February 24, 1989

MEMORANDUM

SUBJECT: Opinion in Frank J. Kelley, Michigan Natural Resources Commission, Michigan Air Pollution Control Commissions, and David F. Hales v. Albar Industries, C.A. No. 88-CV-40302-FL, E.D. Michigan, February 7, 1989

FROM: Terrell E. Hunt
Associate Enforcement Counsel
Air Enforcement Division

TO: Edward E. Reich
Acting Assistant Administrator
for Enforcement and Compliance Monitoring

On February 7, 1989, the U.S. District Court for the Eastern District of Michigan issued a decision upholding the right of a State to bring suit in Federal court as a citizen under the Clean Air Act.

The State of Michigan recently filed suit against Albar Industries under section 304 of the Clean Air Act (the citizen suit provision) in U.S. District Court, alleging that Albar had violated certain new source permitting requirements contained in the Federal new source regulations and the Michigan State implementation plan. Albar challenged Michigan's standing to sue under section 304. The court upheld Michigan's right to maintain the action, stating that "the inquiry should end with the plain language of the statute." [Opinion at page 2.]

The court was persuaded, as well, by the decision in Hancock v. Train, 426 U.S. 167, 196, 48 L. Ed. 555, 575 (1976). The Supreme Court found, in Hancock, that States have standing to sue under section 304. The Albar court noted that, in drafting the Clean Air Act amendments of 1977, Congress chose to let the effect of Hancock stand by not altering 304 and 302(e) to preclude State access to Federal courts.

Albar's motion to strike Michigan's request for civil penalties was also denied on the ground that while the Clean Air Act does not authorize penalties under section 304, the State can collect them under the authority of the State statue.

A copy of the decision is attached. [Contact Judy Katz, (202)382-2843, for a copy.]

Attachment

cc: Gerald Emison, Director
Office of Air Quality Planning and Standards
Alan W. Eckert
Associate General Counsel
Air and Radiation Division
John S. Seitz, Director

Stationary Source Compliance Division
Air Branch Chiefs/Team Leaders
Offices of Regional Counsel, Regions I-X
Air Compliance Branch Chiefs
Air Divisions, Regions I-X

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

FRANK J. KELLEY, Attorney General of the State of Michigan; and FRANK J. KELLEY, ex rel, MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN AIR POLLUTION CONTROL COMMISSION, and DAVID F. HALES, Director of the Michigan Department of Natural Resources,

Plaintiffs,

CIVIL ACTION
NO: 88-CV-40302-FL

v.

ALBAR INDUSTRIES, INC.,

Defendant.

_____/

MEMORANDUM OPINION AND ORDER

Before the Court is defendants motion to Dismiss, October 25, 1988. This motion is DENIED; plaintiffs have standing to sue. The motion is also DENIED as to civil penalties, subject to the condition herein specified.

I. STANDING

This an action brought by the State of Michigan pursuant to Section 304 of the Clean Air Act, 42 U.S.C. Section 7604, against Albar Industries, a spray painting concern, for enforcement of air pollution standards. At issue is whether the state may sue under the "citizen suits" provision of the Act, which permits commencement of

civil actions by any "person." Id. "Person" is defined in the Act as including a state. Section 302, 42 U.S.C. Section 7602(e).

The Court is persuaded by plaintiffs' argument that the inquiry should end with the plain language of the statute. The United States Supreme Court rejected a similar argument against state use of Section 304 in Hancock v. Train, 426 U.S. 167, 196, 48 L.Ed.2d 555, 575 (1976). The Court wrote that the "only means provided by the Act" for the states to enforce Section 118 of the Act against federal facilities was via a Sections 304 and 302(e) "citizen suit."

Congress overruled the substance of the Hancock decision the following year by enacting an amendment to Section 118, which required the states to sue federal installations for air quality violations by means of state enforcement actions. Defendant here argues that the Section 118 amendment should not be interpreted to mean that Congress intended to remove citizen suits as a whole from state access. This Court rejects that argument. First, Hancock presented Congress with the state standing issue. Apparently in response, rather than altering Sections 304 and 302(e) to preclude the states federal access, Congress amended Section 118 only and left the other provisions undisturbed. It is traditional that when a court interprets a statute and the statute is subsequently amended in a way that does not invalidate the court's reasoning, it is implicit that the Legislature has accepted that reasoning. Here, because the United States Supreme Court

found in Hancock that the states have standing under the citizen suit provision, coupled with congress's subsequent declining to change the statute's plain language that includes states as litigating "persons," the Court concludes that this lawsuit
is authorized. See also Alabama ex rel. Graddick, 648 F.Supp. 1208, 1210 (M.D. Ala. 1986); New York v. Thomas, 613 F.Supp. 1473 (D.C. D.C. 1985).

Defendant's other arguments to the contrary are unconvincing. Defendant urges that ambiguity exists, sufficient to justify judicial interpretation of the otherwise plain language of the statute, by pointing to a provision requiring that prior to instituting suit, a citizen plaintiff must notify the federal Environmental Protection Agency (EPA), the violator, and the state. Defendant argues from this that a reading of "person" to include a state would render this provision nonsensical: it would require a state to notify itself. Although perhaps not a model of statutory draftsmanship, this is not necessarily as illogical a situation as defendant would have it. First, the notice provision would still require a state plaintiff to inform the violator and the EPA. Second, as plaintiff argues, the suing agency might need to notify other agencies within the state entity that also have an interest in the litigation. Neither of these is an exercise in nonsense.

Moreover, as a practical matter, defendant has failed to convince this Court that the states, as primary enforcers of the Clean Air Act but aided by federal monies and leadership 42 U.S.C. Sections 7401(a) (3) and (4), should not be permitted to retain the choice between the state or the federal forums. Defendant's policy argument that the federal courts should not be burdened with this litigation--is unpersuasive. Therefore, it is hereby found that the state of Michigan has standing in federal court to sue a private
corporation under the citizen suit provision of the Clean Air Act. The Court will, accordingly, exercise its pendent jurisdiction to decide plaintiff's state claims arising out of the same operative core of facts.

II. CIVIL PENALTIES

Defendant has moved to strike plaintiffs' request for civil penalties on the ground that the statute does not authorize such recovery to citizen suit plaintiffs. The Court agrees insofar as the federal statute is concerned, but will permit penalty claims under the state statute if such are provided for.

In a citizen suit brought under Section 304, the plain language of the statute empowers a court only to order compliance with the emission standards or limitations sought to be enforced. Section 304, 42 U.S.C. Section 7604(a). The statute reads in pertinent part, "[t]he district courts shall have jurisdiction . . . to enforce . . . an emission standard or limitation, or such an order [issued by the EPA Administrator or the state], or to order the Administrator to perform such act or duty, as the case may be." As another district court has stated, "neither the plain language nor the legislative history of Section 304 can support the broad construction [--that federal courts can transplant state monetary penalties into the federal statute--] which plaintiff seeks to have placed thereon." Illinois v. Commonwealth Edison Co., 490 F.Supp. 1145, 1150-51 (N.D. Ill. 1980); see also California v. Department of the Navy, 431 F.Supp. 1271, 1293 (N.D. Cal. 1977). Thus, there is no federal statutory authority for the granting of civil penalties.

There is authority, however, for the imposition in federal court of sanctions as they may be provided in state law. The Court is persuaded that such is the case, for the reasons stated in Graddick, 648 F.Supp. at 1211. In that case, the court wrote that "[g]iven the complex and interrelated nature of state and federal regulations governing air pollution and the concurrent authority to enforce said regulations shared by both the state and federal agencies, [Alabama] cannot be said to be attempting to enforce state regulations without also being found to be enforcing federal regulations.[SEE FOOTNOTE *]

Plaintiffs' right to pursue civil enforcement penalties, therefore, exists insofar as it is grounded in state law. As such, plaintiffs may pursue penalties in this forum, on the condition that plaintiffs here file

an enumeration of Michigan statutory authority for such penalties within ten days of the date of this writing. Based on that condition, defendant's Motion to dismiss the penalties relief is DENIED.

SO ORDERED

Dated: 2/17/87

STEWART A. NEWBLATT
United States District Judge

[FOOTNOTE *] The Court notes defendant's attempt to distinguish Graddick from the case at bar, by which defendant argues that the Graddick defendant was a federal facility governed by Section 118 of the Act. The Graddick court's written consideration of Section 118's legislative history, which indeed does not apply to this case, was primarily devoted to whether the government had waived sovereign immunity. This factor does not affect Graddick's reasoning with regard to the interrelatedness of the state and federal regulatory schemes, which, as noted, has persuaded the Court.

CERTIFICATION OF SERVICE

UNITED STATES OF AMERICA)
) SS
EASTERN DISTRICT OF MICHIGAN)

CASE NO: 88-40302

I, the undersigned, hereby certify that I have on the 7th day of February, 1989, mailed a copy of the Memorandum Opinion and Order in the foregoing cause, pursuant to Rule 77(d), Fed.R.Civ.P., to the following persons at the addresses given:

Stewart H. Freeman
Assistant Attorney General
Environmental Protection Division
720 Law Building
525 West Ottawa
Lansing, MI 48913

Joseph M. Polito, Esq.
William A. Wichers, II Esq.
Mark R. Werder, Esq.
Robert A. Hykan, Esq.
2290 First National Bldg.
Detroit, MI 48226

Colette J. Lehoux, Secretary to
Stewart A. Newblatt
United States District Judge