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January 19, 2011

Sally Jump, Franklin County Circuit Court Clerk
Franklin County Courthouse
669 Chamberlin Avenue
Frankfort, Ky. 40601

RE: Division No. I, Civil Action Nos. 10-CI-1867 & 1868 (consolidated)
Cabinet v. Frasure Creek Mining, LLC, et al.

Dear Ms. Jump,

Please find enclosed for filing the Applicants' Motion for Leave to File a Reply and Reply to Objections to Applicants' Motion to Intervene. As per the Court's Order of December 15, 2010, today I provided Judge Shepherd and opposing counsel with copies of these documents by email.

Sincerely,

Mary Varson Cromer

Mary Varson Cromer

Enclosures

cc:

Judge Phillip Shepherd	**phillipshepherd@kycourts.net**
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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NOS. 10-CI-01867
AND 10-CI-01868 (CONSOLIDATED)
DIVISION I

ENERGY AND ENVIRONMENT CABINET,

PLAINTIFF,

v.

FRASURE CREEK MINING, LLC

and

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

DEFENDANTS.

MOTION FOR LEAVE TO FILE A REPLY

Applicants for Intervention, 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, [hereinafter "Applicants"], through counsel, hereby move the Court for leave to file a Reply Memorandum to the Memoranda in Opposition to Applicants' Motion to Intervene filed by the Energy and Environment Cabinet ("Cabinet") and the Defendants.

In support of this Motion, Applicants for state as follows:

1. The Court's Order of December 15, 2010 does not specifically allow for a Reply Memorandum from the Applicants.

2. The Cabinet and the Defendants raise issues regarding this Court's jurisdiction to hear the actions the Applicants' seek to bring through intervention.

3. In addition, the Cabinet's opposition to the Applicants' Motion to Intervene raises issues under the Clean Water Act regulation 40 C.F.R. §123.27(d) that should be addressed by this Court.

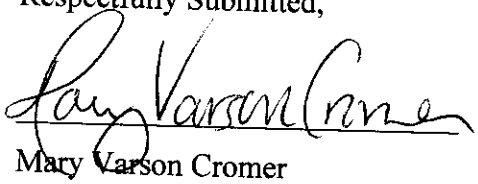
4. This Court's deliberation will be aided by arguments and authorities provided by the Applicants in their Reply to the Opposition Memoranda.

5. The Applicants provide their proposed Reply with this Motion.

6. The Reply is provided by email and regular mail to the Court for consideration during the hearing scheduled for January 27, 2010.

For the foregoing reasons, Applicants respectfully ask the Court to consider the arguments and authorities provided in their Reply to Objections to Applicants' Motion to Intervene.

Respectfully Submitted,



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COMMONWEALTH OF KENTUCKY
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DEFENDANTS.

REPLY TO OBJECTIONS TO APPLICANTS' MOTION TO INTERVENE

Come now the Applicants for Intervention—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," or "Applicants")—through counsel and submit these arguments in reply to objections made in response to Applicants' Motion to Intervene filed in this action on December 14, 2010.

INTRODUCTION

The Applicants for Intervention seek to join their Clean Water Act ("CWA") claims against the Defendant coal companies with the Energy and Environment Cabinet's ("Cabinet") claims. Under Sixth Circuit jurisprudence, this Court has jurisdiction over the Intervenors' claims through the concurrent jurisdiction of 33 U.S.C. §1565. Applicants seek full, not limited intervention. Given the scope of violations alleged by both the Applicants and the Cabinet and

the discrepancies in the degree of fault alleged by the Applicants and the Cabinet, further information is required to determine what type of judgment would ensure that the systemic problems uncovered are remedied and no further violations occur. Further discovery is needed to determine the true nature and extent of the Defendants' CWA violations.

Applicants seek full intervention under Kentucky's Rules of Civil Procedure Rule 24.01. The CWA requires that citizen participation be "provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. §1251(e). To fulfill this Congressional mandate, the CWA regulations specifically prohibit state regulatory authorities from opposing citizen intervention in state enforcement actions as the Cabinet has done here. This Court should reject the Cabinet's arguments in opposition to intervention because such arguments are disallowed by the CWA.

Applicants' arguments in support of intervention under CR 24.01 largely encompass their arguments in opposition to proposed Consent Judgments. Despite the arguments of the Cabinet and the Defendants, the CWA violations giving rise to the Cabinet's complaint are serious and consequential, regardless of whether the Court were to find intentional false reporting, A permittee's self-reporting is at the heart of the CWA's enforcement scheme. Compliance with discharge limits imposed by law cannot be ascertained without accurate and truthful self-reporting. Without accurate and complete DMRs and without any DMRs in many instances, the Cabinet, the Applicants, and the public cannot know the amount and kind of pollutants the Defendants discharged into Kentucky's waterways over the past two-and-one-half years. That the Cabinet considers this systematic problem non-serious and not worthy of substantial penalties is disturbing and evidences a lack of understanding and commitment to the CWA enforcement program.

In determining whether any settlement is fair, reasonable, and in the public interest, this Court must look to whether the enforcement response is sufficient to deter future violations. Given the systematic failures in enforcement revealed by these violations, the Court should also look to whether the proposed remedies are capable of ensuring future compliance. The proposed Consent Judgments do neither. Applicants' respectfully seek intervention to bring their CWA claims against the Defendants and help ensure that any judgments are sufficient to stop the Defendants' patterns of violations and provide a robust enforcement system by the Cabinet.

ARGUMENTS

I. Applicants May Intervene as of Right as Full Parties to This Action

a. Applicants Have Sufficient Interest in this Action

The Cabinet proposes that "if Defendants do not comply with the Consent Judgments [the Applicants] may be heard in federal court under the CWA citizen suit provisions." Cabinet Response, at 13. The Cabinet also suggests that "there is nothing to prevent [Applicants] from pursuing future violations should Defendants fail to comply with the Consent Judgments." *Id.* By these statements, the Cabinet implicitly acknowledges that Applicants have a substantial legal interest in the outcome of this action. Further, the Cabinet acknowledges that Applicants have sufficient standing to bring action under the CWA citizen suit provision.

Applicants contend that if their participation in future related enforcement and compliance proceedings against the Defendants is appropriate, it follows that their involvement in the instant action is equally appropriate. Applicants further contend that the most efficient and effective means to ensure that their interests are addressed is to allow participation in this action.

It should also be noted that, in proposing that the Applicants may take part in hypothetical future proceedings against the Defendants, the Cabinet offers no explanation as to how such hypothetical future participation would be sufficient to represent the Applicants' present interest in enforcement. (See below, Section II.c.)

b. The Franklin Circuit has Subject Matter Jurisdiction over Applicants' CWA Citizen Suit Claim

i. Presumption of Concurrent Jurisdiction

State courts, as courts of general jurisdiction, are presumed to have jurisdiction over federal claims. *See 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"). 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, e.g., *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) (Title VII); *Tafflin*, 493 U.S. at 458 (RICO). Congress has not done so here.

The jurisdiction clause of the CWA citizens' suit provision under which Applicants seek to file their actions against Defendants grants federal courts authority to hear citizen suits, but does not explicitly divest the state courts of their authority to hear the cases as well. The statute provides: "[D]istrict courts shall have jurisdiction...to enforce...an effluent standard or limitation...." 33 U.S.C. §1365(a).[1]

ii. Sixth Circuit Jurisprudence Supports Concurrent Jurisdiction

The Sixth Circuit Court of Appeals held that the citizens' suit provision in the Resource Conservation and Recovery Act ("RCRA") provided concurrent jurisdiction. *Davis v. Sun Oil Co.* (*Davis III*), 148 F.3d 606 (6th Cir. 1998). The RCRA citizens' suit provision states: "Any action [against any person other than the Administrator alleged to be in violation] of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . ." 42 U.S.C. §6972(a). Relying on *Yellow Freight*, the court rejected the argument that RCRA's "shall be brought" language divests the state courts of jurisdiction. *See Davis III*, 148 F.3d at 612 (citing *Yellow Freight*, 494 U.S. at 823).

In an unpublished decision, the United States District Court for the Middle District of Tennessee followed *Davis III* and found the CWA's citizens' suit provision likewise provides concurrent jurisdiction. *Hooker v. Chickering Properties, LLC,* 2007 WL 1296051 (M.D. Tenn. 2007) (Attachment #1). The Court reasoned that "if state courts have jurisdiction over RCRA suits under the governing statutory language, then state courts have jurisdiction over the similar language under the CWA since there is nothing in the statute which suggests an effort to make the jurisdiction exclusive to the federal courts." *Id.* at *2.

Compare the statutory scheme of RCRA to CWA with respect to jurisdiction and venue. RCRA's language is even more specific as to federal court designation. RCRA's venue clause,

[1] The CWA venue clause is seemingly exclusive to federal court jurisdiction and specifies that actions "may be brought . . . only in the judicial district [in which the polluting source is located]." 33 U.S.C. § 1365(c)(1). However, the venue clause in CWA §505 is independent of the jurisdiction provision, occurring in a subsequent subsection. In this respect, the CWA mirrors RICO's statutory scheme. The Supreme Court determined that the RICO venue provision operates subsequent to the decision to bring a claim in federal court, and therefore is not indicative of legislative intent to place jurisdiction of claims exclusively in federal court. *Tafflin*, 493 U.S. at 466–67.

42 U.S.C. § 6972(a), precedes mention of jurisdiction and states that the action "shall be brought in the district court for the district in which the alleged violation occurred," whereas the CWA venue clause, 33 U.S.C. §1365(c)(1), comes after the jurisdiction clause and merely states that actions "may be brought . . . only in the judicial district in which such source is located."

The cases from other circuit courts cited by Frasure Creek for the proposition that federal courts have exclusive jurisdiction over CWA citizens' suits are inapposite. *See* Frasure Creek Response at 6-7 (citing *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984); *Penn. Dep't of Envtl. Resources v. EPA*, 618 F.2d 991 (3d Cir. 1980); *NRDC v. EPA*, 542 F.3d 1235 (9th Cir. 2008)). These appellate decisions involved judicial review of an alleged failure by EPA to perform a nondiscretionary duty under CWA § 1365(a)(2). The courts in each case addressed the issue of "exclusive jurisdiction" of the *federal district courts*, only as opposed to that of the *federal circuit courts*.[2] None of these cases addressed the issue of exclusive jurisdiction of the federal courts (as opposed to the state courts) for CWA citizens' suit adjudication under CWA § 1365(a)(1).

Frasure Creek additionally cites three recent federal district court decisions from other circuits to support its exclusive federal jurisdiction argument. *See* Frasure Creek Response at 7 (citing *Remington v. Mathison*, 2010 WL 1233803 (N.D. Cal. Mar. 26, 2010); *Historic Green Springs, Inc. v. EPA*, 2010 WL 3855248 (W.D. Va. Sept. 29, 2010); *Murphy v. Schwarzenegger*, 2010 WL 3521958 (E.D. Cal. Sept. 8, 2010)). Like the appellate decisions discussed above, *Green Springs* dealt specifically with a challenge to EPA's failure to perform a nondiscretionary duty under CWA § 505(a)(2), and its holding does not extend to § 505(a)(1) citizen suits. 2010 WL 3855248, at *5. The two remaining cases were brought in district courts in the Ninth Circuit. The courts in *Remington* and *Murphy* relied on *NRDC v. EPA*, 542 F.3d 1235, 1242 (9th Cir. 2008) for the proposition that federal courts have exclusive jurisdiction over CWA citizens' suit claims. *Remington*, 2010 WL 1233803, at *6; *Murphy*, 2010 WL 3521958, at *6 n.3. Neither court assessed how the holding of *NRDC v. EPA*, which, as discussed above, does not touch on exclusive federal jurisdiction under 33 U.S.C. §1365(a)(1), could be extended to support a finding of exclusive jurisdiction under that provision. For this reason, Applicants

[2]CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1), provides direct review in the Courts of Appeals for a discrete set of agency actions. The federal district courts have jurisdiction over judicial review of agency actions not contained in this list.

assert that the *Remington* and *Murphy* decisions (precedents which are not binding on this Court) represent an improper expansion of *NRDC v. EPA.*

Applicants ask the Court to apply the Sixth Circuit's analysis in *Davis III* and hold that this Court has concurrent jurisdiction over the Applicants' CWA citizens' suit claims against the Defendants.[3]

c. Venue is Proper in Franklin Circuit Court

The CWA citizens' suit provision establishes venue in the "judicial district in which such source is located." 33 USC § 1365(c)(1). Applicants do not deny that this provision of the CWA applies exclusively to federal court. However, under the Supreme Court's holding in *Tafflin*, discussed in n.1 above, such venue provisions operate after the decision to file in federal court is made and are not determinative of Congressional intent to divest the state of its presumptive jurisdiction. *Tafflin*, 493 U.S. at 466–67.

For initial filings in state court, state venue statutes should apply. The Kentucky statutory venue provision KRS 453.405 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. However, the Cabinet initiated the instant action in the Franklin Circuit Court pursuant to KRS 224.99-101(9), which provides that "[t]he Franklin Circuit Court shall hold concurrent jurisdiction and venue of all civil, criminal, and injunctive actions instituted by the cabinet" for the enforcement of the Cabinet's authority under KRS Chapter 224.

Applicants now seek to intervene as of right pursuant to CR 24.01, or in the alternative, pursuant to CR 24.02, Permissive Intervention. Kentucky Rule of Civil Procedure, Rule 24 is silent as to venue, however, CR 24.03 requires that Applicants' Motion to Intervene "be accompanied by a pleading setting forth the claim or defense for which intervention is sought." For Applicants to intervene in an action properly filed by the Cabinet in the Franklin Circuit Court, they must necessarily file their Complaints in Franklin Circuit Court as well. To require otherwise would waste resources of the Kentucky courts and the parties. This Court has

[3] For further support, the Court can look to three other state courts that have heard CWA citizens' suit claims brought under 33 U.S.C. §1365(a)(1). *Berens v. Cook*, 694 N.T.S.2d 684 (App. Div. 1990); *Puget Soundkeeper Alliance v. State*, 9 P.3d 892 (Wash. Ct. App. 2000); *Kerns v. Dukes*, 707 A.2d 363 (Del. 1998). The issue of jurisdiction was only addressed in the *Kerns* case. In that case, the Delaware Supreme Court answered a certified question from the Third Circuit finding that the Delaware courts have jurisdiction to hear claims under the CWA citizen suit provision, 33 USC §1365(a). The court reasoned that the Delaware courts are competent to grant the relief called for by the CWA. The Delaware court did not consider the decision in *Yellow Freight.*

discretion with regard matters of venue. *Williams v. Williams*, 611 S.W.2d 807,809 (Ky. App. 1981). Applicants ask the Court to determine that venue is properly had in Franklin Circuit Court.

In conclusion, Applicants assert that the Franklin Circuit Court, a court of general jurisdiction, has authority to hear the subject matter of the Applicants' CWA citizen suits against the Defendants. Applicants further assert that their claim is properly noticed and filed in Franklin County, pursuant to CR 24.03.

II. The Cabinet has Failed to Demonstrate that it Adequately Represents the Applicants' Interests

a. The Cabinets Opposition to Applicant's Motion to Intervene Demonstrates that the Cabinet Does Not Represent the Applicants' Interests

The Cabinet objects to Applicants' Motion to Intervene on a number of grounds. Such objection is specifically disallowed by the Clean Water Act, and the Court should reject the Cabinet's objections. If the Cabinet's interests truly mirrored those of the Applicants (as is argued by the Cabinet and the Defendants), it is incomprehensible that the Cabinet would seek to exclude the very parties who exposed the widespread patterns of harm to those common interests. Rather than work with the citizens' groups that brought these matters to its attention, the Cabinet has excluded the Applicants from its investigations and negotiations and now opposes Applicants' intervention.

The language in the Cabinet's Response is telling: "[b]ringing in 8 additional parties … would impose an *unwarranted burden* on the Cabinet." Cabinet's Response, at 18 (emphasis added). Citizen participation is a cornerstone of the Clean Water Act; citizen groups are not unwarranted burdens. *U.S. v. Ketchikan Pulp Co.*, 74 F.R.D. 104, 108 (D.Alaska 1977) (citations omitted) ("[C]itizen groups are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests.").

As pointed out by the Applicants in court and on page 14 of the Memorandum in Support of Motion to Intervene, the Clean Water Act regulation that governs public participation in state enforcement actions, 40 C.F.R. §123.27(d), specifically disallows the Cabinet's opposition to

citizen intervention in this instance.[4] That regulation was promulgated by the EPA pursuant to Section 101(e) of the CWA, which requires that public participation in federal and state enforcement actions be "provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e).[5] The CWA provides statutory intervention as a matter of right for enforcement actions brought at the federal level. 33 U.S.C. § 1365(b)(1)(B). For state-level enforcement actions, EPA promulgated 40 C.F.R. § 123.27(d), which mandates:

> Any State administering a program shall provide for public participation in the State enforcement process by providing either:
>
> 1. Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or
>
> 2. *Assurance that the State agency or enforcement authority will*:
>
> i. Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);
>
> ii. *Not oppose intervention* by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
>
> iii. Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(emphasis added).

Under this regulation, states have two options for establishing public participation in enforcement proceedings: either (1) they must provide intervention as of right for "any citizen having an interest which is or may be adversely affected," or (2) they must investigate all complaints, provide notice and comment on any enforcement actions, and they must not oppose

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[4]Defendant ICG also fails to acknowledge 40 C.F.R. § 123.27(d) in its assertion that CWA § 505 "unambiguously allows intervention only in federal court actions." ICG Response at 3.

[5]Congress intended this provision to "do more than pay lip service to public participation; instead, '[t]he public must have a genuine opportunity to speak on the issue of protection of its waters' on federal, state, and local levels." *NRDC v. EPA*, 859 F.2d 156, 177 (D.C. Cir. 1988) (*quoting* Cong. Research Serv., Envtl. Pol'y Div., Library of Cong., *A Legislative History of the Water Pollution Prevention Control Act Amendments of 1972* at 819, 1490 (Comm. Print 1973)).

any parties seeking permissive intervention. *See* Consol. Permit Regulations, 45 Fed. Reg. 33,290, 33,382-83 (May 19, 1980).[6]

Kentucky CR 24.01 does not provide for intervention of right to "any citizen having an interest which is or may be adversely affected."[7] Kentucky's general intervention as of right provisions are much more stringent than that. Without a statutory right to intervene in KRS Chapter 224, like the one provided for intervention in federal CWA enforcement cases by 33 U.S.C. §1365(b)(1)(B), citizens' groups must rely on 24.01(1)(b).[8] Under that Rule, citizens groups must show an "interest relating to the property or transaction which is the subject of the action [that] 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." CR 24.01(1)(b). The Intervention of Right provision that citizens' groups must rely on in Kentucky clearly excludes some citizens that are or may be adversely affected. Therefore, 24.01 does not meet the requirements of the first option under 40 C.F.R. §123.27(d)(1).

Because it lacks an appropriate vehicle for intervention as of right in state CWA enforcement cases, Kentucky must meet the requirements of 40 C.F.R. §123.27(d)(2). It appears that the Cabinet has met all of these requirements with the exception of §123.27(d)(2)(ii). Under that regulation, the Cabinet *cannot* oppose the Applicants' intervention in this action. Applicants

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[6] EPA promulgated the public participation regulation in response to *Citizens for a Better Env't v. EPA*, 596 F.2d 720 (7th Cir. 1977), which held that previous regulations governing public participation failed to satisfy requirements of CWA § 101(e), 33 U.S.C. § 1251(e). See Consol. Permit Regulations, 45 Fed. Reg. at 33,382-83 (May 19, 1980).

[7] Section 505 of the CWA allows "any citizen [to] intervene as a matter of right" 33 U.S.C. § 1365(b)(1)(B). The Act goes on to define a "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 505(g) (emphasis added). According to EPA, "the legislative history of section 505 indicates Congress' intention to give citizens the broadest right of participation permitted by the requirement of 'standing' contained in the U.S. Constitution. Similar breadth would be required of States choosing to provide intervention as of right." Consol. Permit Regulations, 45 Fed. Reg. at 33,383. FRCP 24(a) governing as of right intervention does not provide such breadth. "To be sure, [a procedural rule that is identical or nearly identical to FRCP 24(a)] offers narrower citizen participation than would be available in federal court, where citizens have a statutory right to intervene." *CLEAN*, 2000 WL 220464 at *17 (W.D. Mo. Feb. 23, 2000). Furthermore, interpreting CWA § 505(b)(1)(B) to provide exactly the same right to intervene as that already afforded under FRCP 24(a) renders the CWA provision futile, and ignores legislative intent.

[8] Some courts have suggested in dicta that a procedural rule similar to FRCP 24(a) may satisfy the first option under 40 C.F.R. § 123.27(d). See, e.g., *NRDC v. EPA*, 859 F.2d 156; *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc. (CLEAN)*, 97-6073-CV-SJ-6, 2000 WL 220464, at *16-17 (W.D. Mo. Feb. 23, 2000). These courts, however, did not treat the issue with sufficient depth because none of the parties involved contested the adequacy of a state's procedural rules with respect to the public participation regulation. A more searching analysis of the statutory and regulatory framework reveals that neither Congress nor the EPA envisioned FRCP 24(a) and its state analogues to suffice as "authority which allows intervention as of right in any civil or administrative action" under 40 C.F.R. § 123.27(d)(1).

ask the Court to take note of this CWA prohibition, find that the Cabinet as a matter of law cannot oppose Applicants' intervention, and reject the Cabinet's opposition to the Motion to Intervene.

b. **The Cabinet's Failure to Recognize the Applicants' Have an Interest in This Action Demonstrates that the Cabinet Does Not Represent the Applicants' Interests**

Congress envisioned active public participation as essential to accomplishment of the public policy goals of the CWA. Such participation "shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e). Rather than providing for, encouraging, and assisting citizen participation in these enforcement matters, the Cabinet argues that "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." Cabinet Response, at 10.[9] The Cabinet's argument is contrary to the policies of the CWA and is not supported by the Kentucky caselaw on which the Cabinet relies.

To support this argument the Cabinet cites cases in which Kentucky courts required applicants to prove a protectable, cognizable legal interest to support intervention as of right. See *Carter v. Smith,* 170 S.W.3d 402, 410 (Ky.App., 2004); *Ambassador College v. Combs*, 636 S.W.2d 305, 307 (Ky. 1982); and *Dorman v. Adams*, 57 S.W.2d 534 (Ky. 1932).[10] These cases are not relevant to the matters before this Court. The cases cited by the Cabinet analyze the CR 24.01 intervention standards in the context of private interests and private rights of action under circumstances that do not invoke the broader scope of public policy. Any judgment entered in this action will have an effect on the general public and its participation in enforcement of the CWA. Protection of the public interest is one of the guiding policies of both the CWA and KRS 224. The public interest the Applicants represent in this action is sufficient to allow intervention under CR 24.01.

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[9] As noted above, the Cabinet also states that intervention by the citizens' groups would constitute an "unwarranted burden" on the Cabinet. *Id.* at 18.

[10] The Cabinet also attempts to refute the Applicants' reliance on *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004). The Cabinet misunderstands the Applicants' argument. The Applicants analogize the instant action to *Baker*. In *Baker*, the Court relied on the regulatory provisions and policies governing "relatives" to find that a second cousin had a protectable interest. *Id.* at 625–26. The Applicants ask this Court to likewise look to KRS 224's language regarding "public interest" to determine that the interests they assert are those that the statute seeks to protect and therefore Applicants' interests are sufficient for intervention under CR 24.01.

c. The Cabinet's Failure to Acknowledge that Applicants' Interests May be Impaired if Intervention is Not Allowed Demonstrates that the Cabinet Does Not Represent the Applicants' Interests

The Cabinet argues that denial of intervention will not impair or impede Applicants' abilities to protect their interests. In support of this argument, the Cabinet cites two cases, including *Purnell v. City of Akron,* 925 F.2d 941 (6th Cir. 1991), in which parties were allowed to intervene under circumstances in which they would have no other legal recourse if denied intervention. *See also Fund for Animals v. Norton*, 322 F.3d 728 (D.C. Cir. 2003). The Cabinet thus proposes a new standard for intervention.

The existing standard for intervention is not whether the applicant would have no other legal remedy, but rather, whether "an unfavorable disposition of the action *may* impair [the applicants'] ability to protect their interest in the litigation." *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (emphasis added). Not coincidentaly, the "may" language of *Purnell* mirrors the "may" language of the Kentucky Rules of Civil Procedure.[11] Until the Kentucky Legislature amends the language of CR 24.01 and 24.02, Applicants contend that the current standard should be applied and, pursuant to *Purnell*, Applicants "need not show that substantial impairment of their interest *will* result," only that it *may*. *Id.* (emphasis added).

The Cabinet also argues that disallowing intervention will not impair Applicants' ability to be heard by the Court regarding the sufficiency of the Consent Judgments because "the Consent Judgments have been posted for public comment and [Applicants] may submit their comments." Cabinet Response, at 13. In response, Applicants first note that it is clear that the Cabinet did not intend to seek public comment before having the Judgments entered. The Cabinet posted the proposed Consent Judgments for public comment on Order from this Court. The Cabinet did not seek public comment before signing the proposed Consent Judgments and moving this Court to enter them.

Second, the ability to comment is not an adequate substitute for the full intervention the Applicants seek. The Cabinet seems to equate the *receiving* of comments with adequate representation of Applicants' interests and the interests of the public in general. However, the

[11] CR 24.01 states in relevant part: "when the applicant ... 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..."

Cabinet offers no assurance that it will consider or even review the Applicants' comments. In fact, any review or consideration of comments by the Cabinet seems unlikely given that the Cabinet negotiated, executed, and moved to enter the proposed Consent Judgments with the Defendants before the public comment period was ordered. Furthermore, to the Applicants' knowledge, the Cabinet has not withdrawn its Motion to Enter the Consent Judgments to allow it time to consider the public's concerns.

In essence, the Cabinet proposes that Applicants' comments apply retroactively to the already executed Consent Judgments, and thus constitute adequate representation of the Applicants' (and the public's) interests. The Cabinet adds that "submissions under the Consent Judgments are available to [Applicants] pursuant to open records request." Cabinet Response, at 13. The Applicants, as the Cabinet should be aware, had no notice that negotiations for Consent Judgments had begun until after the Cabinet and the Defendants had executed same. So again, the Cabinet seems to argue that *ex post facto* participation is somehow sufficient to safeguard the Applicants' interests in this action. Applicants contend that it is not.

d. The Cabinet's Failure to Recognize the Seriousness of the Defendants' Violations and the Environmental Harm that May Have Resulted Demonstrates that the Cabinet Does Not Represent the Applicants' Interests

The Cabinet's contradictory statements regarding this case call into question its ability and willingness to effectively represent the Applicants' interests or the public interest in this matter. The Cabinet at some points downplays the seriousness of the number and type of violations found by asserting, for example, that "the DMR violations are not of the sort that are immediately threatening to public health, there was no 'black water' discharge...." Cabinet's Response, at 13.[12] In contrast, at other points, the Cabinet admits that the degree and scope of uncovered violations are substantial. In a letter to the Administrator for EPA Region 4, the Cabinet references a "series of violations associated with [the Defendants'] operations and their

[12] There is not sufficient information provided by the Cabinet to support this statement. Without accurate and truthful DMR reporting, the Cabinet cannot know what the Defendants have discharged in the last two and one-half years. Neither can the Applicants. This lack of knowledge about the Defendants' pollution discharges has harmed the Applicants' member because they cannot know if the water the use is safe. Now the Cabinet suggests that the Applicants and this Court should trust its conclusion that there was no "black water discharge," after the Cabinet acknowledged that it lacked sufficient oversight of these mines and therefore does not know what was being discharged.

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." Cabinet's Response, Ex. 1. The Cabinet also describes "*gross failure* by Defendants to oversee the laboratories to which they'd entrusted their compliance monitoring and reporting obligations." Cabinet's Response, at 3 (emphasis added). In a similarly contradictory manner, the Cabinet professes to have "the same ultimate objective as [the Applicants] — enforcement of Kentucky's environmental laws for the protection of Kentucky's waterways generally, and compliance by Defendants with those laws, specifically;" while characterizing the Applicants' intervention as "an unwarranted burden" after it has "invested enormous amounts of time in investigation [sic] the NOI allegations, documenting Defendants' violations, and preparing enforcement documents, including NOVs and inspection reports, in addition to negotiating the Consent Judgments." *Id.* at 15, 18.

The Cabinet's cavalier attitude toward the Applicants' interests and their desire to be heard in this action is unacceptable and demonstrates that the Cabinet does not adequately represent their interests.

e. **Applicants Have Met Their Burden to Overcome the Presumption that the Cabinet Adequately Represents Their Interests**

Defendants and the Cabinet maintain that Applicants' shoulder a "strong presumption that the state 'adequately represents' the Movants interests in this enforcement case." Frasure Creek Response, at 13; *see also* Cabinet Response, at 14-15; ICG Response, at 5. While it is well-established that there is generally a presumption of adequate representation by existing parties, the presumption may be easily overcome by parties seeking intervention.

"The right of citizens to intervene in FWPCA cases was granted by Congress on a broad scope. This apparently was in recognition of the fact that the agencies involved might not always prosecute to the fullest extent possible or protect all interests." *Ketchikan Pulp Co.*, 74 F.R.D. at 107 (applying CWA § 505(b)(1)(B)). Both the Defendants and the Cabinet correctly point out that adequate representation is presumed when a party seeks to intervene under FRCP 24(a)(a)(2), and the burden is on the party seeking intervention to demonstrate otherwise. The

burden, however, is minimal, and "[t]he requirement of the [FRCP 24(b)(2)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 540 n.10 (1972) (citing 3B J. Moore, Federal Practice 24.09-1 (4) (1969)). Prospective intervenors are "not required to show that the representation will in fact be inadequate. For example, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir. 1995)).

The Defendants and the Cabinet urge this Court to impose a heightened burden upon Applicants because the state government is a party, citing several decisions that have applied the *parens patriae* doctrine.[13] Although several circuits have departed from the Supreme Court's holding in *Trbovich* by employing the *parens patriae* doctrine, the Defendants and the Cabinet fail to acknowledge that the Sixth Circuit has roundly rejected this approach. In *Grutter v. Bollinger*, the court addressed arguments advanced by opponents to intervention that a greater demonstration of inadequate representation is required when the government, acting on behalf of the public welfare, is a party. In response, the court stated, "this circuit has declined to endorse a higher standard for inadequacy when a governmental entity in involved," and concluded, "[t]he proposed intervenors need show only that there is a *potential* for inadequate representation." *Grutter v. Bollinger*, 188 F.3d 394, 400-01 (6th Cir. 1999) (citing *Trbovich*) (emphasis in original); *see also Stupak-Thrall v. Glickman*, 226 F.3d 467, 479 (6th Cir. 2000). The *Grutter* court went on to hold that the possibility that the government would not raise all of the same arguments as prospective intervenors was sufficient to establish inadequate representation. 188 F.3d 394 at 401.

III. Applicants Oppose Entry of the Consent Judgment

[13]The *parens patriae* doctrine holds, "when one of the parties is an arm or agency of the government, and the case concerns a matter of 'sovereign interest,' the [intervention] bar is raised, because in such cases the government is 'presumed to represent the interests of all its citizens.'" *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir.1996) (quoting *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 1000 (8th Cir.1993)).

Where substantial public interests are at stake, the Court must ensure that proposed consent judgments uphold "the important policies underlying the Clean Water Act." *U.S. v. Telluride*, 849 F.Supp. 1400, 1402 (D.Colo. 1994). In deciding whether to approve a proposed consent judgment negotiated between private parties, a court takes a limited role where the dispute affects only private interests. See *U.S. v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980). The court has a larger role, however, where "interests of individuals and organizations other than those approving the settlement may be implicated." *Id.* at 1331. Because the larger public interest is at stake, this Court must determine whether any proposed Consent Judgments are fair, reasonable, and reflect the public policy interests of the CWA.

CONCLUSION

For the foregoing reasons and the reasons stated in the Motion to Intervene and Memorandum in Support of Motion to Intervene, the Applicants respectfully request that this Court allow their intervention as full parties in this action and deny the Cabinet's and Defendants' Motions to enter the proposed Consent Judgments.

Respectfully Submitted,

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ATTACHMENT 1

Not Reported in F.Supp.2d, 2007 WL 1296051 (M.D.Tenn.), 65 ERC 1692
(Cite as: 2007 WL 1296051 (M.D.Tenn.))

C

United States District Court,
M.D. Tennessee,
Nashville Division.
Alice HOOKER, Henry Hooker, Lisa Hooker Campbell, and Bradford Williamson Hooker,
Plaintiffs,
v.
CHICKERING PROPERTIES, LLC, a Tennessee Limited Liability Company, and Summit Constructors, Inc., a Tennessee Corporation, Defendants.

No. 3:06-0849.
May 1, 2007.

Elizabeth L. Murphy, Nashville, TN, for Plaintiffs.

Don L. Smith, Smith, Cashion & Orr, William Lewis Penny, Stites & Harbison, William Bryan Jakes, III, Howell & Fisher, Nashville, TN, for Defendants.

MEMORANDUM

ROBERT L. ECHOLS, United States District Judge.

*1 Pending before the Court are the Motions to Dismiss, or in the Alternative, Stay Proceedings (Docket Entry Nos. 12 and 14) filed by Defendants Chickering Properties LLC ("Chickering") and Summit Constructors, Inc. ("Summit") repectively to which Plaintiffs have replied in opposition (Docket Entry No. 17).

I. *FACTUAL BACKGROUND*

This is a civil action for declaratory and injunctive relief, the imposition of civil penalties, and restitution under the Clean Water Act ("CWA"), 33 U.S.C. § 1251, and 1365 *et seq.*, allegedly arising from Defendants' current and ongoing discharge of sediment-filled storm water into the Little Harpeth and Harpeth Rivers and onto Plaintiffs' private property. Defendants seek dismissal or a stay because of pending litigation in state court relating to the storm water discharge.

The facts giving rise to the present dispute are as follows. Plaintiffs collectively own or have an interest in over one hundred acres of land along Vaughn Road in Williamson County, Tennessee which connects to the Little Harpeth and Harpeth Rivers and the tributaries which feed them. Plaintiffs' acreage is adjacent to or across the street from Stockett Creek, an 82-acre parcel of land along Vaughn Road which is being developed into a residential subdivision by Defendant Chickering. Defendant Summit entered into a construction development contract with Chickering which included grading and constructing the storm drainage system and retention pond for the project.

Starting in August 2005, storm water run-off began flowing from the new construction site onto Plaintiffs' property and they allege that their property is serving as a direct and immediate drainage site for the Stockett Creek construction project. As a result, Plaintiffs, along with Dr. James O'Neill, filed suit in the Chancery Court for Williamson County, Tennessee against present Defendants and Lose & Associates, Inc., the architectural, land planning, and engineering firm retained by Chickering.

In the state case, the Plaintiffs allege that Defendants created a nuisance by changing the natural drainage and building a large storm water retention pond with two concrete drainage pipes within several yards of the adjoining property line. They also allege that Defendants created another, separate nuisance by discharging slugs of mud and heavily silted storm water along the same path during grading and land disturbance. Plaintiffs also allege that the change in storm water run-off has resulted in significant erosion.

Plaintiffs assert only state law claims in the state court case, including claims for gross negligence, negligence, temporary and permanent nuis-

ance, trespass, and violations of Tennessee's Water Quality Control Act of 1977 (T.C.A. § 69-03-101, *et seq.*). Plaintiffs seek to recover damages for the alleged loss of and interference with the use and enjoyment of their properties, damages for the alleged diminution of value of their properties, damages for the alleged loss of rental value, damages for any cost of repair or remediation to their properties, and temporary and permanent injunctive relief.

***2** In this case, Plaintiffs bring suit under the CWA to enforce the effluent limits of the National Pollution Discharge Elimination System (hereafter "NPDES") permit for storm water discharges from construction-related activities. Plaintiffs allege the run-off is affecting the Little Harpeth River which has an Environmental Protection Agency ("EPA") approved limit for sediment discharges. The Plaintiffs seek injunctive and declaratory relief which would state that the Defendants have violated the CWA, the Tennessee state water quality laws, the effluent limits set by the NPDES permit for storm water discharges relating to construction activities, and that Defendants have violated state and federal law by discharging excessive pollutants. They seek costs, reasonable attorneys' fees, and all allowable penalties provided by the CWA and the Equal Access to Justice Act.

II. *APPLICATION OF LAW*

Defendants have moved to dismiss or stay arguing that the present lawsuit is "nothing more than a rehash of the claims" Plaintiffs are pursuing in state court and that this Court should therefore either dismiss the action or defer the case pending resolution of the state court proceedings. Plaintiffs assert that this case is not a rehashing of the state court case because the state case alleges state tort law violations whereas this case is based upon alleged violations of the CWA. Plaintiffs then posit that because they could not bring their claim in state court, this Court must assume jurisdiction. While this Court agrees that the cases are dissimilar given the nature of the relief sought, the Court cannot conclude that jurisdiction lies exclusively in this Court.

Under the relevant statute, 33 U.S.C. § 1365(a), "[t]he district courts shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties, to enforce ... an effluent standard or limitation ... and to apply any appropriate civil penalties under section 1319(d) of this title." The reference to "the district courts" having jurisdiction can be read as suggesting that jurisdiction is vested in the federal district court to the exclusion of a state court. However, unless Congress explicitly states that federal courts have exclusive jurisdiction, the presumption is that jurisdiction is concurrent as between state and federal courts because "state courts have inherent authority, and are presumptively competent, to adjudicate claims arising under the laws of the United States." *Taffin v. Levitt,* 493 U.S. 455, 458 (1990). "[T]o overcome the 'presumptive competence' of state courts to hear and determine cases arising under federal law, ... Congress must 'affirmatively divest' the state courts of that jurisdiction and must do so in the text of the statute." *Holmes Fin. Assoc. v. Resolution Trust Corp.,* 33 F.3d 561, 565 (6th Cir.1994).

Given "the presumption of concurrent jurisdiction that lies at the core of our federal system," the Supreme Court in *Yellow Freight System v. Donnelly,* 494 U.S. 820, 834 (1990) held that concurrent jurisdiction existed over Title VII cases, even though the enforcement provision of that statute provides that " '[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.' " *Id.* at 823 (quoting 42 U.S.C. § 2000e-5(f)(3)). Based on *Yellow Freight,* the Sixth Circuit in turn found concurrent jurisdiction to exist on a claim involving environmental contamination of property under the Resource Conservation and Recovery Act ("RCRA"), even though the statute provided that "private suits *'shall be brought* in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur.' "

Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir.1998)(emphasis in original) (quoting 42 U.S.C. § 6972). If state courts have jurisdiction over RCRA suits under the governing statutory language, then state courts have jurisdiction over the similar language under the CWA since there is nothing in the statute which suggests an effort to make the jurisdiction exclusive to the federal courts. See, *City of Hays v. Big Creek Improvement Dist.*, 5 F.Supp.2d 1228, 1230 (D.Kan.1998)(while section 1365(a) provides for citizen suits, "the Act is devoid of any suggestion that other actions are revocable to federal court or that federal jurisdiction is intended to be exclusive").[FN1]

> FN1. The Court finds Plaintiffs' reliance on 28 U.S.C. § 1355 as a basis for jurisdiction misplaced. While that statute provides that district courts shall have "original jurisdiction, exclusive of the States, or any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture pecuniary or otherwise, incurred under any Act of Congress," the Court does not understand this case to involve any fine or penalty which has already been incurred.

***3** With the conclusion that this Court does not have exclusive jurisdiction over Plaintiffs' CWA claim, the question becomes whether the Court should dismiss this action or abstain in favor of the pending Williamson County Chancery Court litigation. This Court finds neither abstention nor dismissal warranted.

Federal courts have a " 'virtually unflagging obligation' " to exercise their jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Accordingly, "abstention from the exercise of federal jurisdiction is the exception, not the rule."

"In certain 'exceptional' circumstances ... a federal court may abstain from exercising its subject matter jurisdiction due to the existence of a concurrent state court proceeding, based on consideration of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of the litigation." *PaineWebber Inc. v. Cohen*, 276 F.3d 197, 206 (6th Cir.2001) (citation omitted). Such abstention is based upon the doctrine developed by the Supreme Court in *Colorado River* and its progeny.

"Before the *Colorado River* doctrine can be applied, the district court must first determine that the concurrent state and federal actions are actually parallel." *Romine v. Compuserve Corp.*, 160 F.3d 337, 339 (6th Cir.1998). "[E]xact parallelism" is not required; '[i]t is enough if the two proceedings are substantially similar.' " *Id.* "The question is not whether the suits are formally symmetrical, but whether there is a 'substantial likelihood' that the state court litigation 'will dispose of all claims presented in the federal case.' " *AAR Intern., Inc. v. Nimelias Enterprises, S.A.*, 250 F.3d 510, 518 (7th Cir.2001).

This Court finds that the present case and the state court case filed by Plaintiffs are not parallel. While both involve essentially the same parties, and both revolve in some way around the drainage from the Stockett Creek project onto Plaintiffs' property, the state court case will not dispose of Plaintiffs' CWA claim in this case, nor will the relief necessarily be the same should Plaintiffs prevail in both actions.

Yet, even if the cases are considered parallel, abstention, in the form of a stay, would not be appropriate. In determining whether to abstain from entertaining a parallel case, a court should consider eight factors. Those factors are:

(1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; ... (4) the order in which jurisdiction was obtained[;] ... (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the rel-

ative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

***4** *PaineWebber,* 276 F.3d at 206 (citing, *Romine,* 160 F.3d at 340-31). Applying those factors, this Court concludes that a stay is unwarranted.

With regard to the first factor, Defendants assert that the Williamson County Chancery Court has assumed jurisdiction over the property. However, while the case involves property rights in the form of diminution based upon water run-off, "the gravamen of the case does not revolve around a 'thing' or an item of property but rather around allegations of unlawful conduct." *Crown Enter., Inc. v. Lambert,* 2006 WL 2844445 at *3 (E.D.Mich.2006). "The first factor contemplates assertion of jurisdiction over, say, a ship or a house, and not, broadly speaking, over a dispute that happens to touch upon property rights." *Id.; see, United States v. Fairway Capital Corp.,* 433 F.Supp.2d 226, 239 (D.R.I.2006)(the first factor "applies to situations in which a court assumes jurisdiction over a res in the course of an *in rem* proceeding" and "requires that the court have possession or control of the property that is the subject of the suit"). This factor "is inapposite ... and thus weighs against abstention." *Romine,* 160 F.3d at 341. Accord, *PaineWebber,* 276 F.3d at 207.

This forum is just as convenient as the state court forum, being located only miles apart and within easy driving distance. Where the geographical factor is neutral, the second factor favors retention of the case in federal court. *Village of Westfield v. Welch's,* 170 F.3d 116, 122 (2d Cir.1999).

The third factor relates to the avoidance of piecemeal litigation. It is true that the existence of an ongoing proceeding in state court relating to the water run-off could theoretically result in inconsistent legal or factual determinations. However, there is no absolute bar against parallel proceedings in two or more courts since " '[e]ach court is free to proceed in its own way and in its own time without reference to the proceedings in the other court.' " *Woodfern v. Community Action Agency,* 239 F.3d 517, 525 (2d Cir.2001) (quoting *Kine v. Burke Constr. Co.,* 260 U.S. 226, 230 (1922)).

The fact that adjudications in different courts "might end with 'disjointed or unreconcilable results ... is not the threat of piecemeal litigation with which *Colorado River* was concerned; it is a prospect inherent in all concurrent litigation." *Id.*

(citation omitted). "The 'mere potential for conflict in the results of the adjudications does not, without more, warrant staying of federal jurisdiction' " and "thus is not sufficient to support a decision to abstain under *Colorado River.* " *Id.* Accordingly, this factor does not weigh in favor of abstaining from jurisdiction in this case since, if issues are resolved in the other case, they can be raised as a bar in the present case.

The fourth factor deals with the order in which jurisdiction was obtained while the seventh factor deals with the relative progress of the cases. Here, the litigation in state court was filed a year before this case, and it appears that some discovery may have already occurred. Based upon the record as it presently exists, it appears that these two factors may weigh slightly in favor of a stay, because there is no evidence that the state court case has progressed to any significant degree.

***5** The fifth factor is whether federal or state law supplies the rule of decision. "[T]he presence of federal law issues must always be a major consideration weighing against surrender" of federal jurisdiction in deference to parallel state proceedings. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 26 (1983) and hence this factor weighs in favor of retaining jurisdiction.

The sixth factor relates to the state court's ability to protect the rights of the Plaintiff and the eighth factor relates to the presence or absence of concurrent jurisdiction. As already indicated, the Court has determined that the state court has con-

current jurisdiction over Plaintiffs' CWA claim and hence if that claim were to be added in the state court case it would appear that the rights of the Plaintiffs would be adequately protected. These two factors thus weigh against retaining the case.

After "a careful balancing of the important factors as they apply ... with the balance heavily weighted in favor of the exercise of jurisdiction," *Moses H. Cone Memorial Hosp.*, 460 U.S. at 16, this Court finds that a stay is not appropriate. "At bottom, in assessing whether *Colorado River* abstention is appropriate, a district court 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.' " *Chase Brexton,* 411 F.3d at 463 (quoting *Colorado River,* 424 U.S. at 813). Assuming the pending actions regarding the run-off from Stockett Creek are parallel, fully half of the factors to be weighed counsel against abstaining in these proceedings. Hence, this Court must conclude that exceptional circumstances warranting abstention are not present in this case. With the conclusion that abstention is not warranted, Defendants' alternative request for dismissal fails. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 673 (1978) (citation omitted)(since abstention is appropriate "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest, ... the circumstances warranting dismissal 'for reasons of wise judicial administration' must be rare indeed"). FN2

FN2. The Court rejects Defendants' contention that the present action is barred under the doctrine of "prior suit pending." (Docket Entry No. 13 at 3-4). "The Tennessee doctrine of 'prior suit pending' ... is a state law doctrine which plainly does not apply to federal courts." *Laney Brentwood Homes, LLC v. Town of Collierville,* 144 Fed. Appx. 506, 511 (6th Cir.2005). Likewise, the Court rejects Defendants' assertion that the present suit should be dismissed under the "first-filed" rule. The "first-filed rule only applies to two cases filed in separate federal courts." *AmSouth Bank v. Dale,* 386 F.3d 763, 791 n. 8 (6th Cir.2004).

III. *CONCLUSION*

On the basis of the foregoing, the Motions to Dismiss, or in the Alternative, Stay Proceedings (Docket Entry Nos. 12 and 14) will be denied.

An appropriate Order will be entered.

M.D.Tenn.,2007.
Hooker v. Chickerling Properties, LLC
Not Reported in F.Supp.2d, 2007 WL 1296051 (M.D.Tenn.), 65 ERC 1692

END OF DOCUMENT

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing MOTION FOR LEAVE TO FILE A REPLY AND REPLY TO OBJECTIONS TO APPLICANTS' MOTION TO INTERVENE were sent via email on this 19th day of January 2011:

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