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**

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE RULE 26 DISCLOSURES AND DISCOVERY

Plaintiff, Pryor Oil Co., Inc. submits this memorandum in opposition to Defendant's Motion to Exclude from the Scheduling Order Rule 26 Disclosures and Discovery.

BACKGROUND

On November 27, 2002, Pryor Oil Co., Inc. ("Pryor Oil") faced the imminent, illegal seizure of its private property, *i.e.*, the Howard-White No. 1 oil well ("the Well"), by a federal government regulatory agency. On that date Pryor Oil filed the instant action seeking immediate relief from this Article III Court to restrain the United States Environmental Protection Agency Region IV ("EPA"). EPA's secret but well-planned attack on the Well continued unabated on Monday, December 2, 2002, as government-financed contractors and equipment arrived in Morgan County, Tennessee, from Kentucky in anticipation of the unannounced seizure. Only the news of Pryor Oil's Thanksgiving Eve filing of this lawsuit caused EPA to cease and desist.

The existence of this lawsuit is the *single* factor that has restrained EPA from seizing the Well until today.

As outlined in the complaint, by Thanksgiving EPA had established a remarkable history of trying to appropriate the Well. The Well blew out on July 19, 2002, and had been permanently capped by July 27, 2002. No uncontrolled oil has released from the Well since that date. Despite the uncontroverted fact that the Well is not a continuing source of any uncontrolled release, EPA refuses to relinquish jurisdiction over it. Pryor Oil seeks a declaratory judgment from the Court that EPA has acted and continues to act in excess of its statutory jurisdiction.

The narrow issue before this Court is whether EPA has had the legal authority since November 27, 2002, to control the Well under the Oil Pollution Act, 33 U.S.C. § 2701-2761 and section 311(c) of the Clean Water Act, 33 U.S.C. § 1321.[1] In its Motion to Exclude, the federal government asserts that the Court's power to decide the question is completely and forevermore limited to a review of EPA's administrative record which Pryor Oil only received from the government a day after the instant motion was filed. On the one hand, Pryor Oil respectfully disagrees with the federal government; the Court can review additional materials at its discretion as outlined below. On the other hand, Pryor Oil agrees with the government that in this specific instance, on this specific administrative record, addressing this specific very narrow question, a review of the record should prove sufficient. Pryor Oil respectfully requests, however, that the

[1] The United States Coast Guard, the trustee of the National Pollution Funds Center, is demanding that Pryor Oil reimburse the federal government for the millions of dollars that EPA wasted after it "federalized" the site and the Well. Many of EPA's response actions were unnecessary, unhelpful and caused environmental harm. Pryor Oil requests that the Court, in deciding this motion, reserve all issues as to whether the administrative record is complete with regard to any issue outside of the limited scope of the complaint. Pryor Oil should not be barred by the restraints of issue and claim preclusion, estoppel, waiver, or laches, *inter alia*, with respect to supplementing the administrative record in any separate action the federal government may file against it in the future.

Court reserve its right to augment the record should it become necessary in the interest of fairness and justice.

ARGUMENT

When reviewing EPA's action under the Administrative Procedures Act, 5 U.S.C. § 706, the Court's primary focus should be the materials that were before the agency when it made its final decision. The Court, however, should not view the administrative record as an absolute boundary that defines the scope of the case. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). There are certain circumstances where additional materials must be considered in order to "preserve a meaningful judicial review." *North Carolina Division of Services for the Blind v. United States*, 53 Fed. Cl. 147 (2002). The following is a partial list of the exceptions to be considered in making extra-record evidence determinations:

- Whether the administrative record is complete; *Bar MK Ranches v. Yutter*, 994 F.2d 735, 739-40 (10th Cir. 1993);
- Whether there is a strong showing of improper behavior on the part of the decision maker; *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001);
- Whether additional evidence is needed to determine if the agency's decision was arbitrary and capricious. *Stauber v. Shalala*, 895 F.Supp.1178, 1190 (W.D.WI 1995).

1. The Administrative Record in Incomplete.

While substantially complete for the purpose of determining the limited issue presently before the Court, the record omits certain pertinent documentation. For example, EPA omitted from the administrative record EPA-generated evidence of further attempts to assault Pryor Oil's private property. On May 28, 2003, six months *after* Pryor Oil filed its complaint EPA's hired geologist issued a memorandum opining that a Mechanical Integrity Test ("MIT") on the Well

should be performed if Pryor Oil deepens it (see attached at ___). In a June 20, 2003, letter to EPA's On Scene Coordinator ("OSC"), Pryor Oil corrected technical inaccuracies and faulty assumptions contained in EPA's memorandum (see attached at ___). Neither of these documents can be found in EPA's administrative record. Looking solely at the certified administrative record, one could rationally conclude that since this lawsuit was filed EPA has relinquished its relentless claim on the Well. Such a conclusion would be untrue.

If Pryor Oil's attempt to exhaust its administrative remedies before filing this case should become an issue, the Administrative Record is incomplete. Notwithstanding EPA's lack of jurisdiction over the Well, Pryor attempted to settle EPA's imaginary issues through EPA's administrative process. Key evidence of these attempts, along with EPA's less than responsive communications, has been omitted from the Administrative Record. Please see, without limitation, the letter dated November 26, 2002, from Pryor Oil counsel to EPA, attached.

Neither EPA's continuing assertion of jurisdiction over the Well, nor Pryor Oil's attempt to exhaust its administrative remedies, is dispositive on the question of EPA's actual, legal jurisdiction over the Well. Additional evidence outside of the administrative record could become critical, however, depending on the government's claims of justification. To the extent these side issues become pertinent, the record is incomplete and should be augmented.

2. Strong Showing of Improper Behavior.

This case is replete with evidence of EPA's improper behavior. EPA has conveniently omitted it from the Administrative Record.[2] While this bad behavior is not necessarily germane to the limited jurisdictional question currently before the Court, Pryor Oil should not be barred

[2] Some, but not all, of the evidence of EPA's bad behavior is within EPA's control. For example, omitted from the record is a letter dated August 2, 2002, from Morgan County Superintendent of Highways C. Roy Smith to EPA Region IV Administrator Jimmy Palmer. In it, Superintendent Smith enumerates the various ways that EPA wasted

from supplementing the administrative record should it become necessary to advance the cause of fairness and justice.

3. Evidence of EPA's Arbitrary and Capricious Decisions.

The history of EPA's federalization and management of the site, along with its attempts to confiscate the Well, provides textbook evidence showing how to make arbitrary and capricious decisions. Much of this evidence is not included in EPA's Administrative Record.

Again, however, this case is about EPA's decision to continue exercising jurisdiction over the Well. That decision is beyond arbitrary and capricious; it is without statutory authority. Any agency action toward the Well is illegal.

Given the limited scope of the complaint, hopefully Pryor Oil will not need to air the government's dirty laundry at this juncture. As stated above, however, depending on the case presented by the government, Pryor Oil may require that the administrative record be supplemented. Eye-witness testimony, expert witness reports and testimony, documents, demonstrations, a site visit, and other relevant material may be required to rebut EPA's predictable assertions that its actions were, and continue to be, justified.

Conclusion

Pryor Oil prays that to the extent it becomes necessary to preserve a meaningful record, the Court will consider additional materials outside of the administrative record.

Respectfully submitted,

Beverlee J. Roper
Daryl G. Ward

taxpayer money and destroyed county resources during EPA's misdirected activities following federalization of the site and Well. In September 2002, Pryor Oil became aware that the letter had been written and sent.

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