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 PRYOR OIL'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Pryor Oil Co., Inc. ("Pryor Oil") filed this lawsuit when it learned that the United States Environmental Protection Agency ("EPA") was actively moving to plug its Howard/White Unit #1 natural gas and oil well (the "Well") located in Morgan County, Tennessee. Pryor Oil brought this action under the United States Constitution, Section 10(a) of the Administrative Procedures Act, 5 U.S.C. § 702, and 28 U.S.C. § 2201, seeking judicial review of and declaratory judgment relief from Defendant's actions purportedly taken pursuant to Section 311(c) of the Federal Water Pollution Control Act of 1972, as amended, commonly referred to as the Clean Water Act (hereinafter "CWA"). 33 U.S.C. § 1321(c). Pryor Oil now seeks summary judgment on its claim that the EPA lacks statutory jurisdiction over the Well given the

uncontroverted fact that the Well has not leaked one drop of oil since it was capped on July 27, 2002.

II. BACKGROUND

The Blowout. On Friday July 19, 2002, while drilling the Well, Pryor Oil's contractor encountered formation pressure that caused the Well to blow out. Pryor Oil immediately notified the Tennessee Department of Environment and Conservation ("TDEC") and implemented its spill response plan to contain released oil. With on-site oversight by TDEC, Pryor Oil and local volunteers worked to contain the released oil. The following morning a bulldozer, digging additional containment, struck a flint rock igniting the released oil and natural gas. The fire consumed much of the released oil and destroyed the liner in the containment pits. After the Well ignited Pryor Oil, TDEC, and local volunteers including members of the Tennessee Oil and Gas Association, doubled their efforts to contain the situation. Pryor Oil immediately contacted and hired Boots and Coots International Well Control ("Boots and Coots") to secure the site and bring the Well under control.[1] Boots and Coots arrived at the scene on Saturday, July 20, 2002.[2]

Federalization. Two days after the blow out EPA's On Scene Coordinator ("OSC") arrived at the scene. Without ever discussing Pryor Oil's ability to fund the Well-capping activities with any Pryor Oil representative, EPA's OSC federalized the site on the pretence that Pryor Oil could not afford to cap the Well.[3] Again without asking Pryor Oil about its ability to

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[1] Pryor Oil initially agreed to pay Boots and Coots' over-the-phone estimate of $50,000 per day for six days ($300,000).

[2] The next day, Sunday, Boots and Coots' on-site engineer revised the estimate to $75,000 per day but reduced the timeframe to four to five days to complete capping the Well. Pryor Oil forwarded $100,000 as an up front payment, with a promissory note to pay the remaining balance when the Well was capped.

[3] Pryor Oil had made arrangements to pay Boots and Coots for its services. The details of the arrangement between Boots and Coots and Pryor Oil were outlined in an August 26, 2002, memorandum from Boots and Coots. In an effort to justify the federalization of the site and to rewrite history, EPA's OSC later persuaded Boots and

pay for a response, EPA issued a press release stating, "[t]he OSC assumed the responsibility and direction of the response action after it was determined that the owner/operator of the well was unable to give sufficient financial assurance to the contractor(s)." EPA Press Release, *EPA Issues Order for Removal Action at the Howard White #1 Crude Oil Fire and Spill Site in Wartburg, Morgan County, Tennessee*, August 22, 2002.

After federalizing the site, EPA's OSC ordered Pryor Oil's crews to stop their cleanup and containment operations and to leave the site. (AR 10 1 0038) The OSC's order prevented Pryor Oil's crews from continuing to recover and transport released oil from on-site containment pits. Pryor Oil's crews had been using multiple vacuum trucks to recover released oil and transfer it to tanker trucks that transported the oil for sale to a regional refinery. (AR 2 8 0005) After Pryor Oil's crews reluctantly left the site, EPA's OSC, along with her contractors, abandoned the site for her hotel, allowing the Well fire to rage and the oil in the containment pits to seep into the ground. (AR 2 8 0025)

At approximately 10:00 a.m. on Monday July 22, 2002, EPA's OSC finally arrived back at the site. (AR 2 8 0026) She immediately called a meeting that lasted until noon and then went for a helicopter ride. (AR 2 8 0026) Boots and Coots did not receive authorization to proceed with its activities until that afternoon. (AR 2 8 0026)

The response was so delayed after a week of incessant meetings that the fire basically burned itself out by the time Boot and Coots finally prepared to extinguish it the following Saturday. By then the paraffin in the Well had slowed the flow of natural gas so much that the

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Coots to modify its memorandum regarding whether Pryor Oil had made sufficient arrangements for payment. (AR 2 1 0072-75) Despite any revisionist statement by Boots and Coots, EPA never inquired of Pryor Oil regarding ability to pay issues. The administrative record is notably lacking evidence of any such inquiry.

Wartburg Volunteer Fire Department extinguished the fire with a one and a-half inch hose in just a few seconds.

Oil Seeps at Clear Creek. As stated above, after federalizing the site EPA halted Pryor Oil's efforts to capture and recover the released oil that was migrating into the containment pits. Instead, EPA ignored the released oil migrating into the soils and bedrock on the bluff above Clear Creek, and hence downward toward the creek. The first action taken by EPA to remove accumulated oil and oily soil from the bluff above Clear Creek began six days later, on July 27, 2002, with a limited excavation. (AR 2 8 0013).

On July 29, 2002, David W. Charters, an EPA Environmental Response Team member, observed oil and oily water continuing to leach from the soil onto the soil-bedrock interface and flow downgradient in the area above Clear Creek. (AR 2 1 0006) Mr. Charters confirmed in writing to EPA's Associate OSC that oil would move into the fractures and seams of the shallow bedrock creating a long-term problem at the creek as it migrated downgradient towards it. (AR 2 1 0007) As predicted by Mr. Charters, the released oil that EPA's OSC had allowed to soak into the soils migrated down through bedrock fractures and began to seep from the bank of Clear Creek. The volume of the oil captured from these seeps on Clear Creek reduced dramatically over time, down from 100 gallons per day on September 19 to "[a]pproximately 00.00 gallons . . . released during the reporting period [October 31, 2002]." (AR 2 10 0044-56)

EPA Attempts to Escrow Proceeds from the Well. When EPA issued its Unilateral Administrative Order ("UAO") under CWA § 311(c) it required, *inter alia*, Pryor Oil to escrow for the benefit of the United States any funds generated by the Well. (AR. 10.11:0012) At that point Pryor Oil hired environmental legal counsel who objected to the escrow provision on the grounds that EPA did not have this authority. EPA removed the provision from the UAO in its

Amendment #1. (AR 2 4 0014) EPA's OSC, undeterred, continued her efforts to seize proceeds from the Well by later pressuring TDEC to order the funds escrowed. (AR 2 1 0033)

EPA's Mechanical Integrity Test. Perhaps being unwilling to accept responsibility for the environmental harm that her inaction had caused, EPA's OSC settled on a theory that flaws within the Well casing allowed oil to escape the Well and travel to Clear Creek. This theory requires oil to travel hundreds of feet, both vertically upward and horizontally, through the subsurface, passing through several layers of impermeable rock and clay. Based on this logic and despite the opinions of its own on-scene expert, EPA included in its August 5, 2002 UAO a requirement that Pryor Oil conduct a Mechanical Integrity Test ("MIT") on the Well, ostensibly to determine if the Well was the source of the discharge to Clear Creek. (AR 10 11 0002, AR 2 1 0076)

Pryor Oil could not perform the EPA-ordered MIT because the pressure in the capped Well was increasing, eventually reaching more than 500 pound per square inch ("p.s.i."). This high pressure made conducting the EPA-ordered MIT a serious risk to the environment and by-stander and operator safety. As an alternative, Pryor Oil proposed to conduct a test that could be performed safely and would prove that the Well could not be leaking oil because the high pressure had forced all of the oil out of the Well and back into the formation. (AR 2 2 0182) EPA arbitrarily rejected Pryor Oil's alternative to the EPA-ordered MIT without explanation. (AR 10 11 0033-41) Pryor Oil then proposed non-binding arbitration before a technically proficient arbitrator to discuss the need for and the dangers presented by the EPA-ordered MIT. (AR 11 1 0088-91)

EPA's Gas Deliverability Test Requirement. Instead of responding to Pryor Oil's offer to air the issue before a technically proficient independent third party, EPA issued

Amendment #5 to the UAO on Friday, October 11, 2002, faxed at 5:30 p.m, which happened to be the Friday before a federal holiday (Columbus Day). Amendment #5 ordered Pryor [Oil] to perform a Gas Deliverability Test ("GDT") on or before October 15, 2002. (AR 10 11 0046) The cover letter to the Amendment further required that the test be conducted pursuant to Tennessee regulations and "Monograph 7: Backpressure Data on Natural Gas Wells." (AR 10 11 0042-47)

Upon receipt of EPA's Amendment #5, Pryor Oil immediately ran a search for the required Monograph 7. Pryor Oil discovered that no copy of the 212-page Monograph published in 1935 by then-Secretary of the U.S. Department of the Interior Harold Ickes was registered to exist in the State of Tennessee. Pryor Oil was able to locate a copy of the Monograph 7 at the Linda Hall Library in Kansas City and shipped it overnight to Cookville. (AR 11 4 0094-95)

In order to satisfy EPA's mean-spirited deadline, Pryor Oil was forced to locate and move specialized equipment from Pennsylvania over the holiday weekend at great cost. (AR 11 4 0094-95) On October 15, 2002, Eastern Reservoir Services conducted the GDT with EPA, TDEC, United States Coast Guard ("USCG"), and National Park Service ("NPS") oversight.[4] (AR 2 2 0194-200) The GDT confirmed Pryor Oil's concerns that the pressure in the Well was too high for the MIT to be conducted safely. (AR 2 2 0221-0222)

Evidence the Well Is Not Leaking. Pryor Oil provided EPA with evidence that the Well could not be the source of oil that was seeping into Clear Creek. The Well had been constructed in a sound manner that exceeded industry standards. The Well was cased with new 7-inch casing

[4] Obviously EPA's OSC had notified these regulatory agencies *far in advance* of Friday at 5:30 p.m. Multiple representatives of each agency appeared at the Well first thing Tuesday morning immediately following the federal holiday.

to 901 feet below the surface of the ground with 15.6 pounds per gallon cement circulated to the surface. (AR 10 11 0002, AR 2 2 0241, AR 10 11 0002 AR 2 4 0017)

After the Well was capped, gas pressure began to build until it exceeded 500 pounds per square inch ("p.s.i."). (AR 2 2 0221-222) The Well casing held this pressure for weeks until Pryor Oil completed a natural gas gathering line to a Citizens Gas company compressor station and began to bleed natural gas off the Well in December 2002. Leaks in a well under this amount of pressure would be evidenced by natural gas bubbles around the Well. Natural gas bubbles have never been detected at the Well, not in the wellhead cellar, not around the top of the casing, and not in the retention basins located just down gradient from the Well. (AR 10 11 0002, AR 2 2 0221-222) U.S. Coast Guard personnel monitored Clear Creek daily from July 23, 2002 to February 6, 2003, and never observed gas bubbles at any time at the point where ever-shrinking volumes of residual oil seeped toward Clear Creek. (AR 11 1 0003-0282)

Pryor Oil also forwarded to EPA a distillation analysis that proved the seeping oil had been exposed to temperatures above 300 degrees Fahrenheit, a clear indication that the seeping oil had been released during the fire. Pryor Oil also provided EPA with a diagram of the Well showing that the two oil and gas formations in contact with the well were more than 1100 and 2200 feet respectively below Clear Creek. (AR 2 4 0018; AR 2 2 0182; AR 2 2 201 & 217-219) Pryor Oil also hired Eastern Reservoir Services to conduct a Tube Displacement Deliverability Test ("TDDT"), which proved that the gas pressure from the Warsaw formation had forced any oil left in the Well back into the lower Sunnybrook formation, making it impossible for the Well to be the source of oil that seeped into Clear Creek.[5] (AR 2 2 0226-240)

[5] The TDDT was identical to the alternate MIT that Pryor Oil had proposed more than three months earlier, long before the need for this lawsuit arose.

EPA's OSC pressured other federal and state agencies into drafting written concurrences supporting the necessity for the EPA-ordered MIT. (AR 2 1 0031-32) EPA was unable, however, to convince TDEC and the NPS that the MIT should be performed so long as the Well remained under high pressure. The more Pryor Oil worked to provide evidence that the Well was sound, the more determined EPA's OSC became in requiring the MIT. The administrative record contains evidence that even EPA's OSC did not believe that the Well was the source of the oil that was seeping into Clear Creek. (AR 2 1 0014) Yet, like a bulldog in her determination, she insisted that her MIT be conducted.

EPA's Ultimatum. On November 13, 2002, EPA's OSC gave Pryor Oil an ultimatum in the form of Amendment #6 to its UAO, — either complete a gathering line by December 1, 2002 and perform the MIT two months later or EPA would "respond to the continued discharge or threat of discharge from the [Well], including without limitation, assessing well integrity or plugging and abandoning the [Well]." If Pryor Oil missed the December 1, 2002 deadline, Amendment # 6 precluded Pryor Oil from completing the gathering line and taking any further action at the Well. (AR 10 11 0048-56) In short, EPA intended to take Pryor Oil's Well unless Pryor Oil could complete the herculean task of finishing the gathering line in a few short weeks.[6]

On November 17, 2002, Pryor Oil notified EPA that its progress on the gathering line had been impeded by the harsh weather conditions, including tornadoes, that were pounding Morgan County. (AR 11 4 0125-127) The following week, Pryor Oil reported to EPA that the wet weather would prevent Pryor Oil from completing the gathering line by the December 1, 2002

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[6] Ironically, Pryor Oil had earlier appealed to EPA to be allowed to build the gathering line. (AR 11 4 0024) Through the dry month of August and into September, EPA refused to allow Pryor Oil to work on the line stating " . . . work must not begin without the approval of the EPA OSC." (See attached letter from Martha M. Brock to Beverlee Roper dated August 22, 2002, omitted from the administrative record.) Instead, EPA waited until the weather predictably turned and then ordered completion of the 3-mile gathering line in an unreasonable time frame. (AR 2 4 0035-37)

deadline. (AR 11 4 0065-66) Pryor Oil informally requested an extension of EPA's deadline. EPA never responded. On November 26, 2002, Pryor Oil filed a formal motion for extension of time. (AR 10 1 0015-24) EPA denied Pryor Oil's motion without explanation.

EPA Attempts to Plug the Well. Confident in her belief that Pryor Oil would miss the deadline, EPA's OSC hired contractors to plug the Well far in advance of the Thanksgiving holiday. (AR 11 1 0233, 0237) Jim Pryor, the president of Pryor Oil, confirmed EPA's plans to seize the Well on November 26, 2002, when he spoke to Jerry Howard from Boss Cement, one of the contractors EPA hired to do the work. EPA 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. The fact that EPA brought Boss Cement to the site indicates its intent to plug the Well. The administrative record does not contain any evidence that EPA planned to complete the pipeline and then conduct the MIT.

Pryor Oil Sues EPA. With no recourse, Pryor Oil filed this action on November 27, 2002, to prevent EPA from seizing the Well. Despite Pryor Oil's November 29, 2002, telephonic notification to EPA's counsel that the lawsuit had been filed, including a request for a temporary restraining order, EPA's equipment and personnel began arriving in Morgan County to plug the Well on the morning of December 2, 2002. (AR 11 1 0249) EPA's OSC held multiple meetings with her contractors to discuss various methods that she could employ to gain access to the Well despite the filed lawsuit. (AR 11 1 0249) Only after discussions between EPA's OSC, EPA attorneys, and the U.S. Department of Justice, did EPA's OSC finally decide to cancel her immediate arrangements to plug the Well and extend the deadline for Pryor Oil to finish the gathering line.

EPA's Pattern of Abuse Continues. Over the next several months, EPA and Pryor Oil met and attempted to negotiate an Administrative Order on Consent. During those negotiations, EPA's OSC issued several amendments to the UAO extending the deadline for Pryor Oil to conduct the MIT. Finally, on May 7, 2003, EPA's OSC removed the MIT requirement from the UAO. Nevertheless, EPA refuses to acknowledge that its jurisdiction over the Well ended when the discharge or threat of a substantial discharge ended.

In fact, EPA continues to attempt to force Pryor Oil to conduct the MIT. On May 28, 2003, EPA's hired geologist, David Smink, issued a memorandum opining that an MIT should be performed on the Well if Pryor Oil deepens it. This memorandum was used to pressure TDEC into requiring the MIT. In a June 20, 2003, letter to EPA's OSC, Pryor Oil corrected technical inaccuracies and faulty assumptions contained in EPA's memorandum and asked EPA to clarify its position regarding the MIT. In completely consistent fashion, EPA has not responded to Pryor Oil's letter as of this date. Thus, EPA's pattern of exceeding its statutory authority continues. This lawsuit was and continues to be the only barrier that has kept EPA from taking the Well.

III. STATEMENT OF UNCONTROVERTED MATERIAL FACTS

1. While drilling at 2,430 feet, Pryor Oil's drilling contractor encountered high pressure that caused the Well to blow out on Friday evening, July 19, 2002. (AR 1011 0002)

2. On July 21, 2002, EPA's OSC arrived at the site and without discussing Pryor Oil's ability to fund the Well-capping activities with any Pryor Oil representative, federalized the site on the alleged basis that Pryor Oil lacked sufficient financial resources to cap the Well. (AR 2 8 0025)

3. Released oil that soaked into the soil and bedrock on the bluff above Clear Creek predictability began seeping from the banks of the creek. (AR 11 1 0007)

4. The volume of the oil captured from these seeps on Clear Creek reduced dramatically over time:

a. On September 19, 2002, EPA estimated the volume of oil captured by the Coast Guard at **100 gallons per day**.

b. On October 8, 2002, the flow of oil had slowed to about **sixteen gallons per day**.

c. By October 27, the volume of oil in containment fell to **four gallons per day**.

d. After November 3, 2002, approximately **four gallons of emulsified material**, which consisted mostly of air and water, was collected per day.

e. By November 13, 2002 only a very **small sheen** could be detected.[7]

f. During the week of November 17, 2002 to November 23, 2002, Pryor Oil's consultant and the onsite Coast Guard team measured the seep in drops.

(AR 10 1 0017-0021)

5. EPA's On Scene Coordinator's Polrep reports confirm that the seep reduced dramatically, to the point that the OSC reports beginning on October 31, 2002, indicated that "[a]pproximately 00.00 gallons were released during the reporting period." (AR 2 10 0044-56)

6. On August 5, 2002, EPA issued a UAO requiring Pryor Oil to, *inter alia*, perform a MIT to determine if flaws in the Well were the source of oil seeping into Clear Creek. (AR 10 11 0002)

7. Pryor Oil provided EPA with conclusive evidence that the Well could not be the source of seeps into Clear Creek.

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[7] Only a minuscule amount of oil is needed to create a sheen.

a. The Well was cased with 7 inch casing to 901 feet below the surface of the ground. (AR 10 11 0002)

b. The casing was constructed from new pipe. (AR 2 2 0241)

c. The Well was cemented with 15.6 pounds per gallon cement, circulated to the surface. (AR 10 11 0002, AR 2 4 0017)

d. The Well cementing job was performed to industry standards. (AR 2 2 0221-222)

e. Natural gas bubbles were never detected at the well, in the wellhead cellar, around the top of the casing, or in the retention basins located just down gradient from the Well. (AR 10 11 0002, AR 2 2 0221-222)

f. After the Well was capped, gas pressure began to build up in the Well until it exceeded 500 pounds per square inch ("p.s.i."). (AR 2 2 0221-222)

g. A distillation analysis proved that the oil seeping into Clear Creek had been exposed to heat above 300 degrees Fahrenheit, an indication that the oil was released during the fire rather than escaping from the capped Well. (AR 2 4 0018)

h. A diagram of the Well showed that the Warsaw formation was located more than 1100 feet below Clear Creek and the Sunnybrook formation, the source of the high pressure that caused the blow out, was located more than 2200 feet below Clear Creek. The geologic strata between these formations and Clear Creek includes several impermeable layers. (AR 2 2 0182, AR 2 2 201 & 217-219)

8. Personnel from other regulatory agencies and EPA's own contractors did not support the OSC's theory that the Well was an ongoing source for the oil that seeped into Clear Creek.

a. Boots and Coots concluded "that it is highly unlikely the source of oil seeping into the river adjacent to the well site location is due to an induced fracture." Rather the "projected source of the seep was residual oil remaining from the initial blow out." (AR 2 2 0224)

b. The Director from the Tennessee State Oil and Gas Board studied a geologic cross section of the subsurface in the vicinity of the Well and concluded that "there is no demonstrated evidence of faults that might act as passageways for the upward migration of fluids." (AR 2 2 201 & 217-219)

c. The NPS also determined that the wellbore fluids are located near the bottom of the well and there is no indication that wellbore fluids are migrating up and around the well casing. (AR 2 1 0055-56)

9. The Well has not discharged any uncontrolled oil since it was capped on July 27, 2002. (AR 10 1 0010-11)

10. On May 7, 2003, after months of failed negotiations on an Administrative Order on Consent, during which EPA refused to acknowledge that its jurisdiction over the Well had ended, the OSC issued another amendment to EPA's UAO eliminating the requirement to conduct the MIT but reserving EPA's jurisdiction over the Well. (Admin. Rec. 10.11:0078-81, Letter from Ms. Brock to Ms. Roper enclosing Amendment 11 to EPA's UAO, May 7, 2003).

IV. QUESTION PRESENTED

The only question presently before the Court is whether EPA has had jurisdiction over the Well now or at anytime since at least November 27, 2002.[8] EPA's statutory jurisdiction is predicated upon EPA establishing that a discharge or a threat of a substantial discharge of oil is occurring or may occur to navigable waters, or on the adjoining shorelines to the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. 33 U.S.C. § 1321(c)(1). EPA has not established, and the administrative record cannot support, that a discharge or a substantial threat of a discharge of oil to navigable waters or on the shorelines of navigable waters has occurred from the Well after it was capped on July 27, 2002.

V. STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *National Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

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[8] The issue of whether EPA's response actions were justified will arise if the United States Coast Guard, the trustee of the National Pollution Funds Center, files a lawsuit demanding that Pryor Oil reimburse the federal government for the $ 1.74 million that EPA has spent since it "federalized" the site.

Pryor Oil is also not currently challenging EPA jurisdiction over the ongoing monitoring activities at Clear Creek. EPA's jurisdiction over the monitoring activities, while not at issue here, is also very questionable. The OPA excludes natural seeps from the definition of "discharge" and groundwater is not included in the "waters of the United States." The Fifth Circuit recently held that released oil that travels through the subsurface before discharging into a stream is not covered under the OPA. *See Rice v. Harken Exploration Co*, 250 F.3d 264 (5th Cir. 2001).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To refute such a showing, the non-moving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Celotex Corp.*, 477 U.S. at 322. A mere scintilla of evidence is not enough. *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). The Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-moving party. *National Satellite Sports*, 253 F.3d at 907.

VI. ARGUMENT

The facts of this case are unique among reported oil pollution cases. A survey of the relevant case law reveals that courts have not previously analyzed EPA's or USCG's continued assertion of jurisdiction over a facility or vessel after the discharge or threat of discharge has been abated.[9] No case asserts facts reflecting the unchecked behavior exhibited by EPA in this case. Instead in cases regarding EPA's or USCG's jurisdiction under the OPA and Section 311 of the CWA, the courts' recital of the facts and legal analysis ends when the discharge or the threat of substantial discharge ends. Presumably the federal agencies involved in the reported cases faded from the scene when their jurisdiction ended. *See United States v. Jones*, ___ F.Supp.2d ____, CIV.A. 501CV323S(HL), 2003 WL 14436184 (M.D.Ga. June 4, 2003) (EPA Region IV, the same EPA office that responded at the Well, responded to a discharge at an oil processing plant with extensive petroleum contamination in the soil by installing sheet piling, which are large plastic walls that are inserted into the ground around the contaminated site.

[9] EPA and the USCG share responsibility to administer the OPA. Executive Order 12777 delegated the President's authority under Section 311(c) of CWA and Section 1011 of OPA to the USCG for matters within the coastal zone and to the EPA for matters within the inland zone. Exec. Order No. 12777, 56 F.R. 54757 (1991).

From the Court's recital of the facts it appears that EPA gave up its jurisdiction under the OPA when the plastic pilings were installed, even though the contamination remained in place but did not pose a threat of substantial discharge.); *United States v. English*, CV00-00016ACKBMK, 2001 WL 940946 (D. Haw. March 28, 2001) (The Court concluded that the USCG had jurisdiction to conduct a removal action on the *Sea Tiger* when the owner repeatedly refused to address a threat of a substantial discharge. The Court does not mention the fate of the *Sea Tiger* after the USCG removed more than 50,000 gallons of petroleum products from the ship. Presumably, USCG lost interest in the ship once the threat of a substantial discharge had been removed.); *United States v. Mizhir*, 106 F.Supp.2d 124 (D. Mass. 2000) (The brakes of an oil delivery truck failed causing the driver to lose control and crash, releasing 3000 gallons of oil. Some of the oil reached a nearby stream. There is no indication in the reported opinion that EPA attempted to exert jurisdiction over the truck after the accident, even though it can be assumed that the oil tank on the truck remained damaged.); *United States v. J.R. Nelson Vessel, Ltd.*, 1 F.Supp2d 172 (E.D.N.Y. 1998) (After the owners refused to act, the USCG removed 500 gallons of oil from a fishing vessel that had partially sunk in its mooring. When the removal was complete, the USCG, pursuant to the Rivers and Habors Appropriations Act of 1899 not the OPA, ordered the owners to remove the vessel from the harbor as it posed a threat to navigation.).

None of these cases presents a fact pattern similar to the bizarre facts in this case. Here, EPA continues to exert jurisdiction over the Well more than a year after the discharge or threat of a substantial discharge ended. The OPA does not grant EPA jurisdiction forevermore over an oil and gas well that experienced a blow out. Even the infamous Exxon Valdez, which spilled millions of gallons of oil and inspired Congress to enact the OPA, was repaired and has

continued to operate independently from the cleanup operations that continued in Prince William Sound. The situation with the Well is analogous.

The Well was capped on July 27, 2002. The Well has not discharged any uncontrolled oil or posed a threat of a substantial discharge since that day. The Well was cased and cemented in a manner that exceeded Tennessee regulatory standards. The Well held more than 500 p.s.i. for weeks and gas bubbles have never been observed around the Well or at the point where oil seeped into Clear Creek.[10] If the Well were the source of the oil that seeped into the creek, it would logically follow that the flow of oil would increase as the pressure in the Well increased. The opposite occurred. As the pressure in the Well increased, the flow of oil sharply decreased.

There is not one scintilla of evidence in the administrative record, or anywhere else, that the Well has discharged any uncontrolled oil since the day it was capped. There is no evidence that the Well continues to pose a threat of a substantial discharge of oil. With these critical elements missing, EPA's statutory jurisdiction ends.[11]

To hold otherwise, would expand EPA's jurisdiction to the working lifetime of every oil and gas well that has caused oil to reach navigable water. Under this theory, EPA's OPA jurisdiction would end only after a well is plugged. Such a conclusion is contrary to the statutory framework of the OPA and against public policy. The OPA was enacted to facilitate the clean up of discharged oil, not to federalize private property and destroy valuable oil and gas resources.

It is worth noting that while section 311(c) allows the destruction of a vessel if necessary to stop a discharge or to abate a threat of a substantial discharge, this right of destruction applies

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[10] The high pressure in the Well remained stable until Pryor Oil began bleeding natural gas off through the gathering line. This sustained period of high pressure is a further demonstration that the Well is sound.

[11] TDEC is the agency with regulatory authority over Pryor Oil's operations at the Well. *See* Tenn. Code. Ann. § 60-1-202 (2002) ("[TDEC] has jurisdiction and authority . . . to prevent pollution of fresh water by oil, gas, or salt water"). In response to the blow out at the Well, TDEC implemented new requirements that are designed to prevent

only to a "vessel." *See* 33 U.S.C. § 1321(c)(1)(B)(iii). The statute defines "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel." 33 U.S.C. § 1321(a)(3). The Well is not a vessel. As a result, EPA has no jurisdiction to destroy the Well. Even when applied to vessels, this power to destroy private property is rarely used. *See Clausen v. M/V New Carissa*, ____ F.3d ___, Nos. 01-35928, 01-36079, 2003 WL 21911097, *1 (9th Cir. Aug. 12, 2003)("[USCG] decided to try a maneuver never previously attempted in the contiguous forty-eight states – to burn the vessel and its fuel rather than risk trying to bring the ship out intact.").

EPA appears fixated on asserting jurisdiction over the Well. The justification for EPA's continued control over the Well is based solely on EPA's erroneous but self-serving theory that the Well continues to leak oil into Clear Creek. The administrative record does not support EPA's assertion of continual jurisdiction over the Well.

VI. CONCLUSION

The limited question before the Court is whether EPA has had jurisdiction over the Well since November 27, 2002. It is uncontroverted that the Well was capped on July 27, 2002. The administrative record does not contain a shred of evidence that the Well has leaked since that time. Without a discharge or a threat of a substantial discharge, EPA jurisdiction over the Well does not exist.

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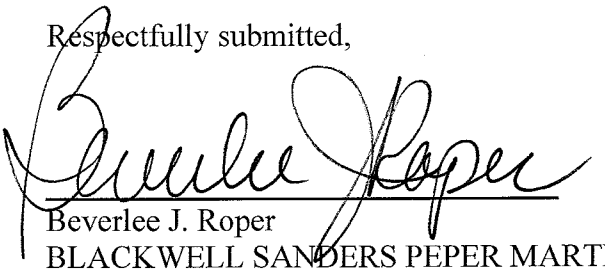
future blowouts throughout the state. (AR 10 1 0005) Given TDEC's regulatory control, any decisions made by Pryor Oil with regard to the Well cannot constitute a threat of a substantial discharge.

Respectfully submitted,



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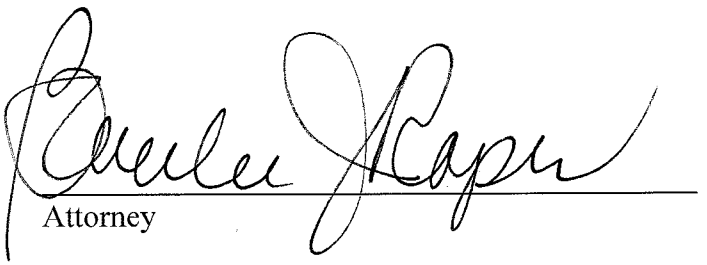
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via U.S. Mail this 20th day of August, 2003, upon:

Elizabeth S. Tonkin
Assistant U.S. Attorney
800 Market St., Suite 211
Knoxville, TN 37902



Attorney

ATTACHMENT 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

AUG 2 2 2002

received
8/27/02

4 WD ERRB

Ms. Beverlee Roper
Blackwell Sanders Peper Martin
2300 Main Street
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Kansas City, Missouri 64141-6777

Re: Pryor Oil Company, Inc.
Removal Administrative Order under Section 311(c)
Of the Clean Water Act; Workplans

Dear Ms. Roper:

EPA has reviewed the proposed workplans submitted to EPA on August 12 and 14, 2002, and attaches a summary of the modifications to be made to the workplans as submitted. Per Section VII(2) of the above-referenced Order, please review and make the attached revisions and submit to me within five (5) days.

EPA has not made modifications to the proposed workplan, submitted on August 14, 2002, for reseeding, revitalization and restoration of the pasture areas, including the area immediately surrounding the well. EPA will provide those modifications to you within 14 days.

Pryor did not submit the workplan, per Attachment B of the Order, for the reseeding, revitalization and restoration of the water storage pit. EPA extends the time for submittal of this workplan to within five (5) days of receipt of this letter.

EPA will review the revised workplans upon your resubmittal and will notify you of its decision. Per the Order, work must not begin without approval of the EPA OSC.

Please contact me at (404) 562-9546 if you have any questions pertaining to this matter.

Sincerely,

Martha M. Brock
Assistant Regional Counsel

cc: Barbara Caprita