

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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STATE OF WISCONSIN, DEPARTMENT  
OF NATURAL RESOURCES,

Plaintiff,

v.

MURPHY OIL USA, INC.,

Defendant.

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OPINION AND  
ORDER

00-C-0408-C

This is a civil action for injunctive and monetary relief brought by plaintiff State of Wisconsin, Department of Natural Resources against defendant Murphy Oil USA, Inc. Plaintiff alleges that defendant's oil refinery in Superior, Wisconsin, has violated numerous state and federal environmental laws.

Presently before the court is defendant's motion to dismiss. Defendant lists five grounds for dismissal:

- 1) the attorney general for the State of Wisconsin lacks authority to enforce the federal laws that plaintiff contends have been violated by defendant;
- 2) this court lacks subject matter jurisdiction over the state law claims the attorney general is authorized to pursue;

- 3) the first through fourth claims of plaintiff's complaint are barred by Wis. Stat. § 285.81(4);
- 4) the "permit shield" protects defendant from prosecution under the Clean Air Act; and
- 5) the state must exhaust its administrative remedies before proceeding to enforcement.

In opposition, plaintiff argues that the attorney general *does* have the authority to enforce federal laws under Wis. Stat. § 299.95, the citizen suit provision of the federal Clean Air Act, 42 U.S.C. § 7604(a)(3), and Wis. Stat. § 165.25(4), and because he does, this court has jurisdiction over the suit.

I conclude that the Wisconsin attorney general's power to enforce environmental laws is limited to the enforcement of *state* laws, over which this court has no jurisdiction. Therefore, defendant's motion to dismiss for lack of subject matter jurisdiction will be granted.

#### OPINION

"The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." GNB Battery Technologies v. Gould, Inc., 65 F.3d 615, 619 (7th Cir. 1995). "Under the well-pleaded complaint rule,

federal law must create the cause of action, or some substantial, disputed question of federal law must be an element in the plaintiff's claim." Id.; see also Lehmann v. Brown, No. 99-3550 (7th Cir. Oct. 16, 2000). Although plaintiff pleads federal causes of action in its complaint, it has not authorized the attorney general to bring a federal cause of action to enforce federal laws.

#### A. The Limited Powers of The Wisconsin Attorney General

The Supreme Court of Wisconsin has recently affirmed a long history of precedent maintaining the limited powers of the Wisconsin attorney general. See State v. City of Oak Creek, 232 Wis. 2d 612, 605 N.W.2d 526 (2000), in which the court stated that "in Wisconsin . . . the powers of the attorney general are strictly limited . . . he is given only such powers as 'shall be prescribed by the law.'" Id. at 624, 605 N.W.2d at 531 (citing Wis. Const. art. VI, § 3). The court emphasized that "it is therefore essential to the maintenance of an action brought by the attorney general . . . that we should find some statute authorizing it." Id. Moreover, "the attorney general is devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens." Id. at 627, 605 N.W.2d at 533.

B. Wis. Stat. § 299.95

Plaintiff misses the mark when it argues that Wis. Stat. § 299.95 authorizes the attorney general to enforce federal environmental laws. Wis. Stat. § 299.95 provides that:

the attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except §§ 281.48, 285.57, 285.59 and 299.64, and all rules, special orders, licenses, plan approvals and permits of the department, except those promulgated or issued under §§ 281.48, 285.57, 285.59 and 299.64 and except as provided in § 285.86.

As the Supreme Court of Wisconsin has made clear, the attorney general cannot bring an action without an affirmative statutory grant of enforcement power. It is plainly apparent that § 299.95 does not authorize the attorney general to enforce any *federal* environmental laws.

Plaintiff contends that the attorney general has the power to enforce federal environmental laws because those laws are *related* to the state statutes listed in § 299.95. It is true that the state laws are patterned after the federal Clean Air Act. They were approved by the United States Environmental Protection Agency and can be enforced by that agency, but the state and federal laws are not one and the same. Plaintiff must still cite authority specifically granting the attorney general power to enforce the *federal* laws.

Plaintiff cites an Eighth Circuit case, Union Electric Co. v. Environmental Protection Agency, 515 F.2d 206 (8th Cir. 1975), that explains the close relationship between the state and federal laws. The court discusses the prosecution power of the Environmental Protection

Agency: “[the state laws] have the force and effect of federal law and may be enforced by the Administrator in federal courts.” Id. at 211. The court then details the power of the states: “*the state may enforce its regulations through state proceedings, and citizen’s suits in limited circumstances.*” Id. (emphasis added). The court does not say that the states may enforce federal laws.

Section 299.95 does not authorize the Wisconsin attorney general to prosecute alleged violations of federal environmental statutes either explicitly or by relation to federal laws.

C. Citizen Suit Provision of the Federal Clean Air Act, 42 U.S.C. § 7604(a)(3)

Although Congress has created a narrow means for state attorneys general to sue under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a)(3), the state of Wisconsin has not granted its attorney general the power to do so. The citizen suit statute authorizes “any person” to commence a civil action for certain violations of the federal environmental laws and § 7602(e) defines “person” as including states. See 42 U.S.C. §§ 7602(e), 7604(a)(3). Plaintiff cites a case in which the state of New York used the citizen suit provision to sue a neighboring New Jersey corporation because it could not sue the corporation under New York state law. See State of New York v. U.S. Metals Refining Co., 771 F.2d 796 (3rd Cir. 1985). It is irrelevant, however, whether § 7604(a)(3) would allow Wisconsin to sue a corporation

within its own borders because plaintiff has not cited a statute that specifically empowers the Wisconsin attorney general to bring such a suit.

D. Wis. Stat. § 165.25(4)

Plaintiff is incorrect in its contention that Wis. Stat. § 165.25(4) grants the attorney general the power to sue for violations of federal environmental laws. Plaintiff quotes § 165.25(4)'s directive that the Department of Justice “furnish all legal services required by the department of natural resources” and argues that this directive supports the attorney general’s “filing of lawsuits to enforce the laws *the Department administers.*” Plf.’s Br. in Opp’n to Mot. to Dismiss, dkt.#9 at 2 (emphasis added). Even if that phrase in § 165.25(4) does grant enforcement powers, enforcing a federal environmental law is not the type of “legal service required by the department” because the Wisconsin Department of Natural Resources does not administer federal laws.

Furthermore, § 165.25(4)'s directive to furnish legal services to the department cannot be construed as a grant of *any* enforcement powers. This is evidenced by the fact that 1) when the legislature intends the attorney general to exercise enforcement powers, it states so explicitly (see, e.g., § 165.25(4)(ar) “the department of justice shall furnish all legal services required by the department of agriculture, trade and consumer protection relating to the enforcement of

...”); and 2) the legislature has delineated the attorney general’s powers regarding enforcement of environmental laws in the more specific provision of Wis. Stat. § 299.95. Section 299.95 lists the specific environmental provisions that the attorney general has the power to enforce. If § 165.25(4) actually granted the attorney general enforcement powers for *all* environmental laws, § 299.95 would be rendered superfluous. The general rule of statutory construction is that “a court should not construe a statute in a way that makes words or phrases meaningless, redundant or superfluous.” Welsh v. Boy Scouts of America, 993 F.2d 1267, 1272 (7th Cir. 1993). Moreover, “it is a cardinal principle of statutory construction that the more specific controls over the general.” Resolution Trust Corp. v. Gallagher, 10 F.3d 416, 420 (7th Cir. 1993).

#### E. Summary

Because plaintiff has failed to show that the Wisconsin attorney general has the power to bring a cause of action under federal law, I have to read its complaint as raising only questions of state law, over which this court has no subject matter jurisdiction.

#### ORDER

IT IS ORDERED that the motion of Murphy Oil USA, Inc. to dismiss the complaint

is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 25th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge