

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CASE NO. 10-CI-1867 & 10-CI-1868  
(Consolidated)



COMMONWEALTH OF KENTUCKY,  
ENERGY AND ENVIRONMENT CABINET

PLAINTIFF

V.

ORDER

FRASURE CREEK MINING, LLC  
and  
ICG HAZARD, LLC, et. al.

DEFENDANTS

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This action is before the Court on the motion to intervene filed by Appalachian Voices, Inc., Waterkeeper Alliance, and others<sup>1</sup> who object to the entry of the proposed consent decree between the plaintiff Energy and Environment Cabinet (“EEC”) and the defendants, Frasure Creek Mining, LLC (“Frasure Creek”) and ICG Hazard, LLC (“ICG”) and their affiliated coal companies concerning violations of the Clean Water Act, 33 U.S.C. Sec. 1251 *et seq.*, KRS 224.70-110, and 405 KAR Chapter 5. The parties have fully briefed the motion to intervene, and the Court held a hearing on this motion on January 27, 2011. Being sufficiently advised, the Court GRANTS the motion to intervene under CR 24.01, but holds the Interveners’ motion to file an intervening complaint in abeyance pending the Court’s review and ruling on the joint motion to approve the proposed consent decree filed by EEC, Frasure Creek and ICG.

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<sup>1</sup> The Interveners are 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.

The EEC alleges in the Complaints against Defendants that Frasure Creek and ICG failed to maintain required records in violation of 401 KAR 5:065 Section 2(1)<sup>2</sup>; failed to submit monitoring results at required intervals in violation of 401 KAR 5:065 Section 2(1)<sup>3</sup>; improper operation and maintenance in violation of 401 KAR 5:065 Section 2(1)<sup>4</sup>; failed to comply with permit limits in violation of 401 KAR 5:065 Section 2(1)<sup>5</sup>; failed to monitor permit limits with approved test procedures in violation of 401 KAR 5:065 Section 2(1)<sup>6</sup>; 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. Movants in their Intervening Complaint(s) allege Clean Water Act counterpart violations to the same state law violations alleged by the Cabinet.

The Interveners assert that the penalties and remedial measures jointly proposed by the Cabinet, Frasure Creek and ICG are inadequate, and that they fail to protect the public interest in enforcement of the Clean Water Act and the corresponding provisions of state law. The Interveners, as required by CR 24.03, have tendered to the Court proposed Intervening Complaints setting forth in detail their claims related to this action.

CR 24.01 provides intervention as a matter of right. “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

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<sup>2</sup> See also 40 C.F.R. 122.41(j)(2), the corresponding federal regulation.

<sup>3</sup> See also 40 C.F.R. 122.41(1)(4)), the corresponding federal regulation.

<sup>4</sup> See also 40 C.F.R. 122.41(j)(2)), the corresponding federal regulation.

<sup>5</sup> See also 40 C.F.R. 122.41(a), the corresponding federal regulation.

<sup>6</sup> See also 40 C.F.R. 122.41(j)(4)), the corresponding federal regulation.

to protect that interest, unless that interest is adequately represented by existing parties.”  
CR 24.01.

In this case, the Interveners do have “an interest relating to the property or transaction which is the subject of the action and is so situated that 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.” Here, the Interveners brought the violations of Defendants to the attention of the Cabinet by researching and serving their Notice of Intent to Sue under the Clean Water Act on October 8, 2010. Interveners argue that the Cabinet does not adequately represent their interests, and that the EEC has failed to protect the public interest by agreeing to a settlement in the form of the proposed consent decree that lacks adequate penalties and remedial measures to ensure compliance with the law.

As the Court noted in the oral argument, unless the Interveners are allowed to participate, there will be no adversary hearing on the proposed consent decree, because EEC, Frasure Creek and ICG have all agreed to its entry. In that respect, this case is similar to a declaratory judgment action in which the parties have reached an agreement prior to the filing of the action. “An actual controversy for purposes of the declaratory judgment statute, requires a controversy over present rights, duties, and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion.” Barrett v. Reynolds, 817 S.W.2d 439 441 (Ky.1991) (*citing Dravo v. Liberty Nat’l Bank & Trust Co.*, 267 S.W.2d 95 (Ky.1954)); *see also Maney v. Mary Chiles Hospital*, 785 S.W.2d 480 (Ky.1990)<sup>7</sup>. The Interveners, representing the very

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<sup>7</sup> “It is reasonable to believe that the reason why the Declaratory Judgment Act requires notice to the Attorney General ‘before judgment is entered’ and an opportunity to intervene is because a primary

citizens and interested environmental groups who brought these violations to light through their own expenditure of a massive amount of time and effort to research the public records of the Cabinet, have come forward with good faith allegations that the consent decree is inadequate to protect the public interest.

The Cabinet, by its own admission, has ignored these now admitted violations for years. The citizens who brought these violations to light through their own efforts have the legal right to be heard when the Cabinet seeks judicial approval of a resolution of the environmental violations that were exposed through the efforts of these citizens. In these circumstances, it would be an abuse of discretion to deny those citizens and environmental groups the right to participate in this action, and to test the provisions of the consent decree against the applicable legal standard of whether the consent decree is “fair, adequate, and reasonable, as well as consistent with the public interest.” *See United States v. Lexington-Fayette Urban County Government*, 591 F.3d 484, 489 (6<sup>th</sup> Cir. 2010).

The Cabinet argues that this Court does not have jurisdiction over the subject matter of the tendered Intervening Complaints, even though the consent decree they have submitted concerns violations of both state and federal law. State courts, as courts of general jurisdiction, are presumed to have concurrent jurisdiction over federal claims. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (holding that under the U.S. system of dual sovereignty, state courts have “inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States”). *See also Martinez v. California*, 444 U.S. 277, 282-83, n. 7 (1980), *Maine v. Thiboutot*, 448 U.S. 1, 2, n. 1

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purpose of the Act was to permit lawsuits testing public questions, such as the validity of bond issues. Such cases have the potential for becoming ‘sweetheart’ cases wherein friendly parties seek to establish the constitutionality of their actions.”

(1980). The bar to overcome the presumptive competence of state courts is high. To do so, Congress must explicitly divest the states of the authority to adjudicate federal law claims. See Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990). The EEC, Frasure Creek and ICG have failed to identify any explicit divestment of authority in the CWA or Kentucky statutes.

There is a presumption of concurrent jurisdiction. Such presumption is only defeated by clear language in a statute divesting state courts of jurisdiction, and giving federal courts sole jurisdiction. No such exclusion of state court jurisdiction is apparent in the Clean Water Act. Moreover, the requirements of state law and federal law on the issues giving rise to this controversy are substantially, if not completely, the same. The parties are in agreement that the Commonwealth has delegated authority from the U.S. Environmental Protection Agency under the Clean Water Act to administer the CWA in Kentucky. As noted by Memorandum in Support of Joint Motion to Enter Consent Judgment, “[t]he Clean Water Act, KRS Chapter 224, Kentucky’s water quality regulations, and [the] KPDES permits, all share the common goal of eliminating the discharge of harmful pollutants and improving the quality of the waters of the Commonwealth.” (Joint Memorandum, 12.10.10, p. 4).

EEC, Frasure Creek and ICG raise a number of other challenges to the jurisdiction and venue of this Court to adjudicate the Interveners’ CWA claims. Without deciding any of the CWA issues presented, this Court finds that the Interveners have standing to intervene as a matter of right under state law, and to contest the validity of the proposed consent decree under KRS Chapter 224 and 405 KAR Chapter 5. The Court will

reserve ruling on the CWA claims and defenses until after it has ruled on the issues presented under state law.

The Court finds that judicial economy would be served by bifurcating the issues in this matter, so that the threshold issue of whether this Court should approve the proposed consent decree as a matter of state law should be considered and decided before the Court adjudicates the issues presented under the Clean Water Act, including the issue of whether this Court has jurisdiction to adjudicate the CWA claims.

Accordingly, IT IS ORDERED AND ADJUDGED:

1. The motion to intervene is GRANTED, subject to the terms and conditions set forth below;
2. Pursuant to CR 16 and CR 42.02, the Court, on its own motion, directs that the issues raised in the original complaint filed by the EEC, and the Joint Motion to Enter Consent Judgment filed by EEC, Frasure Creek and ICG, shall be bifurcated from the claims raised by the Interveners in the tendered Intervening Complaints.
3. The parties, including the Intervening Plaintiffs, have 90 days from the entry of this Order to complete an initial round of discovery, which shall be limited to the issue of whether the proposed consent decrees, are "fair, adequate, reasonable, and consistent with the public interest." During this initial period of discovery, the Intervening Plaintiffs shall be entitled to serve on EEC, Frasure Creed and ICG, interrogatories (not to exceed 30) under CR 33 and requests for production of documents under CR 34. EEC, Frasure Creek and ICG shall designate one or more representatives to testify concerning the

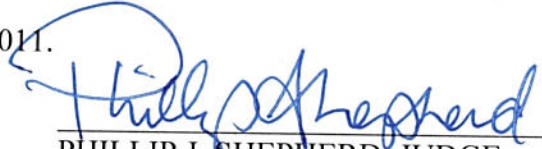
issues raised by the proposed consent decree under CR 30.02(6), and such representatives shall be made available for deposition by the Intervening Plaintiffs. Any party that seeks to present expert testimony shall, within 60 days of the entry of this Order, make a full disclosure of all information required by CR 26.02(4), including a full and complete summary of any “opinions to which the expert is expected to testify and a summary of the grounds for each opinion.”

4. The parties are directed to meet and confer, and to agree upon reasonable terms and conditions for the completion of discovery set forth above on these threshold issues within 10 days of the entry of this Order, and to submit an Agreed Order setting forth the terms of their agreement for entry by the Court.
5. After completion of the limited discovery set forth above, the Court will set this action for a hearing on the merits of the consent decree under state law, and will hear testimony on all issues related to the motion to approve the consent decree, including any objections of the Intervening Plaintiffs.
6. The hearing on the Joint Motion to Enter Consent Judgment, and the objections of the Intervening Plaintiffs, will be held on Tuesday, June 14, 2011 at 9:00 a.m.
7. A pretrial conference will be held on May 23, 2011 at 2:00 p.m.
8. Pursuant to Local Rule 14 of the Franklin Circuit Court, the parties are directed to conduct a mediation in this case, to designate a mutually acceptable mediator within 10 days of the entry of this Order, and to schedule a mediation session prior to the June 14, 2011 hearing. If the parties cannot

agree on a mediator, they shall notify the Court, and the Court will designate a mediator.

9. The filing of the Intervening Complaints by the Intervening Plaintiffs is held in abeyance pending the Court's ruling on the merits of the Joint Motion to Enter Consent Judgment.

SO ORDERED this the 11th day of February, 2011.

  
PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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