UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
Village of Noble	)	SDWA DOCKET NO. C9101
	)	
Respondent	)	
	)	

ORDER AND REASONS DISMISSING COMPLAINT WITH PREJUDICE

BACKGROUND

By administrative complaint dated May 20, 1991, Complainant, the Division Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency (EPA), Region 6, initiated this action.[1] Complainant alleged that Respondent violated Section 1414(g)(3)(B) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g-3(g)(3)(B), and 40 C.F.R. § 141.14, by failing to comply with Administrative Order F8824, dated August 15, 1988. This administrative order required delivery of water with concentrations of coliform bacteria less than the maximum contaminant level allowed. After the filing of the

[1] At the time the complaint was issued, EPA Region 6 had a different organizational structure. However, the authority to prosecute this action is within the domain of the current Region 6, Compliance Assurance and Enforcement Division Director. *See* EPA Region 6 Delegation Nos. R6-9-33-A (August 7, 1995) and R6-9-33-B (August 7, 1995).

administrative complaint, accompanied by a cover letter, neither party filed additional documents in this action.

The next event reflected in the file includes the May 13, 1999, Order to Show Cause issued by this tribunal. The Order to Show Cause required Complainant to file certain information with the Regional Hearing Clerk within thirty (30) days after service. This information included the original administrative compliance order and proof of service, original complaint and proof of service, and a written explanation detailing why Complainant failed to prosecute this action for eight (8) years.

REGULATORY AND STATUTORY STANDARD OF REVIEW

This proceeding, a Class II penalty action, is governed by procedures set forth in the Consolidated Rules of Practice Governing The Administrative Assessment of Civil Penalties (Consolidated Rules). *See* 40 C.F.R. Part 22. Several sections in Part 22 deserve attention here. First, 40 C.F.R. § 22.42(c) shows that issuance of an administrative compliance order is a jurisdictional prerequisite to the filing of an administrative complaint under SDWA Section 1414(g).

Next, Complainant must file the original complaint with the Regional Hearing Clerk, and prove service of the same by affidavit or properly executed return receipt. *See* 40 C.F.R.

§§ 22.05(a) and (b)(v). In accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), federal agencies are required to proceed with reasonable dispatch during all administrative proceedings. If Complainant decides not to proceed in an administrative penalty action, then withdrawal under 40 C.F.R. § 22.14(e), is proper in most cases.

However, in cases like this one, where Complainant fails to comply with a prehearing order issued by the Presiding Officer, Complainant may be found in default. *See* 40 C.F.R. 22.17(a). "Default by the [C]omplainant . . . result[s] in the dismissal of the complaint with prejudice." 40 C.F.R. § 22.17(a). Further, it is noteworthy that federal civil actions may be dismissed with prejudice, for failure to prosecute. *See* Fed. R. of Civ. P. 41(b). Although the above rule is not applicable to 40 C.F.R. Part 22 administrative penalty cases per se, it is relevant, and serves as a useful guide in the administration of justice.[2]

DISCUSSION

Based on record evidence, dismissal of the administrative complaint with prejudice under Section 22.17(a) is warranted

[2] Note that rule 41(b) is similar to 40 C.F.R. § 22.17(a). Both provide for dismissal of actions with prejudice, for failure to comply with court/tribunal orders.

here. Record information shows that Complainant initiated this action in May 1991. Since that time, Complainant did not proceed at all, as the administrative record file fails to include additional filings. Such a delay without any justification is inconsistent with Section 555(b) of the APA, and unreasonable. *See Cutler v. Hayes*, 818 F.2d 879, 896-899 (D.C. Cir. 1987).

Although given the opportunity by way of a May 13, 1999, Order to Show Cause, Complainant failed to submit any information to address the unjustified delay in prosecution (an eight-year delay). In addition, Complainant submitted no information to cure the jurisdictional (failure to prove issuance and service of an administrative compliance order to Respondent) and procedural (failure to file the original complaint and prove service to Respondent) defects identified by this tribunal. In fact, Complainant failed to respond to the Order to Show Cause at all. Complainant's unresponsiveness is puzzling, as the Show Cause Order unequivocally provided that any noncompliance could result in the issuance of a default order. Clearly, such failure to respond is irreconcilable with 40 C.F.R. § 22.17(a), and therefore, Complainant must suffer the consequences. *See In re Rybond, Inc.*, 6 E.A.D. 614, 626-627, (EAB 1996).

ORDER

Due to the unreasonable delay in prosecution, jurisdictional and procedural defects pursuant to 40 C.F.R. §§ 22.42(c), 22.05(a), and 22.05(b)(v), and Complainant's unexplained default under 40 C.F.R. § 22.17(a), this case is hereby dismissed with prejudice.

Under 40 C.F.R. § 22.30(a), any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying brief with the Environmental Appeals Board (EAB), and serving all other parties and amicus curiae within twenty (20) days after service. Otherwise, pursuant to 40 C.F.R. § 22.27(c), this Order And Reasons Dismissing Complaint With Prejudice is a final order forty-five (45) after service. Notwithstanding, under 40 C.F.R. § 22.30(b), the EAB may sua sponte, elect to review this Order And Reasons Dismissing Complaint With Prejudice within forty-five (45) days after service.

SO ORDERED this 13TH day of July 1999.

/S/
GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

In the Matter of Village of Noble , SDWA Docket No. C9101

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, Regional Hearing Clerk for the Region 6, U.S. Environmental Protection Agency located in Dallas, Texas, hereby certify that I served true and correct copies of the foregoing Order dated July 13, 1999, on the persons listed below, in the manner and date indicated:

The Honorable Peggy Anderson Village of Noble, Mayor P.O. Box 129 Noble, Louisiana 71462	U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED
Mr. Efren Ordonez, Esq. U.S. EPA Region 6 (6RC-EW) 1445 Ross Avenue Dallas, Texas 75202-2733	HAND DELIVERY

Dated:

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Lorena S. Vaughn
Regional Hearing Clerk