of the positions taken by the FCNC would be adamantly opposed by other citizens, interest groups, and/or elected officials, and that it was important that the LFUCG not be viewed as giving special preference to the FCNC.

The FCNC and thirty-one individual residents [4] of Fayette County have sought to intervene in the present case as intervenor plaintiffs (and although the Court has not yet ruled on their motion, they will hereinafter be referred to as the "Intervening Plaintiffs"). Along with their motion to intervene, the Intervening Plaintiffs filed the present motion for the Court's consideration.

II. MOTION FOR OTHER RELIEF

A. *The Parties' Positions*

*2 In the present motion, the Intervening Plaintiffs asks the Court to convene a pre-trial conference for the purpose of requiring all parties, including the Intervening Plaintiffs, to engage in meaningful settlement negotiations. In the alternative, they ask the Court to order the inclusion of the FCNC so it may return to the negotiating process between the parties. In support of their motion, they argue generally that the federal judiciary adheres to a policy that favors the settlement of disputes without litigation. Because of the strong possibility that this matter will ultimately be resolved by a Consent Decree, it is in the confidential negotiating process that the interests and rights of the various parties will be identified, negotiated, and resolved. Thus, this Court should require the FCNC's participating on those negotiations in order to support Congress's policy of supporting citizens in their efforts to enforce ongoing and recurring CWA violations. The FCNC argues that based on its long history of advocacy for a safe, clean system in Fayette County, it has earned a seat at the table and is the most qualified non-governmental organization to be an effective voice for Fayette County citizens.

The plaintiffs do not oppose the participation of the FCNC in the settlement negotiations. However, they do not see a need for a court hearing or conference and oppose any order that includes mandatory mediation or other alternative dispute resolution. Defendant LFUCG opposes the Intervening Plaintiffs' motion on three bases: (1) that intervention as a matter of right under the CWA does not authorize, entitle, or empower them to participate in settlement negotiations between the plaintiffs and LFUCG; (2) the facts do not support their claim of entitlement; and (3) they do not represent all citizens' interests and have certain special interests they seek to advance.

As to the second and third arguments, the LFUCG asserts that the FCNC has taken actions outside of the informal agreement with the prior administration by voicing its intent to file the tendered intervening complaint against LFUCG and by taking actions during the negotiations that demonstrated it was not assisting and/or supporting the LFUCG in the negotiation process. Further, the LFUCG states that the FCNC took positions in the negotiations that advanced special interests of the FCNC on issues that were not related to the alleged CWA violations, positions that would impose substantial and unnecessary costs on taxpayers.

The Intervening Plaintiffs reply that they agree there is no statutory right requiring FCNC's participation in the confidential negotiating process. However, the Court has the inherent power to require FCNC's participating under the present circumstances. The Intervening Plaintiffs also point out that the present plaintiffs do not object in any fashion to FCNC's continued participation. The FCNC also disputes that it has breached the agreement with the LFUCG because it has disagreed with some of the positions taken by LFUCG. Finally, the FCNC disputes the notion that it is a "special interest" seeking special treatment. The FCNC has been involved with this issue for over a decade and the argument that it is seeking special treatment does not bear any relation to the reality of the negotiations that have taken place. Finally, the FCNC argues that the current administration has welched on the previous administration's agreement to include FCNC in the process and, therefore, should now be estopped from "disinviting" the FCNC from the negotiations.

III. DISCUSSION

*3 The Intervening Plaintiffs assert that the Court has authority to order their participation in settlement negotiations pursuant to Federal Rule of Civil Procedure 16, which states in relevant part as follows:

> In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as ... establishing early and continuing control so that the case will not be protracted because of lack of management....

Fed.R.Civ.P. 16(a)(2). Rule 16 also permits the Court to require parties to appear before it for the purpose of "facilitating the settlement of the case." *Id.* Rule 16(a)(5). The Court may also "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." *Id.* Rule 16(c).

Despite the general public policy favoring the settlement of disputes without litigation, there is no statute, rule, or case law giving a court authority to compel specific parties involved in private settlement negotiations to involve a third party or any other party to the suit. Parties are free to engage in settlement negotiations as they see fit, which would include the decision to exclude certain parties from the negotiations if they so choose. Likewise, parties are free to impose conditions on private settlement negotiations-such as the *inclusion* of

a certain parties in the negotiations.[5] It appears that the only time the Court can force participation of all parties in settlement negotiations is when those negotiations take place before the Court in a court-ordered settlement conference.

Even assuming that the Intervening Plaintiffs are permitted to intervene in this matter, this does not necessarily grant them an automatic "seat at the table." Although it is the subject of a separate motion, it is noteworthy that the CWA permits citizens to intervene as a matter of right under certain circumstances, although the CWA couches this right in terms of a negative:

> No action may be commenced under subsection (a)(1) of this section ... if the Administrator [of the EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the [effluent] standard, [effluent] limitation, or order [issued by the EPA or a state with respect to such effluent standard or limitation], but in any such action in a court of the United States any citizen may intervene as a matter of right.

33 U.S.C. § 1365(b)(1)(B) (section titled "Citizen Suits"). Thus, written into the citizen intervenor provision is a preference for an administrative enforcement action, rather than a private citizen enforcement action. As noted by the Eighth Circuit, the CWA "was not intended to enable citizens to commandeer the federal enforcement machinery." *Dubois v. Thomas,* 820 F.2d 943, 949 (8th Cir.1987). "[O]nce intervenors have been given the opportunity to object to the decree they have had an appropriate day in court and a judgment on consent may be entered." *United States v. Ketchikan Pulp Co.,* 430 F.Supp. 83, 85 (D.Ala.1977) (entering consent decree under the CWA over objections of environmental groups); *see also United States v. Metropolitan St. Louis Sewer Dist. (MSD),* 952 F.2d 1040, 1044 (8th Cir.1992) ("Once the intervenors had an opportunity to file objections to the proposed consent decree, '[t]here is little else that they could have done.' ") (quoting *United States EPA v. City of Green Forest, Ark.,* 921 F.2d 1394, 1402 (8th Cir.1990)); *City of Green Forest, Ark.,* 921 F.2d at 1402 ("Had the citizens intervened, they still would not have been able to compel a consent decree on their own terms.").

**4* The CWA and associated case law make clear that private parties should not be allowed to hijack, via intervention-even intervention by right, a government suit such as the present one. In light of the CWA's preference for administrative enforcement actions, the Court does not believe it can-or should-force the EPA, the Commonwealth, or the LFUCG to include the Intervening Plaintiffs in their private settlement negotiations. The Intervening Plaintiffs very well may have earned a "seat at the table," but this gives them no legal standing-only political standing, in the Court's view.

The Intervening Plaintiffs also argue that the LFUCG should be estopped from excluding them from the negotiations based on the parties' "agreement" as set forth in a letter dated October 19, 2006. However, this letter is not signed by both parties and, therefore, cannot be considered an "agreement." It may well be evidence of an agreement but, based on the parties' pleadings, there appear to be a number of factual questions surrounding the agreement and its terms which cannot be resolved at this stage of the litigation. Therefore, this agreement does not support the Intervening Plaintiffs' present request.

IV. CONCLUSION

The Court has the authority to compel the Intervening Plaintiffs' participation only in a settlement conference before the Court, but not in private settlement negotiations taking place between the existing parties. Even if it had such authority, it would decline to exercise it in the present case. Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that the motion of the FCNC for other relief [DE # 8] is DENIED.

Footnotes

1 Also pending is the motion of FCNC and thirty-one individuals for leave to file an intervening complaint as a matter of right [DE # 7], which will be considered separately. Any reference herein to "Intervening Plaintiffs" is not intended as an indication that the Court has granted that motion, but is used only for ease of reference.

2 In fact, the FNC had agreed to forego initiation of a citizen suit during its participation in the negotiations, but noted that if the EPA filed suit, it would necessarily have to intervene.

3 The FCNC notes that the LFUCG's agreement to include FCNC in the negotiations was made during the administration of Mayor Teresa Isaac, while the letter "disinviting" the FCNC from those negotiations came from the new administration of Mayor Jim Newberry.

4 It is not clear whether Tom and Delia Pergande are included as putative intervenors in this action. They are named in the body of the tendered intervening complaint, but not in the caption. They have been included in the number cited and for purposes of this motion.

5 The Intervening Plaintiffs go to great lengths to point out that the current plaintiffs do not object in any fashion to their inclusion. There is nothing to stop the EPA or the Commonwealth from taking advantage of the Intervening Plaintiffs' expertise on these matters or from requiring the presence of the FCNC or other Intervening Plaintiffs in the ongoing settlement negotiations.

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