

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION
CASE NO 7:10-cv-00125-ART

KENTUCKY COAL ASSOCIATION

Plaintiff

V.

LISA JACKSON, in her official capacity,
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code:1101A
Washington, D.C. 20460

and

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Mail Code:1101A
Washington, D.C. 20460

Defendants

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION BY
COMMONWEALTH OF KENTUCKY
TO INTERVENE**

Comes now the Movant, the Commonwealth of Kentucky (hereinafter, “the Commonwealth”), by and through counsel, and states the following in support of its Motion to Intervene as a Plaintiff against Lisa Jackson, as Administrator of the U.S. Environmental Protection Agency (hereinafter, “EPA”) and the EPA:

I. FACTUAL AND PROCEDURAL BACKGROUND

The intervening plaintiff, the Commonwealth of Kentucky, by and through the Kentucky Energy and Environment Cabinet, is an executive administrative agency of the Commonwealth of Kentucky, with its central office located in Frankfort, Kentucky.

Pursuant to Kentucky Revised Statutes (“KRS”) 224.10-100 and in addition to all other powers and duties vested in the Cabinet the Cabinet shall have the authority, power, and duty to:

- (4) Develop and Conduct a comprehensive program for the management of water, land, and air resources to assure their protection and balance utilization consistent with the environmental policy of the Commonwealth;
- (5) Provide for the prevention, abatement, and control of all water, land, and air pollution...;
- (6) Provide for the control and regulation of surface coal mining and reclamation in a manner to accomplish the purposes of KRS Chapter 350 (State Surface Mining Regulation and Control Act)...;
- (9) Appear and participate in proceedings before any federal regulatory agency involving or effecting the purposes of the Cabinet...;
- (19) Issue, continue in effect, revoke, modify, suspend, or deny under such conditions as the Cabinet may prescribe and require that applications be accompanied by plans, specifications, and other information that the cabinet deems necessary for...
 - (a) Permits to discharge into any waters of the Commonwealth...

Additionally, the Cabinet is authorized by KRS 224.16-050 to issue federal permits pursuant to 33 U.S.C. Section 1342(b) of the Federal Water Pollution Control Act.

The Kentucky Coal Association (“KCA”), initiated the underlying action on behalf of its members, many of whom require a Section 402 KPDES Permit in order to conduct their coal mining operations in Kentucky. Coal mining operations in Kentucky are subject to 2 separate statutory permitting schemes. One set of statutes and implementing regulations requires a permit for surface mining activities pursuant to KRS Chapter 350, enacted pursuant to the Federal Surface Mining Reclamation and Enforcement Act. The discharge of pollutants from surface mining operations is subject

to the permitting requirements in KRS Chapter 224 and Kentucky Administrative Regulations Title 401. Those statutes and regulations have been promulgated pursuant to the Clean Water Act (hereinafter, "CWA"), 33 U.S.C. §1342.

As stated in KCA's complaint, in 2009 and 2010, there was a series of EPA directives and correspondence pertaining to numerous draft KPDES permits. The exchange of objections, comments, and correspondence between the Kentucky Division of Water and the EPA reached its climax when EPA issued the Detailed Guidance and when it objected to several KPDES permits that were to be issued to various coal companies. The Detailed Guidance is discussed in detail in the Complaint in Intervention for Declaratory and Injunctive relief tendered herewith.

Those extra-regulatory actions, including the permit objections, are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because they have invaded and usurped the authority of the Commonwealth to perform the following functions related to the regulation of surface coal mining: the development of water quality standards under the CWA, 33 U.S.C. §1313; the administration of the NPDES permitting program under the CWA, 33 U.S.C. § 1342; and the administration of the permitting process under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1201 *et seq.* In the Clean Water Act, Congress clearly provided that States have the primary responsibility and right to prevent, reduce, and eliminate water pollution, to plan the development and use of water resources, and to consult with the EPA Administrator, *see* 33 U.S.C. § 1251(b); EPA has wholly disregarded that directive.

Pursuant to Congress's allocation of authority, the Commonwealth of Kentucky has the authority to establish narrative water quality standards that it determines will best protect the overall well-being of Kentucky's waters. The Detailed Guidance overrides Kentucky's properly promulgated water quality standards and, because water conductivity alone does not accurately measure the overall quality of a stream, EPA has compromised Kentucky's ability to adequately monitor and protect the quality of the State's streams and other waters and the aquatic ecosystems therein.

The Commonwealth can show that it has standing to intervene as a matter of right pursuant to Federal Rule of Civil Procedure (hereinafter, "Rule") 24(a)(2). In the alternative, the Commonwealth can show that it meets Rule 24's requirements to intervene with the Court's permission.

With regard to intervention of right, the Commonwealth can show that it is entitled to intervene under Rule 24(a)(2) because it has filed a timely motion to do so, it has an interest in the outcome of the underlying litigation, its interest will be impaired absent intervention, and the existing parties will not adequately represent that interest. As for permissive intervention, the Commonwealth can show that its claims share common questions of law and fact with the original plaintiff and that, as a government entity, its claims are based on statutes administered by it and regulations that are issued pursuant to those statutes.

II. ARGUMENT

A. The Court has Jurisdiction Over the Commonwealth's Claims Against Lisa Jackson and the EPA.

The averments made in the Commonwealth's proposed Complaint in Intervention with regard to jurisdiction are incorporated by reference as if fully set out herein.

B. The Commonwealth is Entitled To Intervene as a Matter of Right.

Rule 24 states, in part:

- (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:...claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

As a general matter, the Sixth Circuit has recognized that judicial economy favors intervention and Rule 24 should therefore “be ‘broadly construed in favor of potential intervenors.’” *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991)). The Sixth Circuit has held that a proposed intervenor must satisfy four factors before being entitled to intervene as a matter of right: (1) the motion to intervene must be timely; (2) the proposed intervenor must have a substantial legal interest in the subject matter of the case; (3) the proposed intervenor’s ability to protect its interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor’s interests. *See, e.g., Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)). The Commonwealth satisfies each of these factors.

(i) The Commonwealth’s Motion to Intervene is Timely

The Commonwealth has brought this motion one day after the initial complaint was filed; thus, “the case [is] obviously still in its initial stage.” *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *see also, Blount-Hill v. Ohio*, 224 F.R.D. 399, 402 (S.D. Ohio 2005) (holding motion to intervene filed five months after complaint

was timely); *Martin v. Corr. Corp. of Am.*, 231 F.R.D. 532, 536, (W.D. Tenn. 2005) (holding motion to intervene filed “at an early stage of the litigation” was timely); *c.f.*, *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001) (“If the litigation has ‘made extensive progress in the district court before [intervenors] moved to intervene’ then this factor weighs against intervention.”)

(ii) The Commonwealth has a Substantial Legal Interest that Warrants Intervention

The Sixth Circuit “subscribe[s] to a ‘rather expansive notion of the interest sufficient to invoke intervention of right.’” *Coalition to Defend Affirmative Action*, 501 F.3d at 780 (quoting *Michigan State AFL-CIO*, 103 F.3d at 1245). “Interest” for the purposes of Rule 24(a)(2) ‘is to be construed liberally.’” *St. Paul Fire and Marine Ins. Co. v. Summit-Warren Indus. Co.*, 143 F.R.D. 129, 133 (N.D. Ohio 1992) (quoting *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)). The Sixth Circuit has “cited with approval decisions of other courts rejecting the notion that Rule 24(a)(2) requires a specific legal or equitable interest.” *United States*, 260 F.3d at 595 (quotations omitted). Further, “[e]ven if it could be said that the question raised is a close one, ‘close cases should be resolved in favor of recognizing an interest under Rule 24(a).’” *Blount-Hill*, 244 F.R.D. at 402 (quoting *Michigan State AFL-CIO*, 103 F.3d at 1247).

The facts present here are worthy of allowing intervention of right. The Commonwealth, through its executive branch agencies, namely the Department for Environmental Protection (hereinafter, “DEP”) and the Division of Water (hereinafter, “DOW”), is the primary authority responsible for implementation and enforcement of the Clean Water Act (hereinafter, “CWA”), 33 U.S.C. §1251, et. seq. One of the Commonwealth’s obligations as the primary authority is to issue discharge permits.

EPA's actions with regard to the Detailed Guidance and their objections to the 29 permits has disrupted the Commonwealth's effective implementation of the CWA and how it issues and enforces permits throughout the state. If the plaintiffs do not prevail in this litigation, these negative impacts will continue.

The outcome of this litigation will be binding on the Commonwealth. The controlling effect of a judgment in pending litigation is a factor in determining whether an interest is sufficient enough to allow intervention. *See, e.g., Triax Co. v. TRW*, 724 Fed.2d 1224, 1227 (6th Cir. 1983). *See also, Sierra Club v. Espy*, 18 F.2d 1202, 1207 (5th Cir. 1994) (referring to the "stare decisis effect.").

The ultimate outcome of the underlying litigation will have a major impact on how the Commonwealth implements and enforces the CWA and how it issues pollution discharge permits. Accordingly, the Commonwealth has a substantial interest in the litigation.

(iii) The Commonwealth's Substantial Interest will be Impaired Absent Intervention.

The burden of satisfying this factor is "minimal": the "would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied." *Grutter*, 188 F.3d at 399 (emphasis added) (quoting *Michigan State AFL-CIO*, 103 F.3d at 1247). Stated another way, "to satisfy this element, it is not necessary that the would-be intervenor demonstrate that the impairment is probable; they need only demonstrate that such is possible." *Blount-Hill*, 244 F.R.D. at 403 (S.D. Ohio 2005) (citing *Michigan State AFL-CIO*, 103 F.3d at 1247).

The Commonwealth easily satisfies this "minimal" standard. As compared to the other plaintiffs, the Commonwealth sits in a unique position as a regulator. The other

plaintiffs are the “regulated.” The CWA, at 33 U.S.C. §1251(b), explicitly preserves and protects the “rights of the states to prevent, reduce, and eliminate pollution.” As will be discussed more in the following subsection of this memorandum, only the Commonwealth can protect that interest by active participation in this litigation.

Additionally, only the Commonwealth can protect the economic interest of the state as a whole. Although the Kentucky Coal Association, in its complaint, succinctly and sufficiently states the economic harm to its members that will likely result from EPA’s actions, the Association’s interests are limited to its members. The EPA’s actions will likely result in the loss of employment which will lead to a loss in tax revenue which will, in turn, lead to a decrease in state revenues. Accordingly, only the Commonwealth has a legal interest in the economic well-being of the entire state.

If the EPA prevails in this litigation, its actions will also impose certain practical impediments for the Commonwealth. EPA’s actions have compromised the Commonwealth’s ability to adequately monitor and protect the quality of Kentucky’s streams and other waters. Furthermore, the EPA has caused undue delay and presented impediments to the issuance of surface mining permits, thereby threatening Kentucky’s economic well-being. EPA’s actions have also imperiled the general public interest in preserving a supply of coal necessary to meet the nation’s energy needs, in contravention of the expressed goals of the SMCRA, 30 U.S.C. §1202 (f).

(iv) The Commonwealth’s Interests Will Not be Adequately Represented by the Current Plaintiffs.

The Sixth Circuit, in *Jordan v. Michigan Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000), stated that the burden of showing inadequate representation has not been met if “1) no collusion is shown between the existing party

and the opposition; 2) the existing party does not have any interests adverse to the intervener; and 3) the existing party has not failed in the fulfillment of its duty.” The Commonwealth is the regulating entity of the original plaintiffs and such a role qualifies as an adverse interest.

In any event, if the Court is inclined to rule that the Commonwealth has failed to meet the *Jordan* elements and if it is inclined to rule against intervention as a matter of right, it should not because at least one federal court has held that the absence of these elements is not conclusive. See, *Holmes v. Gov't of the Virgin Islands*, 61 F.R.D. 3, 4 (D.V.I. 1973). First of all, the equities of the case (i.e., the factual history of EPA's fluctuating policies; the Commonwealth's role as regulator) mitigate against having the *Jordan* factors serve as a bright-line rule to prevent potential intervenors from satisfying the “inadequate representation” element. Secondly, using the *Jordan* factors as a bright-line rule would be an end-run around Rule 24(a)(2) which states that without the intervenor's involvement, “disposing of the action *may* as a practical matter impair or impede the movant's ability to protect its interest, *unless* existing parties adequately represent that interest.” (Emphasis added). The key word is “may.” In other words, an intervenor need only show that current representation “may be” inadequate. *Supreme Beef Processors, Inc. v. U.S. Dept. of Agriculture*, 275 F.3d 432, 437-38 (5th Cir. 2001).

A better approach than the *Jordan* factors would be to examine (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Arakaki v. Cayetano*, 324

F.3d 1078, 1086 (9th Cir. 2003); *U.S. v. Oregon*, 122 F.R.D. 571, 578 (D. Or. 1988). When applying the facts to these elements, it can be shown that the Commonwealth's interests will not be adequately represented by the current plaintiffs.

For one, it is unknown and, quite frankly, doubtful that the Kentucky Coal Association will make all of the Commonwealth's arguments. Secondly, since the Association is not a regulator, it is not capable of making arguments in defense of the Commonwealth's rights and obligations as the primary CWA implementing authority. Lastly, precisely because of the Commonwealth's position as a regulator it can offer necessary elements to the proceeding that the other plaintiffs cannot do. For example, the Commonwealth can demonstrate its institutional expertise to effectively regulate the state's water resources while promoting economic growth. These are tasks that the Commonwealth cannot effectively do given EPA's current interference.

(v) The Doctrine of "Parens Patriae" Also Gives the Commonwealth Standing to Intervene as a Matter of Right.

There is another aspect of "intervention of right" that must be mentioned and that is the concept of *parens patriae*. The phrase is Latin for "parent of the country" and can create federal standing for a state. *Alfred L. Snapp and Son v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 600-01 (1982). In fact, the doctrine has been recognized in the federal system as grounds for intervention of right. *Sierra Club v. City of San Antonio*, 115 F.3d 311, 315. The interests sought to be protected in a *parens patriae* action are known as "quasi-sovereign interests." These are "interests that the State has in the well-being of its populace." *Snapp*, 458 U.S. at 602. Here, there are two components of the populace's well-being that the Commonwealth seeks to protect: (1) the state's physical well-being vis-à-vis environmental protection, and (2) the state's economic well-being.

Another element of the *parens patriae* doctrine is whether a state is being discriminatorily denied its rightful status in the federal system. *Snapp*, 458 U.S. at 607. The CWA vests authority in the states to develop and police their own water quality standards. EPA, through its reliance on the Detailed Guidance, has usurped the state's recognized role in determining water quality standards and the proper effluent limits. The Commonwealth has *parens patriae* standing to intervene as a matter of right.

C. The Commonwealth Can Meet the Elements Necessary for Permissive Intervention.

In the alternative, the Commonwealth should be allowed permissive intervention pursuant to Rule 24(b) if it is not allowed to intervene as a matter of right. Rule 24(b)(1) states, in part,

In General. On timely motion, the court may permit anyone to intervene who:

(B) has a claim or defense that shares with the main action a common question of law or fact.

The claims made in the Commonwealth's complaint in intervention share common questions of law and fact. The underlying suit, on its face, addresses various aspects of the CWA that the Commonwealth administers, including the permit process. The Commonwealth's complaint addresses those very same CWA sections and it seeks to validate the decision-making process that led to the issuance of the permits in question.

Permissive intervention is also appropriate in this case under Rule 24(b)(2), which states:

By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

As previously stated, the CWA at 33 U.S.C. §1251(b) preserves and protects the “rights of the states to prevent, reduce, and eliminate pollution.” The Commonwealth, through KRS Chapters 151, 224, and others, administers the CWA and protects and manages Kentucky’s water resources. The claims in the Commonwealth’s complaint are based on those statutes. The claims are also based on the improperly developed Interim Guidance which would be an “order or requirement” under Rule 24(b)(2)(B). Furthermore, the Commonwealth’s regulatory regime to administer the CWA can be found in the Kentucky Administrative Regulations at Chapter 401. Those regulations are promulgated pursuant to the aforementioned statutory authority. Therefore, the complaint satisfies the requirements of Rule 24(b)(2).

CONCLUSION

The Commonwealth seeks to intervene in this action to protect its interests as the CWA regulatory authority for the state, and to protect the interests of the Commonwealth’s citizens. The Commonwealth satisfies the elements of intervention of right under Rule 24(a)(2) and, in the alternative, it satisfies the elements of permissive intervention under Rule 24(b)(1)(B) and (2)(A)and(B). The Court has jurisdiction over the Commonwealth’s claims under 28 U.S.C. §§1331, 1346(a)(2), 2201, and 2202. Accordingly, the Court should grant the Motion to Intervene.

Respectfully Submitted,

COMMONWEALTH OF KENTUCKY
ENERGY AND
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/s/ Mary A. Stephens

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NOTICE OF MOTION

Please take notice that this Memorandum in Support of Motion to Intervene will be held for hearing at the discretion of the Judge.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was sent to the following via U.S. mail, first class, postage pre-paid and also the parties listed to receive electronic service on the CM/ECF system on the 18th day of October, 2010.

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