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 CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant filed its Cross-Motion for Summary Judgment urging the Court to hold as a matter of law that all U.S. Environmental Protection Agency ("EPA") actions taken at Pryor Oil Co., Inc.'s ("Pryor Oil's") Howard/White Unit # 1 oil and gas well ("the Well") were not, and are not, outside of its jurisdiction, arbitrary and capricious, or in violation of the United States Constitution. Defendant contemporaneously opposed Pryor Oil's Motion for Summary Judgment earlier filed on the limited question of EPA's jurisdiction to seize and destroy the Well after November 27, 2002, pursuant to Amendment # 6 of its Removal Action Order ("Amendment 6"). Plaintiff hereby opposes Defendant's overbroad motion, and requests that the Court consider issuing, *sua sponte*, summary judgment in favor of Plaintiff on all matters plead in the Complaint.

II. DISCUSSION

A. Defendant's Cross-Motion For Summary Judgment is Overly Broad.

In its cross-motion for summary judgment, Defendant urged this Court to hold as a matter of law that all of its actions taken in response to the blowout at Pryor Oil Co., Inc.'s ("Pryor Oil") Howard/White Unit #1 Well (the "Well") are not, and were not, outside of its jurisdiction, arbitrary and capricious, or in violation of the United States Constitution. Defendant's motion is, in part, beyond the scope of Pryor Oil's Complaint. The Complaint challenged Defendant's issuance and enforcement of its Amendment #6 because that order and Defendant's actions to enforce it went beyond Defendant's jurisdiction, were arbitrary and capricious, and violated Pryor Oil's constitutional rights.[1] Motions for summary judgment must be limited to the scope of the Complaint. *See* Fed. R. Civ. P. 56. Defendant's cross-motion for summary judgment, therefore, should be limited to Pryor Oil's claims.

B. Defendant's Cross-Motion for Summary Judgment Should Be Denied.

Under the Administrative Procedures Act ("APA"), a court cannot uphold agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction[;] ... or unsupported by substantial evidence." 5 U.S.C § 706(2)(A), (E); *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 548 (6th Cir. 2002). Only authorized conduct based on "reasoned, evidence-based explanation[s]" will survive. *Id.* While courts

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[1] For the convenience of the Court, Pryor Oil sets forth its claims here:

Claim One – "If Pryor Oil fails to meet EPA's December 1, 2002 deadline to construct and test the pipeline, EPA will seize control of the Well. EPA has indicated that it may perform an MIT and/or plug the Well and abandon it, all in violation of the Takings Clause and the Due Process Clause of the Fifth Amendment." *Complaint*, Doc. 1 at 12, para. 62.

Claim Two – "EPA's Amendment # 6 is outside the scope of its authority and constitutes an action that is arbitrary, capricious, and taken without procedure required by law." *Complaint*, Doc. 1 at 13, para. 67.

should not substitute their judgments for an agency's, a court's review of agency action, nonetheless, must be "searching and careful." *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971), *overruled on other grounds*, *Califano v. Sanders* 430 U.S. 99 (1977). In this case, Defendant's Amendment #6 violated the APA's standard of reasonableness for at least three reasons: (a) it was not based on a "reasoned, evidence-based explanation," (b) it ran contrary to Pryor Oil's constitutional right of due process, and (c) it exceeded the agency's statutory jurisdiction.

1. Because Amendment #6 Is Not Based On A "Reasoned, Evidence-Based Explanation" It Is Arbitrary and Capricious.

Amendment #6 defies any "reasoned, evidence-based explanation." Specifically, the administrative record lacks evidence to reasonably conclude that the Well is now leaking. Even if this were not so, the record shows that the EPA's imposed deadline ignored important realities of weather and engineering requirements; as such, its order is unreasonable and unsupported by the facts.

a. The administrative record fails to support the issuance of Amendment #6.

Defendant represented to the Court that the Well continues today to discharge oil directly to Clear Creek. This is untrue and cannot be supported by the record.[2]

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[2] Defendant's memorandum contains other inaccurate statements not material to this Opposition, that, for clarification, Pryor Oil here corrects:

- Defendant asserts that the Complaint seeks relief from EPA for seizing the pipeline. *See Df. Combined Mem.*, Doc. 38 at 11. Pryor Oil's Complaint was filed to prevent Defendant from seizing and destroying the Well. *See Complaint*, Doc. 1 at p.12, para. 62.
- EPA's OSC arrived at the site two days after the blowout on Sunday, July 21, 2002 (AR 2 8 0009) not Saturday, July 20, 2002 as stated by the Defendant. *See Df. Combined Mem.*, Doc. 38 at 5.
- While estimating the quantity of oil that was discharged from the Well, Defendant makes the following nonsensical statement: "This conservative estimate does not totally reflect the discharge, as Pryor reports to have collected 2,100 barrels of oil into tanker trucks." *Df. Combined Mem.*, Doc. 38 at 4, n.7.
  Pryor Oil used vacuum trucks to collect discharged oil from the containment pits. Pryor Oil's collection activities did not cause more oil to be discharged. Rather, Pryor Oil prevented oil from escaping into the soils and bedrock above Clear Creek. EPA's OSC arbitrarily ordered Pryor Oil to cease and desist, causing unnecessary harm to the environment. (AR 10 1 0003)
- Contrary to Defendant's statements, Defendant did not give Pryor Oil the opportunity to provide financial assurances regarding its ability to fund the Well-capping activities. EPA's OSC federalized

Defendant cited two items in support of its contention. First, Defendant pointed to countervailing evidence of a subsurface formation fracture contained in a September 16, 2002, memorandum drafted by Defendant's contractor Boots & Coots. *Df. Combined Mem.*, Doc. 38 at p.17, n.21. (*see also* AR 2 2 183-185) In that document Boots & Coots opined that fractures in the formation might *theoretically* be allowing oil to escape the Well and seep into Clear Creek. The memo concluded, "[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.) As fully discussed in *Pryor Oil's Reply to Defendant's Opposition to Pryor Oil's Motion for Summary Judgment*, Defendant ignored the fact that Boots & Coots specifically retracted its support for this "theoretical possibility" in a subsequent memorandum. After thorough study, Boots and Coots concluded the "projected source of the seep was residual oil remaining from the initial blow out." (AR 2 2 0224)

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the site without discussing Pryor Oil's ability to fund the Well-capping activities with any Pryor Oil representative. 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. (AR 2 1 0072-73) EPA's OSC later persuaded Boots and 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. Pryor Oil was in fact capable of financing the recovery efforts. Boots and Coots had already performed work under its contract with Pryor Oil and had additional equipment in transit to the Well site. Boots and Coots was not in the process of leaving the site. (AR 2 4 0001-4)

- Defendant implies that Pryor Oil tried to hide the fact that the blowout had occurred by failing to notifying authorities. *Df. Combined Mem.*, Doc. 38 at 5, n.8. Contrary to that assertion, Pryor Oil immediately notified the Tennessee Department of Environment and Conservation ("TDEC"). Jeff Laxton, a TDEC Inspector arrived at the site before dawn the next day, Saturday, July 20, 2002, a few hours after the blowout. Mr. Laxton was assisting Pryor Oil in its recovery efforts when the Well caught fire.
- Defendant asserts that Pryor Oil ceased its recovery operations after the Well caught on fire. Df. Combined Mem., Doc. 38 at 4. This statement is false. Booms remained in the creek, containing the majority of the oil that reached the water. Besides the two containment areas that were constructed prior to the Well being drilled, Pryor Oil constructed additional containment areas before and after the fire. Pryor Oil used vacuum trucks and absorbent material to recover released oil before and after the fire. Pryor Oil arranged for more help to arrive on Monday morning, July 22, 2002, to assist with all aspects of the emergency. Defendant, however, stopped the ongoing emergency response in its tracks.

Second, contrary to its own expert's official position stated above, Defendant latched onto the emulsified sheen that intermittently appeared in Clear Creek as evidence that the Well continued to leak after it was capped. Defendant stated "[t]here is nothing in the Administrative Record to suggest that this discharge of oil . . . reasonably could be traced to a source other than the Pryor well." *Df. Combined Memo.*, Doc 38 at 17. Defendant continued "at the beginning of September, 2002, Pryor's well was discharging oil into Clear Creek at a rate of approximately 50 gallons per day." *Df. Combined Memo.*, Doc 38 at 17.

These statements are not true and cannot be supported in the administrative record. After the Well was capped it discharged nothing, not one drop. Even before Boots and Coots issued its *official position*, Defendant's other expert raised serious doubts regarding the validity of Defendant's theory that the Well was leaking directly into Clear Creek. On September 4, 2002, Patrick O'Dell, a petroleum engineer and an employee of the United States National Park Service, notified Defendant that the "[o]il that continues to flow into Clear Creek is most likely from released oil migrating through pores associated with surface and shallow formations. If the oil level in the well is deep it is unlikely that oil is migrating to the surface and entering into the creek." (AR 2 1 0056) Pryor Oil also provided Defendant with conclusive evidence that the Well was not leaking. *See Plaintiff Pryor Oil's Memorandum in Support of it Motion for Summary Judgment*, Doc. 30, at 11-12.

Defendant cited Pryor Oil's failure to include a date by which it would perform the MIT in its numerous submitted workplans as justification for "EPA's threat to respond more aggressively", *i.e.*, to seize and destroy the Well. *Df. Combined Mem.*, Doc 38 at 23. Defendant rejected each workplan because Pryor Oil refused to predict when the MIT could be performed safely on the Well, which was pressurized to more than 500 p.s.i.[3]

[3] On November 22, 2002, Pryor Oil submitted the attached packet of material to Defendant for inclusion in the administrative record. *See Letter from Beverlee Roper to Martha Brock*, with enclosures at Appendix A. The packet contains correspondence between Pryor Oil and Defendant regarding the MIT issue, and specifically refutes

Defendant's deadline to conduct the MIT failed to account for evidence generated by the government-ordered Gas Deliverability Test ("GDT"). Defendant ordered Pryor Oil to conduct the GDT at great cost and inconvenience to Pryor Oil. Pryor Oil submitted the results of the test confirming that the pressure in the Well would remain high for an unpredictable amount of time. Defendant never responded and ignored the results of its GDT when it set an unrealistic deadline for performing the MIT in Amendment #6.

b. Defendant's issuance and enforcement of Amendment #6 were arbitrary and capricious.

Defendant's Amendment #6 imposed a deadline that Defendant knew Pryor Oil could not meet. Defendant had initially delayed approval of the construction of the gathering pipeline (AR 10 1 0006-7; 11 04 0024-25) and then, in Amendment #6, dictated an unrealistic and arbitrary deadline for Pryor Oil to complete its construction.[4] (Amendment # 6 AR 10 11 0048-53) Knowing Pryor Oil would be unable to comply with its arbitrary deadline, Defendant began coordinating the seizure and destruction of the Well, before or at the time it issued Amendment #6. (AR 11 1 0233, 0237) Defendant hired contractors and lined up equipment to plug the Well weeks before the deadline expired. (AR 11 1 0233, 0237) Defendant undertook all of these actions despite the fact that its experts unanimously believed that the Well was not an immediate threat and that the timing of the Mechanical Integrity Test was not critical. (AR 2 1 0058; 2 1 0056; 2 2 0224)

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the government's accusation that Pryor "deliberately failed" to include the specific time frame. While the majority of the documents can be found in the current administrative record, which has been arranged in some manner other than sequentially, the packet, as submitted by Pryor Oil is not. Reading the correspondence chronologically provides an independent observer with an accurate view of the situation as it occurred. It should be noted that Defendant never responded to Pryor Oil's request to include the documents in the AR despite two subsequent letters asking about its status.

[4] Defendant cited to the administrative record claiming that Pryor Oil said it could complete the pipeline in three weeks. Defendant has alluded to some statement possibly made by an employee of Pryor Oil. Neither EPA's OSC nor its counsel contacted Jim Pryor, the official site contact, to inquire about a timeframe for completion of the gathering line. (AR 10 11 0007)

Amendment #6 is also *per se* arbitrary and capricious because it failed to provide for *force majeure* events such as severe weather and other factors beyond Pryor Oil's control. On November 18, 24, and 26, Pryor Oil notified Defendant that tornadoes and heavy rains pounding Morgan County would prevent it from completing the pipeline within Defendant's arbitrary timeframe. Defendant summarily denied Pryor Oil's repeated requests for an extension of time to complete the pipeline. Oddly, Defendant denied Pryor Oil's requests although Pryor Oil never asked for an extension of time to complete the Mechanical Integrity Test ("MIT"), just the pipeline.

In summary, rather than anchor Amendment #6 on "reason" and "evidence," Defendant resorted instead to mere belief and conjecture. That is not enough. Defendant completely ignored the overwhelming evidence before it that the Well was not an ongoing source for the oil that seeped into Clear Creek and adopted a theory that had no support anywhere. Defendant's Cross-Motion for Summary Judgment should be denied and summary judgment should be granted in Pryor Oil's favor because Defendant failed to provide a reasoned, evidence-based explanation for the its issuance and enforcement of Amendment #6.

2. Amendment #6 Violates Pryor Oil's Constitutional Right of Due Process.

Under the Fifth Amendment the federal government cannot interfere with Pryor Oil's property rights without "due process of law." U.S. CONST., amendment 5 ("No person shall . . . be deprived of life, liberty, or property, without due process of law"). A court decides what process is due by weighing three factors: (1) the "private interest" threatened, (2) the risk of an "erroneous deprivation . . . through the procedures used" and the "probable value . . . of additional . . . procedural safeguards," and (3) the government's interest in the current procedure. *Matthews v. Eldridge*, 424 U.S. 319, 321 (1976); *see also,* Richard Pierce, Jr., et al., *Administrative Law and Process* 258-59 (3d ed. 1999).

The Eleventh Circuit recently held that an enforcement order issued by Defendant under the Clean Air Act would violate the Due Process Clause were it to have the "force of law" (meaning its violation would expose one to fines or punishment) because Defendant had not provided the regulated party with a "full and fair hearing . . . 'at a meaningful time and in a meaningful manner.'" *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1259 (11th Cir. 2003) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). While not at issue in the case, the court in *Tennessee Valley* suggested the problem might also apply to orders under the other environmental statutes. *Id.* at 1251.

In the case at bar, all three *Matthews* factors cut in favor of Pryor Oil. First, Defendant concedes that its order amounts to a seizure and destruction of Pryor Oil's property. Defendant, in support of its cross-motion for summary judgment, explicitly states that Defendant is authorized to seize and destroy private assets without considering relevant and available information. *Df. Combined Mem.*, Doc. 38 at 23-24. Second, the facts demonstrate that without some mechanism for Pryor Oil to confer with Defendant about the Well, the possibility of an "erroneous deprivation" is very high. Here, Defendant actually ordered the shut down of a valuable asset according to an unmeetable deadline without any credible evidence of threatened danger or other emergency. Had Defendant not refused Pryor Oil's earlier plea for a dialogue and non-binding mediation, this deprivation quite probably would not have occurred. Finally, Defendant has shown no reason why its process – which in reality was no process – could not have accommodated some meaningful opportunity for Pryor Oil to express and justify its misgivings. In fact, Defendant's interest in speedy environmental protection was, in fact, hampered by its refusal to allow Pryor Oil to address the circumstances in the way best supported by the actual evidence.

3. Amendment #6 Exceeds the Agency's Statutory Jurisdiction Under Section 311(c).

Defendant's lack of authority under Section 311(c) is, by itself, enough to invalidate its actions. *See Plaintiff's Motion for Summary Judgment and Supporting Memorandum,* Docs. 29 and 30. In addition, this lack of authority provides yet another example of arbitrary and capricious behavior. *Infra.* at subsection B.

Defendant's assertion that its much broader interpretation is entitled to so-called "*Chevron* deference" is incorrect. *Chevron USA Inc. v. Natural Resources Defense Counsel,* 467 U.S. 837, 843-45 (1984). *Chevron* deference is not appropriate in this case. First, the statute is clear on its face. It only gives Defendant authority to act when a discharge is occurring or a threat of a substantial discharge exists, as discussed fully, in *Pryor Oil's Memorandum in Support of its Motion for Summary Judgment.*

Second, according to the recent decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*") where an agency's construction of a statute would cause a court to "needlessly reach constitutional issues," a court need not defer to that interpretation. *SWANCC*, 121 S.Ct. 675, 683 (2001). In the case at bar, Defendant's view of its authority, in fact, violates a constitutional guarantee. But even if it did not, the Supreme Court's caution against reaching constitutional issues would deprive Defendant of any interpretive deference. *See SWANCC,* 121 S.Ct. at 683.

SWANNC also cautions that to the extent agency interpretation of a statute is contrary to the plain language of a statute, courts should give that interpretation a "hard look." Here, to the extent EPA's interpretation of Section 311(c) allows for long-term authority over the Well, this Court should give that interpretation a "hard look" in relation to the short-term goals expressed in the statute. Defendant argued that jurisdiction remains over the Well because an intermittent oil sheen continues to appear in Clear Creek. Defendant's argument is outside the scope of the Complaint, which never challenged Defendant's jurisdiction and long term goals at Clear Creek. With respect to jurisdiction at the Well, however, the short-term goal of ensuring an effective

and immediate removal of a discharge was over and done with when the Well was capped on July 27, 2002.

C. Summary Judgment Should Be Granted For Pryor Oil on All Claims Plead in the Complaint.

On August 20, 2003, Pryor Oil moved for summary judgment on the issue of whether Defendant had jurisdiction over the Well after November 27, 2002, the date Pryor Oil filed its Complaint. Pryor Oil has not formally moved for summary judgment on the remainder of its claims.

In drafting this memorandum, however, Pryor Oil recognizes that a basis exists, both on the facts and the law, for the Court to enter summary judgment in Pryor Oil's favor on the remainder of its claims. Rather than request an extension of time to file an additional motion for summary judgment, thereby extending the briefing on this case, Pryor Oil requests that the Court grant it summary judgment on all of its claims. Granting summary judgment to a non-moving party is within the Court's power. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, (1986) ("district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence"); *Coach Leatherware Co., Inc. v. Anntaylor, Inc.*, 933 F.2d 162, 167 (2nd Cir. 1991) ("it is most desirable that the court cut through mere outworn procedural niceties and make the same decision as would have been made had the [non-moving party] made a cross-motion for summary judgment"); *Holland v. Dole*, 591 F. Supp. 983, 984 n.1 (M.D. Tenn. 1984).

III. CONCLUSION

Granting summary judgment in Pryor Oil's favor is appropriate because the administrative record demonstrates that Defendant acted irrationally and without a factual basis when it issued Amendment #6 and attempted to enforce the requirements set forth therein.

Amendment #6 exceeded Defendant's statutory mandate and violated Plaintiff's constitutional right of due process.

For the forgoing reasons, Defendant's Cross-Motion for Summary Judgment should be denied. Plaintiff Pryor Oil further requests this Court to enter summary judgment for Plaintiff on all claims in its Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via U.S. Mail this 8th day of October, 2003, upon:

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