COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
FILE NO. DOW-42445-039

ENERGY AND ENVIRONMENT CABINET

PLAINTIFF

APPALACHIAN VOICES, INC,
KENTUCKIANS FOR THE COMMONWEALTH, INC
WATERKEEPER ALLIANCE, INC.
KENTUCKY RIVERKEEPER, INC.
and
PAT BANKS, in her capacity as Kentucky Riverkeeper

INTERVENING PLAINTIFFS

VS.

ORDER SUSTAINING MOTION TO INTERVENE;
ORDER SUSTAINING *PRO HOC VICE* MOTIONS;
ORDER SCHEDULING FOLLOW-UP CONFERENCE; and
FORMAL NOTICE OF FACTORS TO BE USED IN DETERMINING AN APPROPRIATE CIVIL PENLATY FOR ANY ESTABLISHED VIOLATIONS

NALLY & HAMILTON ENTERPRISES, INC.

DEFENDANT

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This matter came before the undersigned Hearing Officer on June 17, 2011 to consider the pending motions and to discuss the terms of a scheduling order to allow timely resolution of this matter within the statutory hearing process deadline. This was a follow-up to the initial conference held on June 17, 2011, at which a briefing schedule was agreed to submit the motion to intervene for ruling at this follow-up conference.

The Hon. Lisa C. Jones appeared on behalf of the Plaintiff, Energy and Environment Cabinet (Cabinet). The Hon. John C. Bender and the Hon. R. Clay Larkin, appeared on behalf of Respondent, Nally & Hamilton Enterprises, Inc. (Nally). The Hon. Catherine Marlantes Rahm,

the Hon. Aaron Colangelo, and the Hon. Burke A. Christensen appeared on behalf of the movants who seek intervention in this matter: Appalachian Voices, Inc., Kentuckians for the Commonwealth (KFTC), Waterkeeper Alliance, Inc., Kentucky Riverkeepers, Inc. and Ms. Pat Banks in her capacity as Kentucky Riverkeeper (collectively the Movants/Intervening Plaintiffs). Finally, as to appearances, the conference was also attended by Mr. Jeff Cummins, an official with the Cabinet's Division of Enforcement (DENF).

Initially, since there was no objection and all of the requirements of SCR 3.030(2) have been fully satisfied, the undersigned sustained the *pro hoc vice* motions of the Hon. Catherine Marlantes Rahm and the Hon. Aaron Colangelo. Consistent with said rule and the undersigned's discretion, said counsel may appear for all preliminary proceedings in this matter without the presence of local counsel, the Hon. Burke A. Christensen. However, since required by the rule, Mr. Christensen must appear during the evidentiary trial of this matter.

The Movants' motion to intervene (docket entry # 5) as full party Plaintiffs was then discussed. Counsel for the Cabinet announced during the initial conference on June 17, 2011, that it did not oppose the motion and did not desire to participate in the briefing of the issue. Counsel for Nally reported it wanted to consider said motion and have its normal response time. Thus, a briefing schedule was agreed to. Pursuant to said schedule, Nally filed its response on June 24, 2011.

In said response, Nally opposed mandatory intervention pursuant to 401 KAR 100 Section 11(2)(a)2[1] arguing Movants failed to establish "an interest which is or may be adversely

[1] Movants have not argued that they qualify for mandatory intervention under the alternative criteria of 401 KAR 100:100 Section 11(2)(a)1, which provides for mandatory intervention if the movant had a statutory right to initiate the proceeding.

affected by the outcome of the proceeding." However, Nally did not oppose the Movants' permissive intervention in this matter pursuant to the authority of 401 KAR 100 Section 11(b), as long as Movants' participation was properly controlled by the undersigned to not obstruct the proceedings or to prevent an agreement between Nally and the Cabinet from being entered.

On July 1, 2011 and also pursuant to the agreed briefing schedule, Movants filed their reply to Nally's response, arguing that they have established the criteria for mandatory intervention; that they have no intention to obstruct or delay the proceedings; that the undersigned has authority to control all parties' participation in this matter to avoid such problems; and that they are not claiming any authority to veto an agreement reached between Nally and the Cabinet, but they desire an opportunity to contest said settlement and argue it should not be approved by this tribunal.

No parties requested oral argument on the pending motion to intervene and the undersigned has concluded it is not needed by him. The undersigned has carefully considered the Movants' initial motion and memorandum, including the attached exhibits and affidavits; Nally's response thereto; and Movants' reply and has concluded that the Movants have established a prima facie case that Movants do indeed meet the criteria of mandatory intervention established by 401 KAR 100 Section 11(2)(a)2. The undersigned concludes that their supporting affidavits establish the Movants have "standing" under the standards of Kentucky law and "Article III standing" under federal law, assuming such is needed for mandatory intervention under federal standards, which are not directly applicable to this proceeding.

As noted by Movants in their reply, Nally while stating Movants had failed to establish said standing did not actually cite any authority or make any actual arguments as to how the

supporting affidavits are insufficient in this regard and, thus, the undersigned agrees with Movants that the point is "effectively conceded." Also, as noted by Movants in their reply, Nally's focus on whether the Cabinet adequately represents their interests is not a relative criteria for consideration of whether a movant qualifies for mandatory intervention. That factor is only relevant for consideration of permissive intervention.

Thus, the undersigned announced his ruling that Movants' motion for mandatory intervention into this matter as full party Plaintiffs is SUSTAINED and is hereby formalized by entry of this Order. The undersigned also notes that if he were required to address the factors for consideration of permissive intervention under 401 KAR 100 Section 11(b), that consideration of said factors would weigh heavily in favor of granting permissive intervention, as not even Nally would oppose.

However, the undersigned for clarity did address the effect of this ruling on the underlying ability for Nally and the Cabinet to reach a settlement agreement without the Intervening Plaintiffs. During this discussion, Mr. Bender again advised this was Nally's primary concern in its partial opposition to the intervention motion. Ms. Rahm again reported it was not their position that they would have the authority to "veto" any such agreement, but did want to be heard.

The undersigned then advised that this tribunal is not like the federal system where consent decrees are subject to public notice and comment and substantive review by the federal judiciary to determine that the consent decree is: "fair, adequate, and reasonable, as well as consistent with the public interest."[2] As a matter of historic practice since this Office of

[2] See *US et al v. Lexington-Fayette Urban County Government,* 591 F3 484, 489 (6th Cir 2010)(Internal citations omitted).

Administrative Hearings (OAH) was formed in 1992, and as required by regulation 400 KAR 1:090 Section 16, Agreed Orders are submitted to OAH only for the assigned Hearing Officer to sign said Agreed Order for acknowledgement purposes only. Thus, the Hearing Officer lacks any authority to make a substantive review and recommendation, unless the matter is remanded by the Secretary to the Hearing Officer for a substantive recommendation.

Given that limitation on the undersigned's authority and the concerns of the parties, including the Intervening Plaintiffs, the undersigned advised that his preliminary thoughts on this issue, which is currently a moot issue since no agreement has been reached, is that if an Agreed Order is tendered to OAH by Nally and the Cabinet for acknowledgement, that the undersigned would attempt to coordinate an expedited schedule to allow time for the Intervening Plaintiffs to file any objections to the Agreed Order and time for the other parties to file a reply. The undersigned would hold in abeyance his acknowledgement signature on said Agreed Order until that schedule has been completed. The undersigned would then sign the Agreed Order as acknowledged (without any substantive recommendation) and OAH would tender said Agreed Order to the Secretary for his consideration along with the Intervening Plaintiffs' objections and the agreeing parties' replies to said objections so the Secretary will have the full information before him when deliberating on whether to enter said Agreed Order.

The undersigned then advised the parties that if this matter is heard and the undersigned must make an appropriate civil penalty recommendation to the Secretary, that said recommendation will be based on the authority of KRS 224.99-010(1) and the factors set out by the Secretary in a prior adjudicative ruling that has been followed by OAH Hearing Officers and the Secretary in subsequent adjudications, as the appropriate factors to consider when making

civil penalty determinations under the authority of KRS Chapter 224, if any violations of the Chapter are established. Those factors, and the referenced Secretary's ruling are set out in the one page attachment to this Order.

There was then some discussion about the hearing process deadline established by KRS 224.10-440(3), which is currently November 14, 2011, if there are no extensions. Counsel for the Cabinet now reports it may be willing to waive the process deadline, if the other parties are in agreement. Counsel for Nally and Intervening Plaintiffs both report the importance of moving this matter forward expeditiously, provided it can be done fairly to all parties' needs. Thus, currently those parties have not reported any willingness to sign waivers of the process deadline.

In addition, Ms. Jones reports that it is very likely the Cabinet will move to amend its complaint in this matter, but given current resources was not able to agree to any final deadline for doing so. It is likely the Cabinet will move to bring in other Nally KPDES permits into this proceeding. There was general agreement that it would be preferable to resolve all of these DMR issues between these parties in a single proceeding, but this amended complaint could practically effect scheduling.

At Mr. Bender's request, there was then some discussion about possible scheduling to accommodate resolution of this matter by November 14, 2011, as currently required. After a review of possible dates and deadlines, this seemed very difficult to arrange. It was generally agreed to schedule a week long evidentiary hearing and to allow the parties simultaneous 30:15 post-hearing briefs. The undersigned also indicated he would want a minimum of 30 days for deliberation. The parties also discussed the need for discovery and Mr. Bender reported he expected some issues to be submitted on motions for summary recommendation.

After this scheduling discussion, counsel agreed to attempt to reach an agreement on the scheduling issues, including whether the undersigned should make a formal extension request to the Secretary. (The undersigned has suggested, if possible, for the parties to agree to an amendment deadline and to then also agree that the 180 day deadline would commence only when the amended complaint is filed, but this possibility is impossible given the Cabinet's limitation on being unable to agree to a deadline for amendment. Unless this or similar approach is taken it would appear there may be a necessity to have two separate proceedings.)

Finally, it was then agreed to schedule a follow-up conference on **Friday, July 8, 2011** at **2:30 PM, ET** for the purpose of again addressing the scheduling of this matter.

Based on the above and being otherwise sufficiently advised, IT IS HERBY ORDERED AS FOLLOWS:

1. The pending *pro hoc vice* motions are **SUSTAINED.** As noted above, the appearance of local counsel is not required for any preliminary proceeding, but local counsel must be in attendance during the evidentiary hearing of this matter.

2. For the reasons stated above, the Movants' motion to intervene into this matter as full party Plaintiffs is **SUSTAINED.** The only limitation on this authority is the Intervening Plaintiffs will not be given any veto authority over entry of an Agreed Order between the other parties should such an agreement be reached. The undersigned, as noted above, does intend to provide Intervening Plaintiffs, an opportunity to file any objections to such an agreement it they are not parties to the Agreed Order so their position can be placed before the Secretary for his consideration. However, if possible, the undersigned strongly encourages a full settlement be reached between all parties, including the Intervening Plaintiffs, as a manner to resolve this

administrative action and the corresponding federal action between Nally and the Intervening Plaintiffs.

3. Counsel shall appear for a status conference in this matter on **July 8, 2011**, at the hour of **2:30 PM, ET** in the conference room of the Office of Administrative Hearings located at 35-36 Fountain Place, Frankfort, Kentucky 40601.

4. Counsel (and any interested persons) may appear telephonically by calling the Office's conference line at the time designated for the conference. The conference telephone number is: (866) 754-7476. After the prompt for the conference code, enter: 8406728#. The participant should then wait until the undersigned joins the call as the leader.

So ORDERED this the 7th day of July 2011.

STEVE BLANTON, HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
ENERGY AND ENVIRONMENT CABINET
35-36 FOUNTAIN PLACE
FRANKFORT KY 40601
PHONE: 502-564-7312
FAX: 502-564-4973

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing ORDER, was, on this 7th day of July, 2011, mailed by both e-mail and by first class mail, postage prepaid to:

HON JOHN C BENDER
HON ANNE ADAMS CHESTNUT
HON R. CLAY LARKIN
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HON BURKE A CHRISTENSEN
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HON AARON COLANGELO
NATURTAL RESOURCES DEFENSE COUNCIL
1200 NEW YORK AVENUE NW SUITE 400
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and hand-delivered to:

HON LISA C JONES
HON JOHN G HORNE II
HON MARY A STEPHENS
Energy and Environment Cabinet
Office of Legal Services
#2 Hudson Hollow
Frankfort, KY 40601

Lisa Booth
DOCKET COORDINATOR

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E. Penalties

109. Guidance regarding the appropriate criteria to consider when assessing a penalty is provided in *NREPC v. Wendell Maggard*, File No. DWM-19198-038 (Final Order, June 2, 1994) which states that one should consider:

1. The seriousness of the violation, taking into account the complete context of the violation, including:

   (a) the susceptibility of the site to environmental harm of the type concerned in the case;
   (b) the physical, geographic and chronological extent of the violation;
   (c) the inherent danger to the environment or human health and safety posed by a violation of the type concerned in the case;
   (d) the substantive nature of the violation, e.g. whether it is a reporting violation or a violation of a substantive standard of the law or regulations; and
   (e) whether the violation is correctable and, if so, the type and extent of remedial efforts required to correct the violation, taking into account any secondary harm to the environment which may be caused thereby;

2. the economic benefit (if any) resulting from the violation;

3. the economic impact of the penalty on the violator, including the cost of remediation;

4. the history of other violations on the site by this violator;

5. the culpability of the violator;

6. the good faith actions of the violator to remedy the violation, comply with the law or obey an order of the Cabinet;

7. such other matters as the imposition of a penalty would require; and

8. the number of days that the Cabinet shows the violator to have violated the law.