COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NOS. 10-CI-01867 & 10-CI-01868
(Consolidated)
DIVISION I

ENERGY AND ENVIRONMENT CABINET PLAINTIFF

VS.

CABINET'S MEMORANDUM OF LAW IN SUPPORT OF RESPONSE TO MOTION TO INTERVENE

ICG HAZARD, LLC DEFENDANTS
ICG KNOTT COUNTY, LLC
ICG EAST KENTUCKY, LLC, and
POWELL MOUNTAIN ENERGY, LLC

AND

FRASURE CREEK MINING, LLC

* * * * * * * * * * *

Comes the Commonwealth of Kentucky, Energy and Environment Cabinet ("Cabinet"), through counsel, and, in support of its objection to the Motion to Intervene filed on behalf 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 ("Movants"), states the following:

STATEMENT OF FACTS

A. The Cabinet's Response to the Allegations in the Notice(s) of Intent to Sue

On or about October 8, 2010 the Cabinet received the Notice(s) of Intent to Sue ("NOIs") Defendants herein. In the NOIs, Movants allege submission of "false or fraudulent" Discharge Monitoring Reports ("DMRs") by each Defendant, based on claims that each Defendant engaged in a "pattern or practice of repeatedly falsifying or otherwise providing inaccurate data in its DMRs".

The Cabinet's response to the allegations in the NOIs of false and/or fraudulent DMR

submittals was swift and thorough. Cabinet management decided that it would conduct a Performance Audit Inspection ("PAI") of Defendants' mining operations and laboratory procedures[1]. A PAI is the most comprehensive inspection recommended in EPA's NPDES Compliance Inspection Manual,[2] most often performed on major municipal or industrial facilities.

On October 12 and 13, 2010 Cabinet personnel were assigned duties to carry out the PAI; Division of Water ("DOW") and Division of Mine Reclamation and Enforcement ("DMRE") inspectors would conduct the mine site sample collection inspections while DOW personnel would conduct the contract lab portion of the inspection. In preparation for the inspection, staff reviewed DMRs for the facilities, prepared an inspection check list on which to document observations, obtained maps and other site information including outfall locations, and established criteria for outfalls to be sampled as part of the PAI. The criteria included those outfalls most likely to be discharging, those for which DMR's were most deficient, and those identified in the NOI by the most serious allegations. Staff also identified the laboratories with which Defendants had contracted for discharge sample collection and analysis and DMR preparation. The inspections were conducted on October 14 and 15, 2010.[3] Two DOW inspectors and one DMRE inspector went to the mine site to observe sample collection, and also

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[1] Each Defendant contracts with a private laboratory for discharge sample collection, analysis, and DMR preparation.

[2] Performance Audit Inspection: The inspector conducts a PAI to evaluate the permittee's self-monitoring program. As with a CEI [Compliance Evaluation Inspection], the PAI verifies the permittee's reported data and compliance through a records check. However, the PAI provides a more resource-intensive review of the permittee's self-monitoring program and evaluates the permittee's procedures for sample collection, flow measurement, chain-of-custody, laboratory analyses, data compilation, reporting, and other areas related to the self-monitoring program. In a CEI, the inspector makes a cursory visual observation of the treatment facility, laboratory, effluents, and receiving waters. In a PAI, the inspector observes the permittee performing the self-monitoring process from sample collection and flow measurement through laboratory analyses, data workup, and reporting. The PAI does not include the collection of samples by the inspector. However, the inspector may require the permittee to analyze performance samples for laboratory evaluation purposes. *NPDES Compliance Inspection Manual,* EPA, July, 2004, pp. 1-1 to 1-2

[3] No on-site inspection of ICG Knott was conducted.

collected split samples for analysis at the state Department for Environmental Services Laboratory in Frankfort. Simultaneously, a DOW team comprised of an Environmental Scientist and employees experienced in lab procedures conducted an unannounced inspection of the contract laboratories. The teams concluded the PAI at 4:00 p.m. on October 15. Following completion of the inspection each team prepared a PAI Report for the facility they inspected.

On November 5, 2010 the Cabinet met separately with Frasure Creek and ICG representatives and informed them of the Cabinet's observations and conclusions. At those meetings the Defendants admitted that, since many of their other mining operations utilize the same contract laboratories as the operations that are the subject of the NOIs, it is likely that their submitted data suffers from the same deficiencies.

B. The Cabinet's Findings resulting from the PAIs and DMR Review

The Cabinet's findings relative to the NOI allegations are documented in the PAI Reports, the Notices of Violation ("NOVs") issued to Defendants, the Complaints and the Consent Judgments. Numerous errors in sample collection or preservation, sample analysis, and recording of data were observed, as well as gross failures in quality assurance and quality control measures at the laboratories.[4] The Cabinet also found a gross failure by Defendants to oversee the laboratories to which they'd entrusted their compliance monitoring and reporting obligations. Exceedences of permit effluent limits were also documented. However, the Cabinet found no substantiation of Movants' claims of submission of fraudulent data by Defendants. The Cabinet had available to it in the course of its investigation substantially more information than was available to Movants. The Cabinet inspected the outfalls and observed their relationship to other

[4] It bears noting that both GSL and S & S Monitoring, Defendants' contractors during the time of the subject violations, to the knowledge and belief of the Cabinet, are no longer in business.

outfalls and permits; the Cabinet inspected the laboratories and observed their poor sample handling, poor "housekeeping" practices, and poor documentation of analysis results.

While the Cabinet cannot know the mindset of Defendants, nor of their contract labs for whose actions Defendants are liable, the Defendants have provided explanations for missing or incorrect data, and in several instances, for those permits served by S & S Laboratory (all of Frasure Creek's permits and ICG Knott's permits) Defendants have submitted corrected DMRs containing all required information as well as "bench sheets"[5] documenting the correct or omitted data. There are numerous examples where the submitted DMR identifies an exceedence of a permit effluent limit but the "bench sheet"[6] shows compliance, tending to negate an intent to submit fraudulent data. In other instances where an outfall is shared by two or more permits, the Defendant explained that their lab collected samples and submitted analysis results for one permit but not, as they are required to do, for the other; in other instances, the Defendant explained that, since an electronic DMR template is used to submit DMRs, it appeared the lab had "pulled up" a previously filled out DMR and neglected to change all of the information before submitting it. Such errors show sloppy practice but do not substantiate an intention to falsify data.

[5] Frasure Creek's contract laboratory titles their supporting document "Pond Analysis Lab Sheet".

[6] As alleged in the NOVs issued to the Defendants and in the Complaints, the records loosely referred to as "bench sheets" by the labs and used to record analysis data, are not considered adequate as a data record by the Cabinet because they do not contain all required information; however, those that were produced to the Cabinet did contain the minimum information.

C. Cabinet measures to ensure DMRs are acted on timely.

In addition to enforcement actions, following the Cabinet's investigation the Cabinet took immediate steps to determine whether all DMRs due to date had, in fact, been received and entered in DocTree, DMRE's electronic filing system.[7]

The Cabinet has also taken measures to ensure that future DMRs are submitted by these Defendants and all coal permittees timely, that the DMRs are timely entered into DMRE's DocTree electronic files and reviewed by the inspector and that, where a DMR documents a violation, appropriate action is taken.[8]

It is significant that the NOIs document DMR deficiencies or missing DMRs beginning in 2008. The Commonwealth of Kentucky had in place an incentive for state employees to retire by December 31, 2008. This incentive was successful and resulted in the Cabinet's loss of many experienced employees, including office support staff who were responsible for scanning and loading submitted paper DMRs into DocTree, and processing files and paperwork generated by mine inspection activities. Unfortunately, this contributed to the backlog of DMR scanning, and turnover among inspectors contributed to misplaced DMRs that had been reviewed but not returned to administrative staff for scanning. Since then, DMRE has replaced many employees

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[7] The following protocol was implemented: All DMRE inspectors were charged with inventorying the DocTree files for all DMRs due in years 2008-2010 for each inspector's assigned permits. For any 2008-2009 DMRs not entered into DocTree the inspector was to search all available hard-copy files to locate them, and have them scanned into DocTree; for any DMR not found in DocTree or for which a paper copy cannot be found, DMRE staff will request a duplicate from the permittee; if it is determined that the permittee failed to submit a DMR for any quarter, the inspector will take enforcement action under KRS Chapter 350 and will request submittal of the DMR. DMRE Regional Offices were given to the end of 2010 to complete the DocTree inventory; inventory spreadsheets were to be submitted to the Central Office in Frankfort for review. This process has been completed.

[8] Beginning January 1, 2010 DMRE no longer accepts submittal of paper DMRs; all DMRs are submitted to DMRE electronically. A computer program (using "Staffware") has been created that ensures loading of electronic DMR files to DocTree, notifies the inspector that the DMR has been submitted and prompts review and preparation of a mine inspection report by the inspector, and notifies DEP's Division of Enforcement of any permit limit exceedence.

that had retired. This loss does not excuse poor performance by the Cabinet; it does explain that the poor performance was not a lack of will but was, at least partly, attributable to a shortage of experienced personnel. Of course, the Cabinet in its investigation discovered DMR reporting and submission violations in the first and second quarters of 2010, also, that it had failed to act on. The discovery of the violations was a result of the intensive DMR review undertaken by the Cabinet, prompted by Movants' NOIs, showing that the NOIs got the results intended.

In addition, the Cabinet is undertaking programmatic initiatives to correct the problems into the future. DOW has initiated a schedule of PAIs of coal mine facilities, to include sample collection and analysis procedures of the three dozen wastewater labs performing laboratory services for coal mining operations in Kentucky. This initiative is expected to take 2 - 3 years. Finally, though not required by the Clean Water Act, efforts are under way in hopes that legislation may soon be introduced in the General Assembly to establish a wastewater laboratory certification program in Kentucky, similar to that required by the Safe Drinking Water Act, 42 U.S.C. 300f(1)(d). The Cabinet believes certification of laboratories would be instrumental in helping ensure proper data collection, testing, and reporting of coal mining wastewater discharges.[9]

D. The Cabinet's Enforcement Action

Following the Cabinet's investigation NOVs were issued to each Defendant. The Cabinet then filed a Complaint against each Defendant and tendered proposed Consent Judgments with the Complaints. The Complaints and Consent Judgments set out in detail the nature of the violations and the specific statutes and regulations violated. Each Consent Judgment requires payment of civil penalties and implementation of remedial measures designed to correct the

[9] See, attached to this Memorandum and incorporated as if fully set out here, letter dated December 13, 2010 from R. Bruce Scott, Commissioner, Department of Environmental Protection, to EPA Region IV Regional Administrator.

violations and to ensure compliance by Defendants in the future.

Following the filing of the Complaints and proposed Consent Judgments, Movants filed a Motion to Intervene and Memorandum in Support, to which the Cabinet responds, below.

ARGUMENT

I. THE COURT IS WITHOUT JURISDICTION OF MOVANTS' INTERVENING COMPLAINTS.

Movants do not specifically allege jurisdiction of their proposed Intervening Complaints in this Court, but "seek to file" their Intervening Complaints "under" the citizen suit provisions of the CWA at §§ 505(a)(1) and 505(1)(B). However, those statutes vest jurisdiction of a citizen's CWA action in federal district courts. CWA §§ 505(a)(2) and 505(c)(1). Therefore this Court is without subject matter jurisdiction of Movants' Intervening Complaints and Movants' motion to intervene should be denied.

II. FRANKLIN COUNTY IS NOT THE PROPER VENUE FOR MOVANT'S INTERVENING COMPLAINTS.

Venue of CWA citizen suits is "only in the judicial district in which [the discharge source] is located". CWA § 505(c)(1). Defendants' discharge sources are located in various counties in Eastern Kentucky and would necessitate that a CWA citizen suit be brought in the federal court serving those counties. Even if a state court were the proper venue, Movants' claims could only be heard in the state court where the discharge source is located, and not in Franklin County. Therefore Movants' motion to intervene should be dismissed.

III. MOVANTS ARE NOT ENTITLED TO INTERVENE IN THIS ACTION AS OF RIGHT.

Whether Movants have a right to intervene in this action is governed by Kentucky Rules of Civil Procedure 24.01, as follows:

> CR 24.01 INTERVENTION OF RIGHT
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> (1) Upon timely application anyone shall be permitted to intervene in an action (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 action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

A. Timeliness of Application and Statutory Right to Intervene

The Cabinet does not argue that the Motion to Intervene is not timely, but for the fact that the Cabinet has, as a result of Movants' NOIs, completed a major investigation of the allegations in the NOIs, issued multiple and comprehensive NOVs to each Defendant, and negotiated and tendered to the Court a fair, reasonable and comprehensive Consent Judgment with each Defendant, with which each Defendant is complying.[10]

Movants do not claim that a statute confers on them an unconditional right to intervene.

[10] Defendant, Frasure Creek submitted its Corrective Action Plan on December 22, 2010 as required by the proposed Consent Judgment; Defendant, ICG's Corrective Action Plan is due January 15, 2011.

B. Movants Have No Present, Substantial Interest in the Subject Matter of the Instant Actions

Movants claim a right to intervene in this action based on their interest "in protecting the cleanliness and health of . . . the Kentucky, Big Sandy, and Licking Rivers and their tributaries"; and their interest "as citizens of the Commonwealth and members of the public, and as organizations" in enforcement of the laws of the Commonwealth. Movants' Memorandum at 4-5. ("MM at __"). Movants cite to no Kentucky or any other state law or legal precedent recognizing such an interest as grounds for mandatory intervention in a state court proceeding.

Movants cite to *Baker v. Webb,* 127 S.W.3d 622, 624 (Ky. 2004) for the proposition that the interest must be a 'present, substantial interest in the subject matter." However, neither *Baker* nor other cases cited by Movants are particularly helpful in identifying what is a "present interest", or a "substantial interest". Generally, in Kentucky a "substantial interest" mandating intervention of right is based on a legally or contractually protectable interest. *See, Carter v. Smith,* 170 S.W.3d 402, 410 (Ky.App., 2004)(former superintendent had a "present and substantial interest" in the subject matter of a lawsuit brought to invalidate his consulting contract); *Ambassador College v. Combs*, 636 S.W.2d 305, 307 (Ky., 1982)(college, as beneficiary of decedent's first will, had sufficient interest "relating to property which is the subject of the primary action" mandating intervention in an action to set aside a subsequent will); *Dorman v. Adams*, 57 S.W.2d 534 (Ky. 1932)(bank stockholder had "a present and

substantial interest in the matter in controversy" to intervene in banking commissioner's action to levy and assessment on bank stockholders").[11] In *Baker, infra,* discussed more fully below, the court found a present, substantial interest where a statutory preference provided a "sufficient, cognizable, legal interest" to family members in adoption proceedings. Unlike in the cases cited by Movants, Movants' interests as citizens in protecting Kentucky waterways are not cognizable, legal interests under Kentucky law and so are not sufficient to entitle them to intervene.

1. Movants' "Public Interest"

Movants claim that the statutes granting the Cabinet the "authority, power, and duty" to implement the environmental policy of the Commonwealth, KRS 224.10-110, and to "provide a comprehensive program *in the public interest* for the prevention, abatement and control of pollution", KRS 224.70-100(1)(emphasis in Movants' Memorandum), give Movants, as members of the public, an interest relating to the subject matter of this action sufficient to allow intervention of right. (MM at 5). Movants rely on *Baker v. Webb,* 127 S.W.3d 622 (Ky. 2004) in support. That case, though, does not support Movants claim of a "public interest" sufficient for intervention as of right. In *Baker* the Court allowed intervention by second cousins of an orphaned child on a finding that state statutes requiring that preference in placing a child under an order of temporary custody be given to relatives of the child, KRS 620.090(2), "vest [applicants for intervention] a sufficient, cognizable legal interest in the adoption proceedings of this child". *Id.* at 625. Unlike KRS 620.090(2), though, KRS Chapter 224 gives exclusive authority, power, and duty *to the Cabinet* to enforce Kentucky's environmental laws, *on behalf*

[11] The court found that a final determination without allowing stockholder to be heard "would be inconsistent with equity and good conscience". *Dorman* at 536. Declining to allow intervention to Movants would not be "inconsistent with equity and good conscience". Movants needn't intervene to be heard. The Consent Judgments are posted for public comment; Movants may submit their comments both to the Court and the Cabinet. Second, entry of the Consent Judgments will not "injuriously affect" the interests of Movants or others with like interests. Defendants' compliance with the Consent Judgments will result in their compliance with the sample collection, analysis, and reporting requirements of the law.

of the public. It does not provide a similar right to citizens.

2. Movants' "standing interest"

Movants claim that their interests provide them with Article III standing to sue Defendants, which is all they must show to meet the interest requirements for intervention of right, citing *Mova Pharmaceutical Corp v. Shalala,* 140 F.3d 1060 (D.C. Cir 1998), *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167 (2000) *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333 (1977) and *American Canoe Association, Inc. v. City of Louisa Water and Sewer Comm'n,* 389 F.3d 536 (6th Cir. 2004). MM at 5. While Movants correctly quote *Mova*[12], their reliance on that case and on *Laidlaw, Hunt* and *American Canoe* is misplaced. Each of the cases addresses standing to initiate a lawsuit by an association in its representational capacity, and hold that an association does have such standing if any member would have standing to sue. In the present case, no member of Movant organizations would have standing to initiate a lawsuit in a Kentucky state court pursuant to KRS Chapter 224 to enforce an interest in clean waterways. In fact, the *Laidlaw* opinion asserts in the very first sentence that, "This case presents an important question concerning the operation of the *citizen-suit provisions of the Clean Water Act.*" *Id.* at 173 (emphasis added). While Movants may have Article III standing to bring a citizen suit under the CWA, or to intervene in a state enforcement action brought under the CWA in federal court, they do not have standing to initiate an enforcement action for violations of KRS Chapter 224 and so, under their own argument Movants do not have an interest sufficient to confer a right to intervene in this state court action.

For the reasons above, Movants do not have a present, substantial interest in this case sufficient to support intervention as of right.

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[12] "[Intervenor] need not show anything more than that it has standing to sue in order to demonstrate the existence of a legally protected interest for the purpose of Rule 24(a)". *Mova,* 140 F.3d 1060 at 1076.

C. Denial of Intervention Will Not Impair or Impede Movants' Ability to Protect Their Interests.

The Movants claim that, if intervention is denied, they will have no ability to protect their interests in clean and healthy waters in Kentucky. MM at 7. However, those cases cited by Movants do not support their claim. In *Purnell v. City of Akron*925 F.2d 941 (6th Cir. 1991) the Sixth Circuit considered a motion to intervene as of right by illegitimate children of the deceased in a wrongful death action for damages, though decedent's paternity had not been established. The Court allowed intervention on the ground that, if they did not intervene, the interests of the illegitimate children would be impaired because they would have no opportunity to put on proof of their damages and the amount of damages awarded would be limited to the proof adduced by decedent's legitimate children. *Id.* at 949. In *Fund for Animals v. Norton,* 322 F.3d 728 (D.C. Cir. 2003) an environmental group challenged the Interior Department's listing of the central Asian argali sheep as merely a threatened rather than endangered species. The Mongolian government was allowed to intervene because, if plaintiffs prevailed, listing of the sheep as endangered would result in a loss of fees and other income to the government's conservation program to protect the sheep; therefore, the Court determined that the disposition of the action without their intervention may as a practical matter impair or impede the Mongolian government's ability to protect its interest. *Id.* at 735. Similarly, in *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489 (9th Cir. 1995) environmental organizations brought action against the United States Forest Service (USFS) seeking to enjoin all activities authorized by USFS within Northern Goshawk habitat. The Court found that the interests of the State of Arizona arising from their statutory obligation to manage state forests in the habitat area for the control of forest fires, as well as its interests in funding it received to discharge those obligations would be impaired if it was not allowed to intervene to assert those interests. The Court found

that these consequences would have been "direct, immediate, and harmful." *Id.* at 1494.

Disallowing intervention in the above cases would have meant that the applicants would have no opportunity to argue their claims before a court. That is not so in the case presently before this Court. Disallowing intervention by Movants will not impair their ability to be heard by the Court regarding the sufficiency of the Consent Judgments – the Consent Judgments have been posted for public comment and Movants may submit their comments. Further, if Defendants do not comply with the Consent Judgments they may be heard in federal court under the CWA citizen suit provisions. Secondly, there is nothing to prevent Movants from pursuing *future* violations should Defendants fail to comply with the Consent Judgments. Finally, all submissions under the Consent Judgments are available to Movants' pursuant to open records request.

Contrary to Movants' assertions, the terms of the proposed Consent Judgments are fair, reasonable and adequate in light of the fact the DMR violations are not of the sort that are immediately threatening to public health, there was no "black water" discharge, Defendants' did not "drag their feet" but entered into a Consent Judgment to resolve the violations within sixty days of being made aware of them, and the penalties are substantial and hold Defendants accountable for the actions of their contract labs.[13]

3. <u>The Proposed Consent Judgments are Fair, Reasonable and in the Public Interest.</u>

Movants claim that the Consent Judgments are "overbroad" since they release the Defendants of liability for known and unknown violations for the statutory limitations period of

[13] Movants, correctly, cite to the standard for evaluating a proposed consent decree that is set out in *U.S. v. Lexington-Fayette Urban County Gov't,* 591 F.3d 484, 489(6th Cir., 2010). In that case the Sixth Circuit deemed reasonable a $425,000 civil penalty against the City of Lexington based on the duration and magnitude of LFUCG's violations, and the fact that the intervening citizen groups had brought the issue of Lexington's CWA violations to the City's attention as early as 1998 and tried since that time, unsuccessfully, to work with the city to resolve those violations. In contrast, Movants brought Defendants' violations to their attention in October and the violations were resolved by Consent Judgments in December.

five years. (MM at 7). Movants offer no case law that would shed light on what is or is not a "too broad" settlement. The terms of the Consent Judgments represent arms length negotiations for the purpose of a full and fair resolution of all of the Commonwealth's claims and potential claims against Defendants. Without doubt Defendants would have balked at a settlement of just some of the Cabinet's claims, leaving the Cabinet free to bring other, separate actions against them. The settlement represents the exercise of the Cabinet's enforcement discretion and promotes economy of both judicial and Cabinet resources. For the same reasons, it is appropriate that the settlements resolve any violations occurring before date of entry and potential KRS Chapter 350 that are of the same type as the KPDES violations.

The final penalties resulted from negotiations which involved lengthy discussions of the type, number, and cause of violations as well as the actual and potential environmental impacts of these violations. Since the Defendants contracted with the laboratories to conduct the monitoring and testing, the same costs are incurred by them regardless of the quality of the labs work or even whether the lab submitted the DMRs, or not. The Defendants' degree of fault is reflected in the civil penalties.

D. Movants' Interests are Sufficiently Represented by the Cabinet

1. The Cabinet and Movants have the same ultimate goal

Kentucky case law is sorely lacking in useful precedent regarding adequacy of representation in the context of a motion to intervene as of right. However, the federal courts have long held that the burden is on the applicant for intervention to prove they are not adequately represented by a party to the suit. *Meyer Goldberg, Inc. of Lorain v. Goldberg,* 717 F.2d 290, 293 (6th Cir. 1983)(internal citations omitted); *Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987). The adequacy of representation is presumed when the proposed intervenor

and a party to the suit have the same ultimate objective. *Bradley v. Milliken* at 1192. Movants acknowledge that the Cabinet is vested by law with the "authority, power, and duty" to administer and enforce the statutes, rules, and regulations promulgated by the Commonwealth to protect the environment, KRS 224.10-100; and to execute the policy of the Commonwealth to provide a comprehensive program in the public interest for the prevention, abatement and control of pollution, and provide effective means for the execution and enforcement of such program, KRS 224.70-100, including the general prohibition against water pollution as set out in KRS 224.70-110. These statutes embody the Cabinet's goals and its very reason for being. The Cabinet's swift and decisive action in this case makes plain that there is no question that the Cabinet has the same ultimate objective as Movants – enforcement of Kentucky's environmental laws for the protection of Kentucky's waterways generally, and compliance by Defendants with those laws, specifically.

To assess whether Movants are adequately represented by the Cabinet "it is necessary to identify the claims currently pending" before this Court. *United States v. Michigan,* 424 F.3d 438, 444 (6th Cir. 2005). In the Complaints the Cabinet alleges that Defendants failed to maintain required records in violation of 401 KAR 5:065 Section 2(1) (as in 40 C.F.R. 122.41(j)(2)); failed to submit monitoring results at required intervals in violation of 401 KAR 5:065 Section 2(1) (as in 40 C.F.R. 122.41(1)(4)); improper operation and maintenance in violation of 401 KAR 5:065 Section 2(1) (as in 40 C.F.R. 122.41(j)(2)); failed to comply with permit limits in violation of 401 KAR 5:065 Section 2(1) (as in 40 C.F.R. 122.41(a)); failed to monitor permit limits with approved test procedures in violation of 401 KAR 5:065 Section 2(1) (as in 40 C.F.R. 122.41(j)(4)); polluted the waters of the Commonwealth in violation of KRS 224.70-110, and degraded the waters of the Commonwealth in violation of 401 KAR 10:031

Section 2. (Frasure Creek Complaint at ¶4; ICG Complaint at ¶5)(ICG was not cited for violation of KRS 224.70-110 or 401 KAR 10:031 Section 2 as no stream degradation was observed at the time of the PAI). Movants in their Intervening Complaint(s) allege Clean Water Act counterparts to the same state law violations alleged by the Cabinet.

Movants' argue that, since the Cabinet has not alleged that Defendants have engaged in "reckless disregard of the law or intentional false reporting" the Cabinet "has implicitly justified the Defendant's fraudulent acts" and therefore does not adequately represent Movants' interests. Such a claim borders on the specious. The Movants base their claims of reckless disregard of the law or false reporting on a review of Defendants' DMRs only. The Cabinet, however, had access to all the information garnered in its Performance Audit Inspections described in the Statement of Facts, above. This investigation by Cabinet DOW and DNR personnel included observation of sample collection at the mine sites, collection of samples by the Cabinet at the mine sites for independent analysis,[14] observations of sample preservation, transportation, and analysis by laboratory personnel, interviews with laboratory personnel and with mining operation personnel, and a thorough, unannounced, onsite inspection of the contract labs. The Cabinet also had access to "bench sheets", or data to back up data reported on the DMRs, which Movants did not have access to. In addition, both ICG and Frasure Creek have submitted explanatory documentation to the Cabinet in response to the claims in the NOIs, and, since the investigation, Cabinet personnel have located and entered into DocTree all of the previously-thought missing DMRs. For these reasons, the Cabinet does not believe Movants' claim of fraud on the part of Defendants is substantiated.[15]

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[14] Analysis of the samples by the State Department for Environmental Services lab showed no violations of permit limits

[15] The Energy and Environment Cabinet has not historically undertaken criminal prosecution of violations of its statutes or regulations. That work typically is performed by the Office of the Kentucky Attorney General, or the

Movants also claim as proof that the Cabinet does not sufficiently represent their interests that: the Cabinet did not include them in the Cabinet's investigation or settlement negotiations, the Consent Judgments do not ensure that monies collected are spent in Eastern Kentucky, and the Cabinet's alleged history of non-enforcement. MM at 10-13. Movants do not offer any statutory or regulatory requirement that persons issuing a NOI shall participate in the Cabinet's investigation or resulting enforcement activities, nor cite to any precedent for such participation. The Cabinet does not invite citizen participation in its investigation activities and neither should it be required to. The NOIs may be analogized to a citizen complaint received by the Cabinet, which the Cabinet takes seriously and investigates. The Cabinet did so in this case. Movants did participate in the investigation to the extent that the allegations in the NOIs prompted the Cabinet's investigation, and informed it.

Regarding Movants' interests in having the civil penalties spent in Eastern Kentucky, neither the Cabinet nor the Movants are entitled to any of the penalties assessed in this case. Nor may either party request how the penalties are to be applied. By operation of KRS 224.10-250, the penalties will be credited to the Kentucky Heritage Land Conservation Fund. Accordingly, despite the Movants' pleas that the money should be "used in Eastern Kentucky," MM at 12, the Court may not direct such an allocation. Finally, Movants allege a history of non-enforcement by the Cabinet. This claim cannot be substantiated on the basis of Movants' allegations in this case and does not support intervention. Movants allege a pattern of non-compliance by Defendants; they do not allege any facts tending to call into question the Cabinet's history of enforcement of the statutes and regulations it is charged with implementing. The Cabinet admittedly failed to take enforcement action regarding the violations that were brought to its attention in the NOIs until it received the NOIs; some of the explanation for this failure is set out

local prosecutor.

in the Statement of Facts, above, and the Cabinet has now addressed that failure, which efforts will continue. The Consent Judgments rectify that failure as far as the violations by these Defendants, and additional programmatic measures are in place, with additional measures in development, to ensure that such failure is not repeated. The facts of this case do not support an allegation of a history of non-enforcement by the Cabinet.

IV. MOVANTS DO NOT SATISFY THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

CR 24.02 PERMISSIVE INTERVENTION

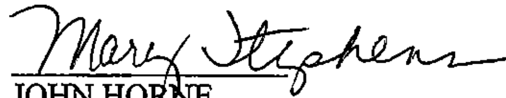
> Upon timely application anyone may be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene, or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider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

No statute confers a conditional, or an unconditional right on Movants to intervene, and Movants do not claim so. However, what claims arise from Defendants' violations are resolved by the Consent Judgments. That Movants are not satisfied with the amount of civil penalties, or the length of time required by the proposed Consent Judgments that Defendants must submit the bench sheets supporting the lab analysis results on their DMRs, does not argue in favor of allowing intervention. Further, allowing Movants' to intervene will unduly delay resolution of the rights of the original parties. The Cabinet has invested enormous amounts of time in investigation the NOI allegations, documenting Defendants' violations, and preparing enforcement documents, including NOVs and inspection reports, in addition to negotiating the Consent Judgments. Bringing in 8 additional parties – 4 environmental associations and 4 individuals, at this time would impose an unwarranted burden on the Cabinet.

CONCLUSION

For all of the foregoing reasons, Plaintiff Energy and Environment Cabinet prays that Motion to Intervene filed by 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 be dismissed.

Respectfully submitted,



JOHN HORNE
MARY STEPHENS
JOSH NACEY
Energy and Environment Cabinet
300 Fair Oaks Lane
Frankfort KY 40601
Telephone: (502) 564-2150 ext 136
Fax: (502) 564-4245

COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Cabinet's Memorandum in Response to Motion to Intervene and proposed Order were on this the 13th day of January, 2011 served on the following by regular mail, postage pre-paid to:

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By: Mary Stephens
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Energy and Environment Cabinet

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NOS. 10-CI-01867 & 10-CI-01868
(Consolidated)
DIVISION I

ENERGY AND ENVIRONMENT CABINET PLAINTIFF

VS.

ORDER

ICG HAZARD, LLC
ICG KNOTT COUNTY, LLC
ICG EAST KENTUCKY, LLC, and
POWELL MOUNTAIN ENERGY, LLC DEFENDANTS

AND

FRASURE CREEK MINING, LLC

* * * * * * * * * *

This matter having come before the Court on 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 to intervene in this action pursuant to CR 24.01, or, in the alternative, CR 24.02, and the Court having reviewed the motion and responses and memoranda in support and having heard oral arguments counsel, and being otherwise sufficiently advised, does hereby ORDER that the Motion to Intervene is DENIED.

ENTERED this ____ day of ____________, 2011.

Hon. Phillip Shepherd, Judge
Franklin Circuit Court

Tendered by:

____

Mary Stephens
Josh Nacey

ENERGY AND ENVIRONMENT CABINET

Steven L. Beshear
Governor

DEPARTMENT FOR ENVIRONMENTAL PROTECTION
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FRANKFORT, KENTUCKY 40601
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Leonard K. Peters
Secretary

R. Bruce Scott
Commissioner

December 13, 2010

Gwen Keyes Fleming
Regional Administrator
U.S. Environmental Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

RE: Kentucky Energy and Environment Cabinet (EEC) enforcement actions regarding ICG and Frasure Creek coal companies, and subsequent Kentucky EEC actions

Dear Administrator Fleming:

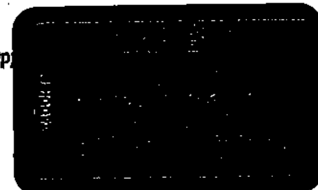
Please find enclosed a CD containing the Kentucky Energy and Environment Cabinet (EEC) enforcement action documents regarding the ICG and Frasure Creek coal companies, respectively. Enclosed documents include the signed Complaints and Consent Judgments that were filed with the Franklin Circuit Court on December 3rd, 2010. Both of these Judgments are currently pending before Judge Phillip J. Shepherd awaiting final resolution.

In addition to the Complaints and Consent Judgments, the CD also contains the various Notices of Violations (NOVs) and Performance Audit Inspection (PAIs) reports that the cabinet issued as a result of its investigation. These documents identify 1,245 violations at 64 different ICG coal mining operations in eight counties, and 1,520 violations at 39 different Frasure Creek coal mining operations in six counties. The PAI's were performed on both ICG and Frasure Creek coal mining operations along with the two primary wastewater testing laboratory contractors for ICG and Frasure Creek respectively. Those labs were:

S&S Water Monitoring, Inc.
4767 KY HWY 580
Oil Springs, KY 41238
(Johnson County)

Geological Sciences and Laboratory, Inc.
3133 North Main Street
Hazard, KY 41701
(Perry County)

KentuckyUnbridledSpirit.com
Kentucky Unbridled Spirit
An Equal Op



The enclosed records document a series of violations associated with ICG and Frasure Creek operations and their oversight of their contract laboratories, including but not limited to: poor record keeping; inadequate quality assurance and quality control; improper sample collection and procedures; failure to comply with effluent limitations; failure to utilize approved test methods; failure to submit discharge monitoring reports; failure to submit monitoring results with an authorized signature; and water quality impacts at one operation.

It should be noted that the investigations initiated by the Kentucky EEC were done in response to Notices of Intent (NOIs) to sue for Clean Water Act violations by four environmental organizations. NOIs were received by the agency on October 7, 2010 for selected coal mining operations owned and operated by ICG-Knott, ICG-Hazard, and Frasure Creek. In response to these NOIs, EEC investigated all of the ICG and Frasure Creek coal mining operations in Kentucky, which went beyond the scope of the October 7, 2010 NOIs. In addition, the EEC investigation included the respective contract labs used by the coal companies which the NOIs could not address.

EEC, as the delegated NPDES authority, has undertaken an initiative to investigate other coal mining operations within the Commonwealth. These investigations also include review of CWA 402 Discharge Monitoring Reports (DMRs) and PAIs of coal mining operations and wastewater labs providing services to these coal mining operations. It is projected that this effort may take up to 2-3 years to complete. There are currently approximately 2000 coal mining operations and three dozen wastewater labs performing analyses of coal mining wastewater discharges within the Commonwealth. It is anticipated that the Cabinet will take several additional enforcement actions as a result of this initiative.

This initiative will demand substantial allocation of limited personnel resources by the agency. The Division of Water (DOW) will be requesting EPA Region 4 to recognize these extensive efforts in its CWA 106 grant commitments. We will be asking EPA to provide DOW with flexibility in meeting its changing CWA 106 grant work performance. It is our belief and hope that EPA will recognize and agree with EEC regarding the importance of this initiative on the part of the Commonwealth and will work cooperatively with Kentucky to adjust any concerns regarding our grant commitments.

Finally, while still in initial stages, Governor Steve Beshear has asked the EEC to work with other stakeholders to evaluate the potential to establish a wastewater laboratory certification program in Kentucky. This concept has been proposed in previous legislative sessions, but has never been enacted. States are split roughly 50-50 on those that do and those that do not have a wastewater lab certification program. Though wastewater lab certification is not a requirement of the Clean Water Act or NPDES regulations, it is apparent that a program similar in nature to what is required by the Safe Drinking Water Act (42 USC 300f(1)(d)) and its attendant regulations (40 CFR 142.10(b)(4)) for drinking water laboratories is needed to ensure proper data collection, testing, and reporting on DMRs for wastewater discharges.

I hope that you find the enclosed information useful and demonstrative of Kentucky's commitment to ensuring the coal mining industry's compliance with Clean Water Act requirements. If you have any questions regarding this letter or related matters, please contact me at your convenience at 502-564-2150 or via email at Bruce.Scott@ky.gov.

Sincerely,

R. Bruce Scott, P.E.
Commissioner
Kentucky Department for Environmental Protection

C: KY EEC (Len, Karen, Brooke)
KY DOW (Sandy, Tom, Jory)
KY DNR (Carl, Jennifer, Jim)
KY OGC (Mike, John, Mary)