IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DISTRICT

OHIO VALLEY ENVIRONMENTAL COALITION, et al.,

Plaintiffs,

v. **CIVIL ACTION NO. 3:02-0059**

CHRISTIE WHITMAN, Administrator, United States Environmental Protection Agency,

Defendant.

PLAINTIFFS' MOTION TO IMPOSE CONDITIONS TO GOVERN INTERVENORS

In its Order dated April 10, 2002, the Court permitted the intervention of the West Virginia Municipal Water Quality Association, et al. (the Municipal Associations), and the Contractors Association of West Virginia, et al. (the Industry Associations). Plaintiff Ohio Valley Environmental Coalition, et al., did not oppose the Intervenors' motions, but, to avoid duplicative proceedings during the case, requested the Court attach conditions to the Intervenors' participation.[1]

By this motion, Plaintiffs urge the Court to impose conditions on the two groups of

[1] The Municipal Associations served their motion to intervene on March 21. Because Plaintiffs did not oppose the first motion, they filed no response. Plaintiffs did, however, intend to seek conditions on intervention if there were multiple intervenors. After the second motion to intervene was served by mail on April 5, Plaintiffs mailed a timely response to that motion on April 10 and requested these conditions. On that same date, the Court issued an order granting both intervention motions without having the opportunity to address Plaintiffs' request for conditions. In their instant motion, Plaintiffs are requesting the same conditions that they requested in their prior response to the motion to intervene. The present motion is also being filed prior to deadline for a response to the second motion to intervene.

Intervenors. "When granting an application for permissive intervention, a federal district court is able to impose almost any condition, including the limitation of discovery." Columbia-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 469 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993).[2] Conditions are necessary here to prevent the two groups of Intervenors from complicating these proceedings and making multiple, duplicative presentations. See U.S. v. Reserve Mining Co., 56 F.R.D. 408, 420 (D. Minn. 1972)(attaching conditions on intervention of multiple parties).

The Municipal Associations and the Industry Associations have not demonstrated that their respective interests are sufficiently diverse that each needs to present facts and legal arguments separately. For example, Plaintiffs will challenge EPA's approval of a provision in West Virginia's rule that exempts a proposed activity from antidegradation review unless its discharge would reduce a stream's assimilative capacity by 10%. Both groups of associations cite this provision as one they intend to support. Municipal Assoc. Mem. 6; Industry Assoc. Mem. 8. In addition, both groups claim that their members hold permits to discharge wastewater into waters of West Virginia, and that these permits, and their members' ability to comply with them, may be affected by this litigation. Id.

The Municipal Associations and Industry Associations identify only one potential difference between them. The Municipal Associations state that they will not address Plaintiffs' claims that are relevant solely to industrial, rather than municipal, discharges. Municipal Assoc.

[2]The Fourth Circuit has not yet decided whether conditions can be imposed on intervention as of right. Columbia-America Discovery Group, 974 F.2d at 469-70. However, as the dissenting opinion in that case noted, at least four courts of appeals have approved of such conditions. Id. at 479 (citing cases). Since that decision, this has become the prevailing view. Beauregard, Inc. v. Sword Services, 107 F.3d 351, 353 (5th Cir. 1997).

Mem. 7 n. 1. The Municipal Associations identify only one claim, relating to surface coal mining activities, that falls in this category. Id., citing Complaint ¶ 28.B. Similarly, the Industry Associations identify only one other claim, relating to nonpoint sources, that falls in this category. Industry Assoc. Mem. 11; see Complaint ¶ 28.G. Since Plaintiffs' Complaint identifies nineteen claims (Complaint, ¶s 28.A. to 28.S.), these two claims do not represent the majority of Plaintiffs' claims. Furthermore, even as to these two claims, the Municipal Associations and the Industry Associations do not argue that their positions conflict in any way. Consequently, the proposed intervenors have not adequately demonstrated the need to file separate briefs or pleadings.

In its September 4, 1998 Order in Bragg v. Robertson, Civil No. 2:98-0636 (S.D.W.Va.), the Court was presented with a similar situation involving multiple interventions by companies and associations in a citizen suit under the federal Surface Mining Control and Reclamation Act. The Court granted the motions to intervene, but ordered "the Associations to coordinate with Arch Coal subsidiaries to avoid duplicative discovery, evidence, argument, pleadings, filings, and memoranda where the Associations' legal positions or factual presentation is in accord with the Arch Coal subsidiaries." See Order, p. 2 (attached).

Similarly, in Kentuckians for the Commonwealth v. Rivenburgh, 204 F.R.D. 301 (S.D.W.Va. 2001), the Court faced multiple motions to intervene by associations that sought to defend a federal agency decision. The Court granted the motions to intervene, but ordered the intervenors "to coordinate to avoid duplicative discovery, evidence, argument, pleadings, filings, and memoranda." Id. at 306. The Court also stated that "[a]ny departure from this Order will be allowed only after a just cause showing that Intervenors' divergent interests and positions require

individual presentation." Id. Plaintiffs request that the Court issue a similar order in this case.

Pursuant to the Court's March 27, 2002 Order and Notice, the deadline for submission of Rule 12(b) motions is April 26, 2002. Unless the conditions requested by Plaintiffs are imposed upon the Intervenors, the Intervenors could file two sets of motions to dismiss, creating unnecessary burdens on the Court and the Plaintiffs.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was served upon counsel at the addresses listed below by first class mail on this 17th day of April, 2002.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

ENTERED

SEP - 4 1998

SAMUEL L. KAY, CLERK
U. S. District & Bankruptcy Courts
Southern District of West Virginia

PATRICIA BRAGG,
et al.,

Plaintiffs,

v. CIVIL ACTION NO. 2:98-0636

DANA ROBERTSON,
et al.,

Defendants.

ORDER

On September 4, 1998, counsel and the Court met to discuss the pending motion filed by the West Virginia Coal Association and the West Virginia Mining and Reclamation Association ("the Associations") to intervene in the case. The Fourth Circuit has held that, to intervene as a matter of right, a movant must show "'interest, impairment of interest, and inadequate representation.'" In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991) (quoting Gould v. Alleco, 883 F.2d 281, 284 (4th Cir. 1989), cert. denied, 493 U.S. 1058 (1990)). "'[T]he application satisfies Rule 24(a)'s third requirement if it is shown that representation of its interest "may be" inadequate.'" Id. (quoting United Guar. Residential Ins. Co. v. Philadelphia Savings Fund Soc'y, 819 F.2d 473, 475 (4th Cir. 1987) (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972))).

Counsel for the Associations presented its arguments for intervention and counsel for Plaintiffs presented its arguments in opposition. Specifically, counsel for the Associations advised the Court the Associations did not anticipate adversity, between the Associations and the Arch Coal subsidiaries, in the legal issues of the case. The Associations do anticipate, however, the need to develop facts not otherwise developed by the Arch Coal subsidiaries. Considering the arguments of counsel and the briefs filed with the Court, as well as the vast importance and potential effects of this case upon the mining industry of West Virginia, the Court **GRANTED** the motion to intervene as of right.

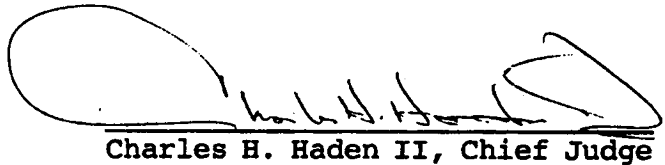
As in their memoranda, the Associations indicated its willingness to agree to conditions on their intervention to mitigate Plaintiffs' objections. Accordingly, the Court **ORDERS** the Associations to coordinate with the Arch Coal subsidiaries to avoid duplicative discovery, evidence, argument, pleadings, filings, and memoranda where the Associations' legal positions or factual presentation is in accord with the Arch Coal subsidiaries'.

The Court noted the same law firm represents both the Arch Coal subsidiaries and the Associations. Upon question by the Court, the Associations indicated their awareness of the potential for a conflict of interest to develop within the law firm. The Associations stated the law firm would take steps to withdraw from representation of one of the clients, should a conflict appear on

the horizon.

The Clerk is directed to send a copy of this Order to all counsel of record, counsel for movants to intervene, and any unrepresented parties.

ENTER: September 4, 1998



Charles H. Haden II, Chief Judge

Certificate of Service

I hereby certify that a copy of the foregoing was served upon counsel at the addresses listed below by first class mail on this 18th day of April, 2002.

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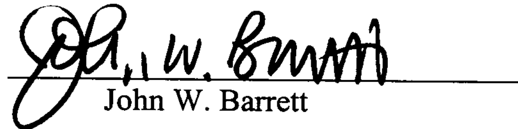

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