UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PRYOR OIL CO., INC.,	)	
	)	
Plaintiff,	)	
	)	No. 3:02-CV-679
v.	)	Judge Phillips
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant, United States of America, by and through Harry S. Mattice, Jr., United States Attorney for the Eastern District of Tennessee, submits this reply memorandum in support of its motion for judgment on the pleadings.

ARGUMENT

In its initial memorandum, the United States demonstrated that the Clean Water Act precludes judicial review at this time of the challenge by plaintiff Pryor Oil Co., Inc. to EPA's administrative order and that this Court also lacks jurisdiction over Pryor's constitutional claim. Pryor's opposition memorandum fails to refute the bases for the United States' motion for judgment on the pleadings, and its complaint should therefore be dismissed in its entirety.[1]

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[1]Contemporaneously, with the filing of this reply memorandum, the United States is cross-moving for summary judgment on the merits of Pryor's claims. If the Court grants the motion for judgment on the pleadings, the parties' cross-motions for summary judgment, of course, would be moot.

I. The Clean Water Act Precludes Pre-Enforcement Review of Administrative Removal Orders.

As discussed in the United States' initial memorandum, U.S. MJP Memo, Doc. 32, at 15-22, the Sixth Circuit Court of Appeals has joined three other circuits in concluding that the Clean Water Act precludes pre-enforcement review of administrative orders issued by EPA.

Pryor's response is that these cases involved section 309 of the CWA, 33 U.S.C. § 1319, rather than section 311, 33 U.S.C. § 1321.[2] Pryor argues that because Congress omitted any reference to a judicial review bar in the Oil Pollution Act ("OPA") in 1990, which was enacted four years after Congress had passed an explicit bar on pre-enforcement review of federal hazardous waste cleanups in the Superfund Amendments and Reauthorization Act ("SARA"), it necessarily follows that OPA and section 311 of the CWA were not intended to preclude pre-enforcement review. (Pryor Oil's Memorandum in Opposition to Motion for Judgment on the Pleadings, Pl. MJP Opp., Doc. 33, at 3-5.) These contentions are meritless.

Although Pryor accurately notes that none of the decisions cited by the United States specifically involved oil spill removal orders, that is a distinction without a difference. The Sixth

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[2]Section 309 sets out EPA's general enforcement authority under the CWA, whereas section 311 specifically applies to oil and hazardous substance liability. Contrary to Plaintiff's assertion, Sections 309 and 311 are complementary and overlapping authorities, and are not mutually exclusive. Although Congress explicitly provided that civil penalties may not be assessed under both Section 309 and Section 311 for the same discharge, 33 U.S.C. §1321(b)(11), this provision would have been unnecessary if these two sections were mutually exclusive. See, e.g., United States v. Colonial Pipeline Co., 242 F. Supp. 2d 1365, 1369-1371 (N.D. Ga. 2002). Furthermore, Section 311(o) expressly provides that "[n]othing in this section shall be construed as affecting or modifying any other existing authority of any Federal . . . agency relative to onshore and offshore facilities under this chapter or any other provision of law. . . ." 33 U.S.C. § 1321(o)(3).

Circuit's definitive decision in Southern Ohio Coal Co. v. Office of Surface Mining, 20 F.3d 1418 (6th Cir. 1994), made no such distinction. There, the Court broadly held that "district courts are without jurisdiction to review pre-enforcement compliance orders issued under the CWA," id. at 1427, and that "Congress provided one forum in which to address all issues, including constitutional challenges, raised by the issuance of a compliance order: an enforcement proceeding." Id. at 1426. Moreover, the enforcement schemes set forth in sections 309 and 311 contain no language that suggests that Congress intended to preclude pre-enforcement review under section 309 but did not intend to preclude such review under section 311.

Pryor's attempt to use SARA to "reverse engineer" an inference that Congress intended to remove any preclusion on pre-enforcement review in section 311 when that section was modified in certain minor ways in 1990 goes nowhere. Section 309 was also modified by Congress after SARA, as part of the Water Quality Act of 1987. By Pryor's reasoning, Congress' failure to amend section 309 in 1987 to provide an explicit bar on pre-enforcement review negates any inference of such a bar. Yet, the Sixth Circuit held seven years later in Southern Ohio Coal Co. that the CWA does bar pre-enforcement review of administrative orders. If Pryor were correct, the Sixth Circuit would necessarily have gotten it wrong. Moreover, the courts are generally "reluctant to draw inferences from Congress' failure to act." Brecht v. Abrahamson, 507 U.S. 619, 632, 113 S.Ct. 1710, 1719 (1993), citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306, 108 S.Ct. 1145, 1154, 99 L.Ed.2d 316 (1988).

In any event, the explicit bar on pre-enforcement review in SARA actually supports the United States' position that Congress does not want litigation to interfere with environmental

cleanups, whether they involve hazardous wastes under the Comprehensive Environmental Response, Compensation, and Liability Act (which SARA amended) or oil spills under the Oil Pollution Act and section 311 of the Clean Water Act. In both situations, protection of the environment and human health is of paramount importance. Related issues of who should pay for the cleanup or whether penalties should be imposed can be litigated at a later date when judicial review of EPA's final action is properly available in connection with an action by EPA to enforce the provisions of its order, to impose penalties, or to recover the costs of cleanup.

Notwithstanding Pryor's assertion to the contrary, the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, does not provide this Court with an alternative independent basis for subject matter jurisdiction. See Your Home Visiting Nurse Services, Inc. v. Shalala; 525 U.S. 449, 457-458, 119 S.Ct. 930, 935-936 (1999); Califano v. Sanders, 430 U.S. 99, 105-106, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). "Rather, the APA prescribes standards for judicial review of an agency action, once jurisdiction is otherwise established." Michigan Dept. of Environmental Quality v. U.S. E.P.A., 318 F.3d 705, 709 (6th Cir. 2003)(citing Dixie Fuel Co. v. Commissioner of Soc. Sec., 171 F.3d 1052, 1057 (6th Cir.1999) and Califano, 430 U.S. at 107, 97 S.Ct. 980). Moreover, the APA specifically provides that it does not apply to "(1) statutes [that] preclude judicial review," 5 U.S.C. § 701(a), and further clarifies that "[n]othing herein (a) affects other limitations on judicial review . . . or (2) confers authority to grant relief if any other statute . . . expressly or impliedly forbids the relief which is sought," 5 U.S.C. § 702.

As explained above and in the United States' initial memorandum in support of the subject motion, the Sixth Circuit and three other circuits have all determined that the CWA at

least impliedly forbids judicial review of EPA administrative orders before EPA seeks to judicially enforce such orders. Accordingly, neither the CWA nor the APA provide any basis for this Court to assert subject matter jurisdiction over Pryor's complaint.

II. Pryor's Constitutional Claims Do Not Confer Jurisdiction on the Court.

For the first time, Plaintiff appears to challenge the constitutionality of OPA and Section 311. Pl. MJP Opp. at 2 ("adopting Defendant's position annihilates the due process provisions of the Constitution thus rendering OPA and Section 311 unconstitutional"); 5 ("Precluding Review of EPA's Actions Would Render OPA Unconstitutional"); 8 ("Such a result renders OPA unconstitutional"). (Doc. 33) Yet, nowhere in its complaint does Pryor contend that OPA or Section 311 is unconstitutional, nor does the complaint seek any relief based upon any alleged unconstitutionality of the statutory scheme. Nor has Pryor sought leave to file an amended complaint. Because Pryor's newly articulated claims of unconstitutionality do not relate to any cause of action set forth in the complaint or to any of the bases for the United States' motion for judgment on the pleadings, they should not be considered by the Court. As the Sixth Circuit stated in Southern Ohio Coal Co., "Congress provided one forum in which to address all issues, including constitutional challenges, raised by the issuance of a compliance order: an enforcement proceeding." 20 F.3d at 1426 (emphasis added).

Pryor asks rhetorically, "If no such review can be had in this Court, then where?" Pl. MJP Opp., Doc. 33, at 2. The answer is contained in the United States opening memorandum. If a person wants to pursue a claim that EPA has taken its property, it may seek compensation in the Court of Federal Claims. If a person wants to pursue a claim that an administrative removal

order exceeded EPA's statutory authority or was arbitrary and capricious, it may assert such a defense if EPA seeks to enforce the order or to impose penalties for violations of the order. Further, if a person complies with an administrative removal order it may seek reimbursement of its removal costs pursuant to 33 U.S.C. §§ 2708 and 2713 by demonstrating that it is not liable or that liability should be limited. Finally, to the extent that a person challenges actions for which costs were incurred by the government, appropriate defenses may be raised in an action brought by the United States against that person for recovery of those costs.

Thus, Pryor's characterization of the United States' position as "bestow[ing] EPA with power to seize and destroy private property at its whim, without providing for any meaningful review by an independent tribunal," Pl. MJP Opp., Doc. 33, at 5, and as "grant[ing] EPA unfettered power to issue orders containing ridiculous, unsubstantiated requirements with no possibility of review by anyone," id. at 7, is pure hyperbole.[3] Judicial review of all of Pryor's claims is available at the appropriate time and in the appropriate forum.

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[3]If any party's position is "ridiculous" and "unsubstantiated," it is Pryor's vituperative, misleading and exaggerated characterization of the factual underpinnings of this case. Throughout its memorandum, Pryor conveniently overlooks the fact that EPA's involvement here was precipitated by Pryor's own actions that caused a well blowout, uncontrolled release of oil and natural gas with thousands of gallons of oil flowing to the surface, igniting and causing a subsequent discharge into Clear Creek and White Creek, both of which flow into the Obed Wild and Scenic River. (See Complaint, Doc. 1, ¶ 6; AR 2 8 0005-09) Nor is it coincidental that Pryor has cited only a single reference (AR 11 1 0249) to the voluminous record in the entirety of its opposition memorandum, (Pl. MJP Opp., Doc. 33, at 3, fn. 3), despite a plethora of factual assertions throughout its memorandum. That same referenced page, however, does also reflect the fact that Pryor's armed employees made thinly-veiled threats to EPA and Coast Guard contract employees during this time frame - threats that resulted in the terms of the agreement filed on December 3, 2002, prohibiting interference with authorized monitoring and barring threats to any parties to these proceedings. (AR 11 1 0249; Doc. 6)

CONCLUSION

Pryor's overstated rhetoric cannot confer jurisdiction on this Court. The United States' motion for judgment on the pleadings should be granted, and Pryor's complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by mailing the same via first class mail, postage prepaid, this 12th day of September, 2003

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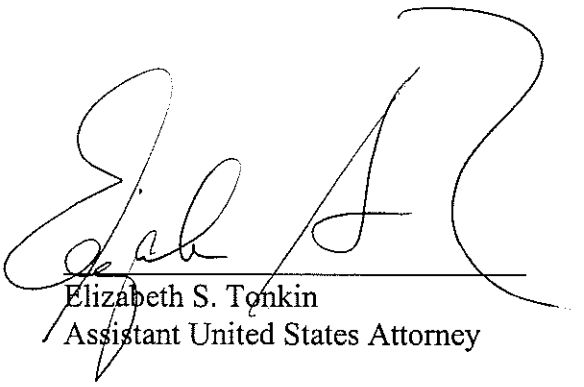

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