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 OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Defendant asserts that this Court lacks jurisdiction to hear the case brought by Pryor Oil Co., Inc. ("Pryor Oil") against the U.S. Environmental Protection Agency ("EPA") because the law affords the federal district court no authority to perform a "pre-enforcement" review of the EPA's Removal Administrative Order ("RAO") issued to Pryor Oil.[1] Defendant concludes that EPA has total unfettered power to enter onto private property to seize and destroy Pryor Oil's oil well because Pryor Oil failed to comply with EPA's supposedly un-reviewable RAO by not

[1] *See* (AR 10 11 0001).

completing a pipeline within an arbitrary timeframe demanded in the RAO. Here, the court will not perform "pre-enforcement" review; it will perform "pre-destruction" review.

If no such review can be had in this Court, then where? Defendant's suggestion that Pryor Oil's only remedy for EPA's unlawful acts is a claim in the Federal Court of Claims is tantamount to the king's agents unlawfully seizing and burning a citizen's home and then saying, "sue me". There must be some sanctuary in the United States of America where individual freedoms guaranteed by the Constitution are sheltered and preserved.

The Oil Pollution Act ("OPA") and Section 311 of the Clean Water Act ("Section 311") do not prohibit this Court's review.[2] In fact, Defendant fails to cite one case that prohibits the Court's OPA jurisdiction. There is none. The Administrative Procedures Act waives Defendant's sovereign immunity with regard to Pryor Oil's ability to obtain judicial review of EPA's actions. Finally, adopting Defendant's position annihilates the due process provisions of the Constitution thus rendering OPA and Section 311 unconstitutional.

II. ARGUMENT

A. The Administrative Procedures Act ("APA")

i. Sovereign Immunity

Congress waived EPA's sovereign immunity. The APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action . . ." 5 U.S.C. § 702; *see also A.E. Finley & Associates, Inc. v. U.S.*, 898 F.2d 1165, 1165 (6th Cir 1990). An aggrieved party is only barred from review if the relevant statute "preclude[s] judicial review." 5 U.S.C. § 702.

[2] The OPA contains the substantive requirements for the prevention of oil pollution into the waters of the United States. When Congress passed OPA, it contemporaneously modified Section 311 to become OPA's enforcement mechanism. Pub.L. 101-380, tit IV, §§ 4201& 4301, Aug. 18, 1990, 104 Stat. 484.

As described heretofore in the pleadings EPA's actions adversely affect or aggrieve Pryor Oil. OPA and Section 311 do not preclude judicial review as discussed below.

ii. Exhaustion of Administrative Remedies

Initially in August 2002, Pryor Oil offered to meet and confer with EPA Region IV counsel and OSC to discuss EPA's requirement to perform an MIT. EPA denied Pryor Oil's request. Pryor Oil provided EPA with information regarding the integrity of the Well. EPA failed to respond. Pryor Oil offered to perform an alternate test to conclusively prove that the Well had integrity and could not be discharging oil into Clear Creek. EPA rejected the proposal without explanation. Pryor Oil offered to submit the technical issues to formal non-binding arbitration. EPA responded by ordering Pryor Oil to perform a Gas Deliverability Test in a three-day timeframe over a holiday weekend, after which EPA issued Amendment #6, ordering Pryor Oil to complete a three-mile pipeline in three weeks over treacherous terrain. Pryor Oil informally and formally requested an extension to EPA's arbitrary deadline. EPA summarily rejected both requests. All the while EPA prepared to seize the Well.[3] Pryor Oil exhausted its administrative remedies.

B. Neither Section 311 nor OPA Bans Judicial Review

Courts must presume judicial review is available for final agency actions "unless there is 'clear and convincing evidence' of a contrary legislative intent." *Allsteel v. United States Environmental Protection Agency*, 25 F.3d 312, 314 (6th Cir. 1994) (citations omitted). Section

[3] In the cover letter to Amendment #6 EPA threatened to perform the MIT or plug the Well in the event Pryor Oil missed the December 1, 2002 deadline. By the morning of December 2, 2002, EPA's equipment and personnel began arriving in Morgan County. (AR 11 1 0249) Defendant admits that the "pipeline had to be completed to reduce the pressure at the well head before the MIT to test the integrity of the well could be conducted." *Defendant's Reply to Plaintiff's Memorandum in Opposition to Motion to Exclude Rule 26 Disclosures and Discovery*, p. 9, n. 10; *Defendant's Motion for Judgment on the Pleadings*, p. 10, n. 15. The record contains no evidence that EPA intended to complete the pipeline before performing the MIT. Thus, it logically follows that EPA intended to plug the Well. Pryor Oil in fact received confirmation of EPA's intent from an EPA-hired contractor.

311 and OPA contain no ban on judicial review of EPA's RAO. Nor, does the legislative history contain any clear and convincing evidence that Congress intended to ban judicial review.

No case cited by Defendant, including *Southern Ohio Coal v. Office of Surface Mining*, 20 F.3d 1418 (6th Cir. 1994), addresses whether Section 311 bans judicial review of EPA orders that carry the effect of law. All of Defendant's cited Clean Water Act ("CWA") cases consider "pre-enforcement" review under Section 309. Section 309 details EPA's authority to enforce EPA-issued permits under the National Pollution Discharge Elimination Program permit program. Section 311, on the other hand, establishes EPA's enforcement authority with regard to OPA, the statute at issue here.

The enforcement provisions of Section 309 are explicitly inapplicable to this case. In the event of a discharge of oil to water Congress requires EPA to choose between Section 309 and Section 311. EPA may assess civil penalties under 309 or 311, but not both. *See* 33 U.S.C. § 1321(b)(7)(F)(11) ("Civil penalties shall not be assessed under both this section and section [309] for the same discharge"). Here EPA opted to proceed under Section 311 and OPA, neither of which bans judicial review.

In 1972, when Congress originally passed the modern CWA, it omitted any provision that precluded judicial review. For various reasons courts later read into the statute a ban on judicial review in Section 309 enforcement cases. In 1986, Congress passed the Superfund Amendments and Reauthorization Act amending the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, by inserting a specific ban on pre-enforcement review for federal hazardous waste cleanups.[4] 42 U.S.C. § 9613(h). Four years

[4] This law does not apply to releases of oil because of the oil pollution exclusion Congress included in CERCLA. *See* 42 U.S.C § 9601(14).

later, in 1990, Congress passed OPA omitting any reference to a judicial review ban. By that point Congress could assess the effect of the pre-enforcement ban. Since 1990, no federal court has written a pre-enforcement ban into OPA. This Court, therefore, has jurisdiction to review this matter.

C. Precluding Review of EPA's Actions Would Render OPA Unconstitutional.

Defendant's argument that Congress intended to preclude any meaningful review of EPA's RAO renders OPA and Section 311 unconstitutional. Defendant argues that Congress bestowed EPA with power to seize and destroy private property at its whim, without providing for any meaningful review by an independent tribunal. Such a result "is repugnant to the Due Process Clause of the Fifth Amendment." *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1259 (11th Cir. 2003).

When pre-enforcement review prohibitions initially made their way into jurisprudence, courts intended to prevent clever legal maneuvering from delaying environmental cleanups. Those courts never envisioned facts like the facts here. As the *TVA* court observed, "[i]t is not surprising that these courts failed to deal with the constitutional issue . . . especially the due process issue--because no 'deprivation' of liberty or property . . . [was] actually at issue until the Government imposes penalties in a subsequent enforcement proceeding." *TVA*, 336 F.3d at 1257 n. 34. Here the due process deprivation of property issue is squarely before the Court. Pryor Oil asks this Article III Court to review EPA's injunction-like order issued without meaningful review coupled with EPA's actions to effect seizure and destruction.

Unlike the *TVA* court, this Court is not bound by any judicial precedent that has ever implied or drafted a ban on judicial review into the relevant statute. Defendant's legal theory renders Section 311 and OPA unconstitutional. To put the facts of this case into perspective, one

would need to add a "Scenario Three" to the two scenarios put forth by the *TVA* court in its opinion at 1242-43:

> **Scenario Three:** *The EPA Administrator hears that Energy Co. has experienced a blowout of a boiler at a power plant. Despite the fact that Energy Co. is addressing the situation with the proper help, both environmentally and operationally with state oversight, EPA takes over the power plant. EPA orders everyone, including all Energy Co. employees, off of the site and allows the boiler to burn unattended. After weeks of bureaucratic meetings, slow work, and ill-advised cleanup activities, the EPA Administrator issues a Removal Administrative Order ("RAO") to Energy Co. to clean up the site, repair roads, grade and reseed areas damaged by EPA's contractors, and perform a test on the power plant that will permanently destroy it. She makes clear that if Energy Co. fails to comply with the RAO she will pursue Energy Co. for civil penalties and will seek an indictment against Energy Co.'s CEO. Energy Co. quickly, within weeks, makes all the ordered repairs but balks at destroying the power plant since it could still operate and provide much-needed energy. There is no basis for the test, in fact or law, but the EPA Administrator refuses to meet and confer with Energy Co. about her ordered test. Energy Co. submits to her an alternate plan that would prove that the power plant could not possibly threaten the environment. She denies the plan. Instead, she orders that another, additional test be performed on the plant in 3½ days with specialized equipment, under arcane rules, a copy of which is not available in the state where Energy Co. operates. Then she disappears on vacation for the next three days. Energy Co. works tirelessly over the three-day holiday, spending extra funds to move equipment from another state, locating the 67-year old rulebook in yet another state and overnighting it to the power plant, and performing the test on time. The test confirms that the EPA Administrator's tenuous theory is not true, and proves that the EPA-ordered test would destroy the power plant. Energy Co. submits two expert opinions to EPA based on the EPA-ordered interim test results. EPA ignores the test results. EPA orders Energy Co. to complete laying three miles of pipeline across treacherous terrain in three weeks. Contrary to orders at other sites where EPA only threatens fines and penalties for noncompliance with orders, this RAO states that if the pipeline (which is totally unrelated to the static condition of the power plant that has been temporarily crippled) is not completed by Thanksgiving, then EPA will take over the power plant and destroy it. Energy Co. works tirelessly to complete the pipeline, but nationally-recognized tornados and torrential rain prevent completion of the pipeline in EPA's timeframe. Energy Co. notifies EPA that the pipeline cannot be completed and asks for an extension. EPA fails to respond. Energy Co. files a formal administrative motion for an extension of time. EPA denies the motion in a one-sentence email. Energy Co. learns that EPA plans to seize and destroy the power plant. As a last resort to saving its power plant, Energy Co. sues EPA in federal district court. Despite knowledge of the filed lawsuit, EPA brings equipment from other states to destroy the power plant. Lawyers from the U.S. Department of Justice cannot locate anyone at EPA as equipment continues to roll toward the power plant. Finally, the EPA Administrator is contacted by someone from the Justice Department who informs her that Article III court involvement means that she must stop. She reluctantly backs down for the moment, but continues to assert*

jurisdiction over the power plant, remains ready to destroy it, and reserves her right to seek fines and penalties from Energy Co.

III. CONCLUSION

If this Court takes the unprecedented step of writing a judicial review prohibition into Section 311, EPA's authority will expand. Such a ruling would grant EPA unfettered power to issue orders containing ridiculous, unsubstantiated requirements with no possibility of review by anyone. The non-reviewable orders could demand work dangerous to humans and the environment and require deadlines that cannot be met, yet they would carry the force and effect of law. Prior to a deadline, despite the fact that no emergency exists, EPA would be free to hire contractors and plan the seizure and destruction of any private asset that it does not like for some reason, although it would not need to articulate a reason. On the day the order's unmet deadline expired EPA could enter onto the person's private property with the force of the United States government, seize the benign asset, and destroy it.

Under Defendant's legal theory and the facts of this case, whether the asset is the source of a release would not be an issue. Whether water is jurisdictional water would not be an issue. Whether the EPA order had any basis in fact and law would not be an issue. Whether EPA's specific requirement and its deadline had anything to do with a former or ongoing release would not be an issue. Whether EPA acted in an arbitrary and capricious manner would not be an issue. No proof, no review, no common sense would need to be brought to bear on EPA before it seized and destroyed the private property. Under Defendant's legal theory and the facts of this case, EPA would only need to show that it issued the order to the asset's owner or operator, and the owner/operator failed to comply with it.

Such a result is nonsensical. Such a result renders OPA unconstitutional. Congress never intended EPA to have such power. Unrestrained power leads to unconstitutional abuse. This court, therefore, has the legal authority to review this case and rule on it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via U.S. Mail this 2nd day of September, 2003, upon:

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