IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

J. FRED ROBINSON and EVELYN ROBINSON, his wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 01-697 GMS
UNITED STATES COLD STORAGE, INC.,	)	
Defendant and Third Party Plaintiff	)	
v.	)	
AMERICAN PREMIER UNDERWRITERS INC., as successor-in-interest to the Philadelphia, Baltimore, and Washington Railroad, and the UNITED STATES AIR FORCE, an agency of the federal government,	)	
Third Party Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

In October 2000, plaintiffs Fred and Evelyn Robinson filed a complaint in Delaware state court against United States Cold Storage ("USCS") to compel USCS to reimburse them for costs associated with the environmental restoration of an allegedly contaminated parcel of land they purchased from USCS.[1]

[1] USCS is not an agency of the federal government.

USCS then filed a third party complaint against American Premier Underwriters ("APU") and the United States Air Force alleging that APU and the U.S. Air Force had contributed to the contamination of the land. USCS seeks contribution from the third-party defendants under Delaware common law and the Delaware Hazardous Substances Cleanups Act ("HSCA"), 7 Del. Code. §§ 9101-9120. The U.S. Air Force removed the action to federal court pursuant to 28 U.S.C. 1442(a)(1). (D.I. 1 at 1.)

Presently before the court is the U.S. Air Force's motion to dismiss the third party complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Specifically, the U.S. Air Force alleges that it is an agency of the United States, and the United States has not waived its sovereign immunity in this action.[2] The court agrees and will, therefore, grant the Air Force's motion to dismiss. Moreover, because dismissing the Air Force as a party removes the only basis for federal jurisdiction, the court will dismiss the remaining claims in this case.

II. FACTS

On December 19, 1985, the Robinsons purchased the parcel of land in question from USCS.[3] The Robinsons subsequently discovered that the soil on the land contained petroleum. It was believed that the petroleum contamination related to the home heating oils that were released on the site in 1978 and 1993. The State of Delaware conducted further testing on the land. As a result, the State discovered that arsenic was also present, and that the levels of petroleum and arsenic were above permitted levels. The Robinsons then hired an independent environmental consulting firm who discovered underground storage tanks

[2] USCS did not respond to this motion.

[3] The land is located in Newark, Delaware.

containing further hazardous substances.[4] The Robinsons entered into a Voluntary Compliance Agreement with the State of Delaware to engage in a process of remediation at the site. The Robinsons allege that they spent $366,662.00 in order to accomplish this clean-up. The Robinsons then sued USCS for contribution to recover the money expended in clean-up efforts.

USCS filed a third party complaint alleging that APU and the U.S. Air Force were also responsible for the environmental degradation at the site. USCS alleges that APU's predecessors-in-interest released hazardous materials onto the property during railroad operations. Regarding the U.S. Air Force, USCS asserts that on May 25, 1954, an airplane owned and operated by the U.S. Air Force crashed onto the parcel in question. USCS contends that the plane crash resulted in the release of hazardous substances onto the site, causing environmental contamination.

III. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to address the merits of the plaintiff's complaint. *See Lieberman v. Delaware*, No. CIV.A.96-523, 2001 WL 1000936, at *1 (D. Del. Aug. 30, 2001). The motion should be granted where the asserted claim is "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Coxson v. Comm. of Pennsylvania*, 935 F. Supp. 624, 626 (W.D. Pa. 1996) (citing *Growth Horizons v. Delaware County*, 983 F.2d 1277, 1280-81 (3d Cir. 1993). Additionally, a motion to dismiss under 12(b)(1) may present either a facial or factual challenge to subject

[4] The complaint does not indicate what the hazardous substances were.

matter jurisdiction. *See Mortensen v. First Federal Savings and Loan*, 549 F.2d 884, 891 (3d Cir. 1977). This case presents a facial challenge because the U.S. Air Force does not dispute the existence of the jurisdictional facts alleged in the complaint. Therefore, the court must accept the facts alleged in the complaint as true, *see Zinerman v. Burch*, 494 U.S. 113, 118 (1990), and make all reasonable inferences in favor of the plaintiff. *See Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990).

IV. DISCUSSION

A. Subject Matter Jurisdiction

Federal courts have no jurisdiction to hear a claim against the United States absent a waiver of sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal government and its agencies from suit."). Moreover, this waiver must be clearly and "unequivocally" expressed. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). Specially, federal agencies may only be made subject to state regulation where there has been a clear Congressional mandate. *See Hancock v. Train*, 426 U.S. 167, 179 (1976).

USCS's claim is rooted in the Delaware HSCA. The HSCA imposes liability on persons who owned or operated the contaminated facility at any time, disposed of a hazardous substance at the facility, or are "responsible in any other manner for the release or imminent threat of release" of a hazardous substance. 7 Del. Code. §§ 9105(a). However, because HSCA is a state regulation, there must be a clear Congressional mandate permitting the U.S. Air Force to be sued pursuant to its terms.

The pre-eminent federal environmental law is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1980). If the United

States has waived sovereign immunity at all in this area, the waiver would be expressed in CERCLA. In fact, CERCLA contains a provision that explicitly waives the sovereign immunity of the United States when the United States is being sued under its provisions. *See* 42 U.S.C. § 9620(a)(1). However, CERCLA's waiver regarding suits brought under state law is less broad. The statute states, "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States." 42 U.S.C. § 9620(a)(4).

The waiver language in CERCLA is not sufficient to permit an exercise of jurisdiction over the U.S. Air Force under the facts in this case. USCS's claim hinges on the fact that the U.S. Air Force crashed a plane on the cite in 1954. CERCLA, however, only waives immunity as to "facilities" owned by the United States. The United States did not own the site in question. Further, the court cannot conclude that the common meaning of facility encompasses an airplane that passed over the site and accidentally crashed there. Moreover, since the plane no longer exists, the court refuses to find that it is a facility.

More important, even if the airplane could be considered a facility for CERCLA purposes, CERCLA's waiver applies only to facilities presently owned and operated by the federal government. *See Redland Soccer Club v. Dep't of the Army*, 801 F. Supp. 1432, 1436 (M.D. Pa. 1992) ("We believe the plain language to mean facilities *currently* owned or operated."). In this case, the plane crash in question occurred nearly fifty years ago, and again, the plane no longer exists. Thus, the plane is not currently operated by the federal government. Since the plane is neither a facility nor currently in operation, the court finds that USCS has failed to allege facts that prove the U. S. Air Force has engaged in an activity that would cause the court to conclude that it has waived its sovereign immunity under CERCLA. Since

the United States has not consented to suit, USCS's statutory and common law claims must be dismissed.

B. The Remaining Claims and Parties

The dismissal of the claims against the Air Force requires the court to consider whether to continue to exercise jurisdiction over the remaining claims in this case. Federal jurisdiction arose under 28 U.S.C. § 1442(a)(1) when the U.S. Air Force removed this action to federal court. Where the federal defendants have been dismissed from a case which has been removed under § 1442(a)(1), however, the district court can either exercise supplemental jurisdiction over the case or remand to state court. *See Gulati v. Zuckerman*, 723 F. Supp. 353, 358 (E.D. Pa. 1989). When deciding whether to continue to exercise jurisdiction, the district court must consider judicial economy, convenience, and fairness to the litigants. *See Growth Horizons v. Delaware County*, 983 F.3d 1277, 1284 (3d Cir. 1993).

There is no reason for this court to hear the claims against the remaining defendants. The state courts are equally as convenient to the litigants. Moreover, judicial economy is better served by remanding the case to state court because all of the remaining claims arise under state law, and there are no federal questions or agencies involved. Finally, although "a belated rejection of supplemental jurisdiction may not be fair,"*see id.* at 1285, this remand occurs early in the life of this case, before the parties have become firmly entrenched in federal court and while they have ample opportunity to continue in state court. For all these reasons, the court will decline to exercise jurisdiction over the remaining claims in this case.

V. CONCLUSION

For the foregoing reasons, the court finds that the U.S. Air Force, as an agency of the United States government, has not consented to be sued in this action. Consequently, the court does not have subject matter jurisdiction to hear the claim against the U.S. Air Force. Additionally, since the court lacks jurisdiction over the U.S. Air Force as the party who removed the action, the court will also decline to hear the claims against the remaining defendants.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The Third-Party Defendant's "Motion to Dismiss the Third Party Complaint" (D.I. 2) is GRANTED; and

2. The clerk shall close this case.

Dated: February 5, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE