Exhibit MSD 18H3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, and STATE OF MISSOURI, Plaintiffs, v. THE METROPOLITAN ST. LOUIS SEWER DISTRICT, Defendant.	))))))))))))))	Case No. 4:07-CV-1120 (JCH)

State of Missouri's Memorandum in Support of Motion to Dismiss Metropolitan St. Louis Sewer District's Counterclaim and to Strike Affirmative Defenses

Factual Allegations

The complaint in this matter includes nine counts brought under federal law, each of which relates in one way or another to the illegal discharge of raw sewage by MSD from constructed sanitary sewer overflows, combined sanitary and storm water sewer overflows and other point sources.

- The first claim seeks an injunction and civil penalties for violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a) caused by discharges of raw sewage from constructed sanitary sewer overflows.
- The second claim seeks an injunction and civil penalties for violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. § 1311(a) and 1342 for unpermitted discharges from combined sewer overflows.

- The third claim seeks an injunction pursuant to Section 504(a) of the CWA, 33 U.S.C. § 1364(a), for discharges of raw sewage.
- The fourth claim seeks an injunction and civil penalties for violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342 for failing to meet proper operation and maintenance requirements in MSD's National Pollution Discharge Elimination System ("NPDES") permit..
- The fifth claim seeks an injunction and civil penalties for violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342 for failing to meet backup power requirements in MSD's NPDES permit.
- The sixth claim seeks an injunction and civil penalties for violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342 for failing to meet bypass prohibition requirements in MSD's NPDES permit.
- The seventh claim seeks an injunction and civil penalties for violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342 for failing to meet noncompliance reporting requirements in MSD's NPDES permit.
- The eighth claim seeks an injunction and civil penalties for violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342 for failing to submit a long term CSO control plan as required by MSD's NPDES permit.
- The ninth claim seeks an injunction and civil penalties for violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342 by creating putrescent, unsightly or harmful conditions in receiving waters in violation of MSD's NPDES permit.

See Complaint (Doc. No. 1).

The first sentence of Section 309(e) of the Clean Water Act ("CWA"), 33 U.S.C. 1319(e), ("309(e)")[1] requires the United States, in any action against a municipality, to include the state where the municipality is located as a party to the case. In this case, the state chose to be included as a plaintiff rather than a defendant, although no state claims have been included in the complaint.

In addition to answering the allegations in the complaint, MSD included the following affirmative defenses:

> 9. Due to Article X, Section 22(a) of the Missouri Constitution, MSD has been unable to raise revenues necessary to prevent the violations alleged in Plaintiffs' Complaint.
>
> 10. Due to Article VI, Section 26(b) and Article X, Section 22(a) of the Missouri Constitution, MSD will be unable to raise revenues necessary to comply with any judgment that may be entered against it.
>
> 11. The relief sought by Plaintiffs constitutes in whole or in part an unfunded mandate prohibited by Article X, Section 16 of the Missouri Constitution.
>
> 12. Pursuant to Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), the State of Missouri is liable for the payment of any judgment that may be entered against MSD and for the payment of any past or future expenses incurred as a result of complying with any judgment that may be entered against MSD.

Answer (Doc. No. 13) at 12-13. MSD also included the two counterclaims against the State. The following paragraphs provide the essence of the claims:

Counterclaim I: Liability Under Clean Water Act §309(e)

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[1] Section 309(e) of the Clean Water Act ("CWA"), 33 U.S.C. 1319(e) reads as follows:

> State liability for judgments and expenses
>
> Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

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11. The Hancock Amendment, Mo. Const. art. X, § 22(a), is a law of the State of Missouri that will prevent MSD from complying with any judgment that may be entered against it in this lawsuit.

12. Missouri Constitution Article VI, Section 26(b) is a law of the State of Missouri that will prevent MSD from complying with any judgment that may be entered against it in this lawsuit.

13. Therefore, pursuant to Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), the State of Missouri is liable for the payment of any judgment that may be entered against MSD and for the payment of any expenses incurred as a result of complying with any judgment that may be entered against MSD.

Counterclaim II: Indemnity

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15. If it should be found that MSD was in any way liable for civil penalties and injunctive relief sought by Plaintiffs in the Complaint, that liability could only be concurrent with the liability of Plaintiff State of Missouri due to the application of the Missouri Constitution, Article VI § 26(b), and Article X §§ 16 and 22, which at times in the past prevented MSD from raising necessary funding to maintain and improve its treatment and collection systems and may prevent MSD from obtaining funding necessary to comply with any judgment arising from this action.

16. Plaintiff State of Missouri has an equitable duty to indemnify MSD for the costs that MSD may incur in defending this action and in complying with any judgment arising from this action, including payment of any fines or penalties.

Answer (Doc. No. 13) at 14-17. Thus, MSD is claiming that Missouri Constitution, Article VI § 26(b), and Article X §§ 16 and 22 prevent it from raising the money needed to pay for compliance. As explained herein, these provisions pose no barrier to compliance.

Argument

I. MSD has the means to raise funds to pay for the lawful operation of its sewer system, so §309(e) of the CWA cannot impose any liability on the State.

A. The Hancock Amendment does not limit the ability of the district to increase the charge imposed on customers for actual service, so the counterclaim fails to state a claim.

1. A brief overview of the Hancock Amendment.

The term "Hancock Amendment" refers to an amendment to the Missouri Constitution passed and effective in 1980. Specifically, the Hancock Amendment consists of Art. X, §§ 15 through 24 of the Missouri Constitution. Art. X, § 16 provides an overview of the purpose of the amendment[2], while the remaining provisions set out details of the amendment's application. The amendment sought to establish the status quo for all state and local taxes in the State, only allowing for tax increases with voter approval. To accomplish this, the amendments:

- Prohibit the State from raising taxes without voter approval.
- Prohibit local political subdivisions from raising taxes without voter approval.
- Prohibit the State from requiring local political subdivisions to offer new or expanded services unless the state pays for these newly mandated services.
- Prohibit the State from shifting any current State services to the local political subdivisions unless the State pays for the services.

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[2] Article X, § 16 reads as follows:

> Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution. The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in sections 17 through 24, inclusive of this article.

See Art. X, §16. As a practical matter, the amendment froze the level of tax-supported services that the State and local political subdivisions could offer without voter approval. Government could eliminate services or shift priorities within its own budget, but could not increase taxes unless voters approved the tax increase, and the state could not solve its own budgetary dilemmas by imposing unfunded mandates on local political subdivisions.

2. A state court has already determined that MSD can raise rates so long as the rates are based on the cost of operation and are not imposed as a tax.

The Missouri Supreme Court has established a five-factor test for determining whether a charge imposed by a government is a tax that is subject to the Hancock Amendment or is a user fee for services that is exempt from the Hancock amendment. *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo.,1991). These five factors are:

1) When is the fee paid, on a periodic basis or only on or after provision of a good or service?

2) Who pays the fee?

3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?

4) Is the government providing a service or good?

5) Has the activity historically and exclusively been provided by the government?

Under these factors, where a charge from the government takes the more traditional form of a broad-based tax, it is treated as a tax for purposes of the Hancock Amendment, while those charges that resemble a fee that a private entity might charge are not subject to the Hancock Amendment.

MSD has litigated two cases that have addressed the question of whether the Hancock Amendment prevents the MSD from raising revenue needed to operate its system. In both cases,

the courts applied the factors established by Missouri Supreme Court.

The first of these was *Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217 (Mo. 1993). At the time *Beatty* was litigated, the charge that MSD imposed on most customers was not based on the customer's actual usage.

> For residential property, the board imposes a flat fee for sewer service. The amount of the fee remains the same no matter how much waste a residential customer sends into the system. Nonresidential customers pay a base charge plus a charge measured by the volume of waste the property adds to the system. Nearly all of the property owners within MSD receive MSD sewer charges. Failure to pay a sewer charge results in a lien against real property by operation of law.

Id at 218. The court examined this method of charging for services and decided that the charges were a tax subject to the Hancock amendment and that any increase must be put to the voters.

> The charge imposed, however, is not directly related to the amount of services an individual, residential fee payer uses. In the end, our uncertainty as to the nature of the charge MSD imposes is heightened by the fact that unpaid sewer charges trigger a lien against real property by operation of law. Thus, we resolve our doubts in favor of the taxpayers and hold that MSD's charges are subject to Article X, Section 22(a), and may not be increased without prior voter approval.

Id at 221.

Shortly after the *Beatty* decision, in 1993, MSD later modified its rate structure to make it more reliant on the actual usage of the sewer system, rather than an across the board rate applicable regardless of the amount of usage. This system of billing was also challenged, but in 1997, MSD got a different result. The court again examined the method of billing.

> Under the new and current form of billing, all customers are charged a $.37 billing and collection charge, a $3.72 system availability or "readiness to serve" charge, and a volume charge of $.99 per 100 cubic feet of customer contributed wastewater.

Missouri Growth Ass'n v. Metropolitan St. Louis Sewer Dist., 941 S.W.2d 615, 618 (Mo.App. E.D.,1997). The court went on to describe MSD's methods of determining the volume of the

wastewater contributed by customers. In reviewing these charges under the Hancock amendment, the court concluded that MSD did not need to seek voter approval to increase the rates.

> Here, after applying the *Keller* factors to MSD's 1993 user charges under Ordinance No. 9029, four of the five factors favor MSD. Because MSD has enacted Ordinance No. 9029 which made significant changes in its billing of user charges, this Court finds in favor of MSD on the first and third factors as well as the second and fourth factors, thereby tipping the scale in favor of MSD. Therefore, we hold the 1993 charge under Ordinance No. 9029 is a user fee and not a tax subject to the Hancock Amendment.

Id at 624. Because the rates were no longer subject to the Hancock Amendment, MSD was, and is, free to raise the rates to obtain revenue needed to operate the system. For the last ten years, MSD has known that it can raise the revenue it needs to operate its system. As a result, MSD's counterclaims fail to state a claim and affirmative defenses 9 through 11 have no legal basis and should be stricken.

B. Even before the passage of the Hancock Amendment, both State and federal law prohibited the discharges at issue, so any judgment and expenses imposed in this case cannot constitute a "new or expanded" activity or a shifting of the tax burden under the Hancock Amendment.

Art. X, § 16 of the Hancock Amendment prohibits the State from "requiring any new or expanded activities ... without state funding." This prohibition in the Hancock Amendment cannot apply for two distinct reasons. First, the prohibition of unpermitted discharges does not require an activity. On the contrary, federal law prohibits that activity, i.e. unpermitted discharges.

Second, the prohibition on unpermitted discharges, even if viewed as an action, is not a "new or expanded action." MSD's unpermitted discharges were illegal prior to 1980 under both federal and Missouri law. MSD seems to take the position that since it has delayed compliance for the last thirty years, the State should now be held liable for the cost of complying and the cost

of any other consequences of its failure to comply. However, the Hancock Amendment was never intended to reward those who delayed compliance with the law.

C. The complaint in this case seeks to enforce requirements of the Federal Clean Water Act. The Hancock Amendment applies only to State mandates and does not apply to any costs required for compliance with federal law, so the State has no possible liability under the Hancock Amendment.

As indicated in the complaint in this case, all counts seek remedies for violations of federal law. The language of Art. X, § 16 makes it clear that the Hancock Amendment only limits the requirements that the State may impose on local political subdivisions:

> **** The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions. ****

While State taxpayers could, theoretically, pass a constitutional amendment through which the state assumes the costs that local political subdivisions incur complying with federal laws, the Hancock Amendment does not attempt this. MSD must comply with federal law and has no basis for claiming that the State is liable for the cost of compliance.

D. MSD lacks the standing needed to raise either a claim or an affirmative defense under the Hancock Amendment.

Art. X, § 23 of the Missouri Constitution provides in pertinent part:

> Notwithstanding other provisions of this constitution or other law, **any taxpayer** of the state, county, or other political subdivision **shall have standing to bring suit in a circuit court** of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive of this article....

Emphasis added. The Missouri Court of Appeals, Eastern District, recently considered the meaning of this provision, concluding that "in order to have standing to assert the Hancock Amendment as a plaintiff or as a defendant, a party has to be a taxpayer." *Firemen's Retirement System v. City of St. Louis*, __ S.W.3d__, 2006 WL 2403955 (Mo.App. E.D., 2006) (copy

attached; slip op. at 5). In reaching this conclusion, the court conducted a detailed review of Missouri Supreme Court decisions on the subject of standing under the Hancock Amendment. See *Fort Zumwalt School District v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995); *State ex rel. Board of Health Center Trustees of Clay County v. County Commission of Clay County*, 896 S.W.2d 627 (Mo. banc 1995). The court specifically held that only tax payers can bring claims or raise affirmative defenses under the Hancock Amendment. Consequently, MSD cannot raise any issues relating to the Hancock Amendment in this case, so claims or defenses based on the Hancock Amendment must be dismissed or stricken.

E. Even if MSD had standing to raise a Hancock challenge to the permit conditions referenced in the complaint, those permit conditions can only be challenged in an appeal of the permit and not in a subsequent enforcement action.

An applicant for an NPDES permit in Missouri may appeal the conditions of that permit to the Administrative Hearing Commission and the Missouri Clean Water Commission. See 621.250, RSMo, 640.013, RSMo, and 644.051.6, RSMo. That decision is subject to judicial review. 644.051.7, RSMo. Failure to exhaust that administrative remedy deprives courts of jurisdiction to hear any challenge to the administrative decision regarding that permit. *City of St. Peters v. Department of Natural Resources of State of Mo.*, 797 S.W.2d 514 (Mo.App. W.D. 1990). In addition, constitutional issues attacking the validity of an administrative action must be raised within that administrative appeal process. T*ate v. Department of Social Services*, 18 S.W.3d 3 (Mo.App. E.D.,2000). As the court explained in *Tate*:

> "Moreover, '[i]t is imperative to an efficient and fair administration of justice that a litigant may not withhold his objections, await the outcome, and then complain that he was denied his rights if he does not approve the resulting decision.' " Brotherhood of Locomotive Engineers Intern. Union v. Union Pacific R. Co., 134 F.3d 1325, 1331 (8th Cir.1998) (quoting Brotherhood of R.R. Trainmen v. Chicago, Milwaukee, St. Paul & Pac. R.R., 380 F.2d 605, 608-09 (D.C.Cir.1967)).

Id at 7. To the extent that the complaint rests on violations of MSD's permit, MSD is, in reality, challenging the constitutionality of the permit. In its affirmative defenses and counterclaims, MSD claims, in effect, that the permit conditions cannot be enforced against it because the conditions violate the Hancock Amendment to the Missouri Constitution. MSD had the opportunity to dispute the validity of any permit condition by appealing the condition on any grounds, including constitutional grounds. Having failed to obtain relief through the administrative process regarding the applicability of the Hancock Amendment to its NPDES permit during an appeal, MSD cannot now attempt to overturn those conditions in this action.

F. Although Art VI, § 26(b) may regulate the methods by which MSD may raise capital, it does not prevent MSD from raising the revenue needed to remedy its many illegal sewage overflows.

Art. VI, § 26(b) limits the extent to which a political subdivision may incur debt by limiting the total amount that may be incurred and requiring voter approval:

> Any ... political corporation or subdivision of the state, by vote of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five percent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes.... For elections referred to in this section the vote required shall be four-sevenths at the general municipal election day, primary or general elections and two-thirds at all other elections.

Although this provision limits the ability to incur debt, it does not limit the ability to raise revenue. As demonstrated above, MSD has the ability to raise the revenue it needs to operate its system. The constitution does not raise any barrier to raising the needed revenue. Rather, Art. VI, § 26(b) appears intended to assure that current costs of government are borne by the current users of government services. This restriction does not prevent MSD from raising revenue and cannot be a basis for any claim against the State under Section 309(e) of the CWA.

G. MSD has no basis at law or in equity to demand payment from the State because the State has not waived sovereign immunity for the claims that MSD asserts.

The doctrine of sovereign immunity, although limited by case law and statute in Missouri, has not been abolished. That doctrine limits suits to those that the State expressly consents to and the manner the State expressly prescribes.

> The State of Missouri may not be sued without its consent, and statutes such as those applicable to this case which waive the immunity of the sovereign from suit are strictly construed.
> ****
> When a state consents to be sued, it may be sued only in the manner and to the extent provided by the statute; and the state may prescribe the procedure to be followed and such other terms and conditions as it sees fit.

Charles v. Spradling, 524 S.W.2d 820, 823 (Mo. 1975). The Missouri General Assembly has created a limited waiver of sovereign immunity as to tort liability, but the language of that statute makes clear that it is not to be viewed as a broad waiver of immunity, even as to torts.

> Such **sovereign or governmental tort immunity** as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, **shall remain in full force and effect; except** that, the immunity of the public entity from liability and suit for **compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances**:
> ****

537.600, RSMo (emphasis added).

Art. X, § 23 expressly waives immunity from suit by taxpayers only in circuit court or the Missouri Supreme Court only for the limited purpose of enforcing the provisions of the Hancock Amendment. As noted above, MSD does not fall within the scope of those persons permitted to sue under Art. X, § 23.

MSD, however, does not limit its claims to the Hancock Amendment. Its seeks recovery directly under § 309(e), see Counterclaim ¶13, in MSD's Answer (Doc. No. 13)and a vague

claim that "Plaintiff State of Missouri has an equitable duty to indemnify MSD for the costs that MSD may incur in defending this action and in complying with any judgment." Counterclaim ¶16, in MSD's Answer (Doc. No. 13). The State has made no waiver of sovereign immunity as to these claims, or any other claims included in the counterclaim. As a result, all claims in MSD's counterclaims must be dismissed because sovereign immunity applies.

II. Pursuant to the Eleventh Amendment of the United States Constitution, this Court lacks jurisdiction to hear MSD's counterclaims against the State of Missouri.

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In considering the impact of this amendment, the Supreme Court has concluded that the Amendment gave broad immunity to States:

> Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of *Chisholm* [*v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793)] that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union. [Citations omitted.]

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669, 119 S.Ct. 2219, 2223 (1999). *Florida Prepaid* reinforced the concept of Eleventh Amendment immunity, making it clear that only two circumstances existed that allowed a claim to be brought in federal court against a state.

> First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment-an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

> Second, a State may waive its sovereign immunity by consenting to suit. *Clark v. Barnard*, 108 U.S. 436, 447-448, 2 S.Ct. 878, 27 L.Ed. 780 (1883).

Id at 670, 119 S.Ct. at 2223. The Supreme Court has noted that "power 'to regulate Commerce' conferred by Article I of the Constitution gives Congress no authority to abrogate state sovereign immunity." *Id* at 672, 119 S.Ct. at 2224.

The Supreme Court gave the following instructions for examining the applicability of the Fourteenth Amendment to the Eleventh Amendment immunity:

> Section 1 of the Fourteenth Amendment provides that no State shall "deprive any person of ... property ... without due process of law." Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We made clear in City of Boerne v. Flores, 521 U.S. 507, 516-529, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), that the term "enforce" is to be taken seriously-that the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations.

The Court held that the Fourteenth Amendment abrogated immunity where a claim is for actions that constitute a deprivation of a property interest. *Id.* No such claim is made here, so the claims at issue here do not arise under the Fourteenth Amendment.

This leaves only the question of whether the State waived its immunity. The standard for finding a waiver is stringent.

> Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." .... Generally, **we will find a waiver either if the State voluntarily invokes our jurisdiction,...,** or else **if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction**.... See also *Pennhurst State School and Hospital v. Halderman*, 465 U.S., at 99, 104 S.Ct. 900 (**State's consent to suit must be "unequivocally expressed"**).

Id at 675-676, 119 S.Ct. at 2226 (emphasis added; citations omitted). Here, the facts related to the State's involvement in this case do not demonstrate a voluntary invocation of the court's jurisdiction because the State is forced to be a party to the case by the terms of 309(e). That

subsection states in the first sentence, "[w]henever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party." The inclusion of the state as a party, absent further action to enforce State claims or rights against the defendant, cannot be viewed as a waiver, as the participation is involuntary. The State cannot avoid participation by remaining silent as to its designation. While the State chose to be designated as a plaintiff in this action, no independent claims have been included. As the state seeks no separate relief, its participation as plaintiff cannot be viewed as a "clear declaration," "unequivocally expressed" that is intends to submit to this court's jurisdiction. Until such time as the State seeks some specific relief not sought by the United States, this court must accept that it has not waived its immunity.

The State's mere presence in the case cannot be viewed as a waiver because while Congress cannot, on its own, discard Eleventh Amendment immunity, it can include a state in an action without violating the Eleventh Amendment. The United States Court of Appeals for the Fifth Circuit examined whether the involuntary inclusion of a state in a federal action violates the Eleventh Amendment and concluded it did not. In *Frazier v. Pioneer Americas, LLC*, 455 F.2d 542 (5th Cir. 2006), the plaintiffs filed a class action suit in state court. The defendants included Pioneer Americas, LLC and the Louisiana Department of Environmental Quality. Pioneer America removed the action to federal court pursuant to the federal Class Action Fairness Act as codified at 28 U.S.C.A. § 1332(d). The court held that the mere inclusion of the state of Louisiana in that suit did not violate Eleventh Amendment immunity. The court cited *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047 (1998) as support for its conclusion. *Schact* held:

> The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power

> to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. .... Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Id at 389, 118 S.Ct. at 2052 - 2053 (citations omitted). With respect to § 309(e), Congress may have several reasons why it would want states include in actions against political subdivisions. A respect for state sovereignty may provide a reason to give states the opportunity to participate in an action against a subdivision of the state. That is particularly appropriate in the context of environmental cases as these programs employ a joint state-federal permitting and enforcement scheme.

The lack of State claims is no mere oversight. Missouri could choose to include the state equivalent of the federal claims in order to get penalties that go to the State treasury or injunctive relief over and above that available under federal law. See 644.051, RSMo and 644.076, RSMo. The State could also choose to include state claims for violations that are not covered by the current counts of the complaint. The state has taken none of these steps.

Here, the state has asserted no claim that would constitute a waiver, so the Court can continue to assert jurisdiction until the State makes an unequivocal declaration of a waiver of its immunity. However, unless such an unequivocal waiver is made, the State maintains its Eleventh Amendment immunity. As a claim has now been brought against the state, the State may assert immunity against that claim. As a result, MSD's counterclaims against the State must be dismissed.

Conclusion

For the reasons stated herein, MSD's counterclaims against the State of Missouri must be dismissed and affirmative defenses 9 through 12 must be stricken.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent electronic notification to the following:

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