UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

PRYOR OIL CO., INC. Plaintiff, v. THE UNITED STATES OF AMERICA, as represented by CHRISTINE TODD WHITMAN, in her official capacity as Administrator of the United States Environmental Protection Agency, and by JIMMY PALMER, in his official capacity as Regional Administrator of EPA Region IV, Defendant.	)	**Civ. No. 3:02-cv-679** **Judge Phillips**

PRYOR OIL'S MEMORANDUM IN REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This pleading replies to that undesignated portion of the United States Memorandum in Support of United States' Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment that opposes plaintiff's Motion for Summary Judgment. The government's opposition fails on the facts and the law.

II. ARGUMENT

A. Defendant Fails to Refute Pryor Oil's Uncontroverted Facts

To refute Pryor Oil's uncontroverted facts Defendant must present significant, probative evidence that indicates a material fact is disputed. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Defendant must support its assertions of disputed material fact with more than mere

allegations. *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Something more than a mere scintilla of evidence is required. *Id.*

Pryor Oil asserted in its Memorandum in Support of its Motion for Summary Judgment that the Well has neither discharged nor threatened a substantial discharge of oil since July 27, 2002, but certainly not since November 27, 2002. Pryor Oil supported its assertion with uncontroverted facts.

Defendant attempts to vaguely refute the uncontroverted fact that the Well is not discharging any oil or threatening a substantial discharge of oil by asserting that "countervailing evidence" shows otherwise. (Defendant's Memorandum in Support of United States' Cross-Motion For Summary Judgment and in Opposition To Plaintiff's Motion for Summary Judgment (Df. Combined Mem.), Doc. 38 at 17, n.21) Defendant cites only one piece of "countervailing evidence," a September 16, 2002, memorandum drafted by EPA's contractor Boots & Coots. (AR 2 2 183-185) In that document Boots & Coots *theoretically* opines that, possibly, fractures in the formation might be allowing oil to escape the Well and seep into Clear Creek. The memo concludes, "[a]s stated above, this issue is still in the *theoretical* stage and is being debated internally within Boots & Coots. As this matter is being analyzed a consensus will be reached and a report issued that gives our *official position.*" (AR 2 2 185, emphasis added.)

Defendant fails to inform the Court that Boots & Coots specifically retracted its support for this "theoretical possibility" in a subsequent memorandum. (AR 2 2 0224) That memo, dated November 19, 2002, presents Boots & Coots' *official position.* In it Boots & Coots concludes that the "theoretical possibility . . . brought forth [in its September 16, 2002, memorandum] is ***highly unlikely*** the source of oil seeping into the river adjacent to the well site location . . ." (*Id.*, emphasis added.) Rather, Boots & Coots concludes, the "projected source of

the seep was residual oil remaining from the initial blow out." (*Id.*) It is worth noting that Boots & Coots carefully cites the underlying basis for its official position: "all information available to us, including the geologic environment where the well is located, the circumstances during the blowout and the pressure repose of the well during the ensuing period of time." (*Id.*) The memo further explains, "[w]e have reviewed the petrophysical properties of this region and understand the zone between the land surface and casing setting depth includes geologic formations that are not conducive to fracturing." (*Id.*)

Despite all evidence to the contrary, Defendant repeatedly infers throughout that undesignated portion of its filing pertaining to its Opposition that the emulsified sheen, currently seen on an intermittent basis in Clear Creek, discharges directly from the Well. Defendant fails to controvert any of its own contractors' and experts' conclusions that oil, and later emulsified material, in Clear Creek is residual from the initial blowout.[1]

Defendant asserts that Pryor Oil's containment and recovery efforts ended when the well caught fire. That statement is simply untrue and unsupported in the Administrative Record. In fact, Pryor Oil's booms in the creek remained in place and Pryor Oil continued to use vacuum trucks to remove oil from the containment pits.[2] EPA forced Pryor Oil to suspend these containment efforts. EPA then abandoned the Site and allowed oil in the containment pits to seep into the soil above Clear Creek.

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[1] *See* Pryor Oil's uncontroverted fact number 8. (Plaintiff Pryor Oil's Memorandum in Support of Its Motion For Summary Judgment, Doc. 30 at 13.)

[2] Defendant also continually insinuates that Pryor Oil had no containment pits in place prior to the blowout. In fact, Pryor Oil had installed two lined containment pits as observed by Tennessee Department of Environmental Conservation inspectors. The fire later consumed the liners.

Finally, EPA asserts that the Well is unstable and threatens a substantial discharge. EPA fails to provide any factual basis, not even a scintilla of evidence, that this unfounded assertion is true.

B. Defendant's Legal Arguments Fail

Having failed to refute any of Pryor Oil's uncontroverted facts, Defendant is left with an argument that EPA has jurisdiction over the Well despite the unrefuted fact that there has been no discharge or threat of a discharge from the Well since it was capped in July 2002. Defending its actions, despite the facts, Defendant argues that "[t]o allow the agency sufficient discretion to respond appropriately under the wide variety of exigent circumstances likely to occur, EPA's statutory authority contains ***no limit***, temporal or otherwise. . . ." (Df. Combined Mem., Doc. 38 at 18) The fact that the United States Department of Justice asserts such continuing unbridled power on behalf of EPA under the facts here should strike fear in the heart of every freedom loving American.[3] Thankfully, the statement is incorrect and is contrary to the plain language of Section 311. Under OPA and Section 311, Congress granted EPA jurisdiction only when a discharge or a threat of a substantial discharge exists. 33 USC § 1321(c)(1)(A). Where these conditions do not exist, as here, EPA's jurisdiction under OPA does not exist. EPA's ability to exercise control over private property is thus limited.

Defendant asserts that EPA does not have "to demonstrate a continuous discharge in order to carry out its responsibilities under Section 311(c)(1)." (Df. Combined Mem., Doc. 38 at 18) In this case, not only has no continuous discharge occurred from the Well, there has not

[3] A body of federal criminal procedure cases provides alleged criminals with Constitutionally-guaranteed protections against illegal government activities like illegal searches and seizures. Based on the facts here, and the federal government's own Administrative Record, it is hard to comprehend that, under the same Constitution, a federal agent can seize *and destroy* an asset of a corporation for no reason.

been *any discharge* or threat of a substantial discharge since the Well was capped over a year ago.

Defendant takes the position that when oil reaches a "navigable" waterway, Congress grants EPA unlimited jurisdiction forever. Nothing in the United States of America stops commerce more than the mere hint of U.S. Environmental Protection Agency jurisdiction. Under the Justice Department's theory, EPA's OPA jurisdiction never ends. Such a conclusion is contrary to the statutory framework of OPA and against public policy. Congress enacted OPA to facilitate the clean up of discharged oil, not to federalize private property, destroy valuable oil and gas resources, and remove property from commerce forever.

III. CONCLUSION

Defendant fails to refute a single fact set forth in Pryor Oil's Memorandum in Support of its Motion for Summary Judgment. Defendant's legal theory contradicts the plain language of the statute. To accept the government's interpretation of OPA and Section 311 renders both unconstitutional. Pryor Oil's Motion for Summary Judgment, therefore, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via U.S. Mail this 19th day of September, 2003, upon:

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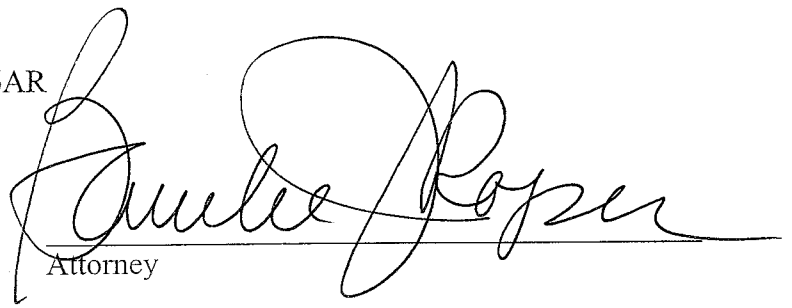

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