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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Corporacion para el Desarrollo	)	
Economico y Futuro de la Isla	)	Docket No. CWA-II-97-61
Nena, et al.,	)	
	)	
Respondents	)	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT, FOR DISMISSAL, AND FOR DEFAULT

On October 21, 1997, Respondent Puerto Rico Land Administration ("PRLA") filed a Motion for Summary Judgment asserting it was entitled to judgment in its favor on the basis that it was not an "owner or operator of a point source" under the Clean Water Act. On November 28, 1997, the Complainant, the U.S. Environmental Protection Agency ("EPA"), responded to PRLA's Motion, by filing a Motion for Voluntary Dismissal of PRLA *without prejudice*. PRLA submitted an opposition to Complainant's Motion and requested a ruling on its Motion for Summary Judgment. On December 11, 1997, Complainant opposed PRLA's Motion for Summary Judgment arguing that dismissal without prejudice is more appropriate.

Additionally, on December 4, 1997, the Complainant moved for a default order against Respondent Isla Nena Paving Corporation ("INPC") asserting that, beyond denying liability in a letter that was not served in accordance with the applicable rules of procedure, INPC had not responded to the Complaint.

For the reasons that follow, PRLA's Motion for Summary Judgment is **DENIED**. Complainant's Motion to Dismiss Respondent PRLA without prejudice is **GRANTED**. Complainant's Motion for Default against Respondent INPC is **GRANTED**, except that the imposition of a penalty is stayed until the issue of liability of the other Respondent is determined.

BACKGROUND

Respondent Corporacion para el Desarrollo Economico y Futuro de la Isla Nena

("CODEFIN") is the developer of a proposed housing project known as Quintas de Santa Elena ("Quintas" or "housing project") in Vieques, Puerto Rico. CODEFIN alleges that it contracted INPC to construct the housing development. PRLA, a public corporation, owns the land upon which the housing project is to be built.

By letter dated October 18, 1996, EPA requested CODEFIN to provide information about the development. CODEFIN provided such information by letter dated January 21, 1997. EPA asserts that it conducted Reconnaissance Inspections of the development on September 5, 1996 and March 19, 1997. Complainant alleges at the latter inspection, it found that INPC was conducting construction activities at the site and that the site lacked erosion and sediment controls that would prevent, reduce and/or minimize, the discharge of pollutant to the Caribbean Sea.

Based upon information submitted by CODEFIN and found during the inspections, on April 24, 1997, U.S. EPA's Director of the Enforcement and Compliance Assistance Division for Region II commenced this proceeding by filing an Administrative Complaint against the Respondents. The Complaint alleges that Respondents violated Section 301 of the Clean Water Act (CWA) by discharging pollutants through a point source to the Caribbean Sea without a National Pollutant Discharge Elimination System (NPDES) permit. The Complaint further alleges that Respondents are in violation of Section 308(a) of the CWA by failing to comply with application requirements for a NPDES storm water permit.[(1)]

While CODEFIN filed a formal answer to the Complaint, PRLA and INPC did not. Rather, PRLA responded by sending the Complainant an informal letter dated May 15, 1997 and by subsequently filing a Motion for Summary Judgment. *See*, PRLA Memorandum of Law in Support of Motion for Summary Judgment, Exhibit C. INPC also responded by letter, dated May 5, 1997, denying any connection to the construction activities at the Quintas project. INPC did not file its letter with the Regional Hearing Clerk, as would be required of an Answer to the Complaint nor has it so filed any Motion or other pleading or document in connection with this case. *See*, 40 C.F.R. Part 22 (Rules of Practice).[(2)]

On October 22, 1997, a Prehearing Order was issued, requiring the parties to set forth in detail their respective positions in the case and the witnesses and evidence they expect to present at the hearing.[(3)] Complainant submitted its Prehearing Exchange on January 14, 1998. By Order dated December 1, 1997, the prehearing exchange between Complainant and PRLA was suspended until the Motion for Summary Judgment was ruled upon.

DISCUSSION

I. PRLA's Motion for Summary Judgment

The Rules of Practice provide that an accelerated decision may be rendered by the Presiding Judge "in favor of the complainant or respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." 40 C.F.R. § 22.20 (a). Additionally, upon motion of the respondent, the Judge may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief." Id.

A motion for accelerated decision is the administrative analog to the motion for summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure. *See e.g., In the Matter of CWM Chemical Services*, Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995). As such, decisions establishing the procedures and requirements of summary judgment provide guidance for accelerated decisions under 40 C.F.R. § 22.20.

The party moving for summary judgment bears the burden of demonstrating the absence of genuine issues of material fact. *Adickes v. Kress*, 398 U.S. 144, 157 (1970). In considering such a motion, the Court must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving

party. *Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

PRLA argues in its Motion for Summary Judgment that its status as the mere owner of the land on which the construction activities occurred is insufficient to invoke liability under the Clean Water Act. PRLA asserts that it does not own any improvements nor any point sources on the land. It cites Federal Court opinions delineating various methods of establishing the necessary degree of connection between a landowner and a point source to incur liability, focusing on the element of control over the point source. *See*, PRLA Memorandum in Support of its Motion for Summary Judgment at 12-13. Not having authorized CODEFIN or INPC to begin construction activities on the land, PRLA argues, it had no control over the construction activities or storm water runoff at issue, and, therefore, cannot be held to be the legal cause of pollutant discharges. *Id.* at 2, 4-5. Since it claims it cannot be a legal cause of the discharges, PRLA charges it is entitled to have judgment entered in its favor.

To determine which entities are liable, the statutory and regulatory provisions upon which this proceeding is based must be reviewed. Section 301(a) of the CWA prohibits the discharge of any pollutant by any person except as in compliance with, *inter alia,* Section 402 of the CWA, which authorizes EPA to issue NPDES permits for the discharge of pollutants. "Discharge of a pollutant" means "any addition of any pollutant to navigable waters[(4)] from any point source" under Section 502(12) of the CWA. The term "point source" includes any "discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, well, discrete fissure . . . ." Section 402(p)(4) authorizes the EPA to establish regulations setting forth permit application requirements for stormwater discharges.

Accordingly, EPA promulgated requirements for storm water discharges, which are codified at 40 C.F.R. § 122.26, and which provide in pertinent part at paragraph (c) as follows:

Application requirements for storm water discharges associated with industrial activity-(1) *Individual application.* Dischargers of storm water associated with industrial activity are required to apply for an individual permit, apply for a permit through a group application, or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit . . . shall submit an NPDES application in accordance with the requirements of § 122.21 * * * *

At Section 122.26(b)(14)(x), the regulations state that the following category of facilities is considered to be engaging in "industrial activity": "Construction activity including clearing, grading and excavation activities."

Section 122.21, setting forth NPDES permit application requirements, provides in pertinent part:

(a) *Duty to apply.* Any person who discharges or proposes to discharge pollutants . . . shall submit a complete application . . . to the Director in accordance with this section and part 124.

(b) *Who applies?* When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.

(c) *Time to apply.* . . . Facilities described under § 122.26(b)(14)(x) shall submit applications at least 90 days before the date on which construction is to commence.

The question at hand is whether PRLA has carried its burden to demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law that it is not liable either for failing to comply with the NPDES storm water permit application requirements or for discharging pollutants from a

point source without a permit. The answer to this question cannot be answered in the affirmative upon review of the documents submitted to date in this proceeding.

PRLA has not addressed each allegation in the Complaint because it did not file an Answer to the Complaint in accordance with all of the requirements of 40 C.F.R. § 22.15. PRLA also has not filed prehearing exchange documents, which could have provided further information as to its degree or ownership or control over the site and its relationship with CODEFIN.

CODEFIN's response to EPA's information request stated that "[s]torm sewer runoff had been discharged to U.S. waters through the culvert crossing State Road 200 to the beach and eventually to the sea. This occurred shortly after clearing the site and continues to occur." This statement, alleged in the Complaint and admitted in CODEFIN's Answer, indicates that discharge of storm water occurred via a culvert used in connection with the construction activities at the site. It is not clear which entity owns or constructed the culvert. A reasonable inference could be drawn in favor of Complainant that the culvert is a point source of the discharge and that it is owned by PRLA.

Moreover, the extent of PRLA's control of the property and activities connected therewith is not entirely clear and immutable, upon review of documents submitted in this proceeding. The record indicates that, on October 17, 1996, CODEFIN and PRLA entered into an agreement for the future sale of the property on which the Quintas project was to be built, but that PRLA has not yet transferred title or possession over the property. PRLA claims that it never authorized entry on its land for purposes of commencement of construction activities, such as soil movement, removal of vegetative cover, and/or generation of storm waters that may require an NPDES permit. *See,* Motion for Summary Judgment, Exhibit A (Conde Statement ¶¶ 5, 11; Gonzalez Statement ¶¶ 7, 12, 13), Exhibit 3. However, PRLA admits that it did authorize the municipality (Vieques) in which the property is located "to make *those arrangements necessary* for obtaining a construction permit for the first phase" of the Quintas project, which would consist of construction of 87 housing units. *See,* Motion for Summary Judgment, Exhibits A, 2 (italics added).[(5)] It is not completely clear on the record as it now stands that by granting such permission to Vieques that PRLA did not, in fact, implicitly authorize the activities which caused the discharge.

In sum, the parties' submissions in this case do not establish that all material facts are undisputed as to PRLA's control of the pollutants being discharged, which is key to determining liability under the CWA. *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 631 (D.R.I. 1990). Any unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. *O'Donnell v. United States,* 891 F.2d 1079 (3rd Cir. 1989). Accordingly, PRLA's Motion for Summary Judgment is hereby, **DENIED**.

II. Complainant's Motion to Dismiss Without Prejudice

While Complainant agrees that PRLA should be dismissed from this action, Complainant requests that the dismissal be without prejudice. PRLA disagrees, maintaining that the dismissal should be on the merits pursuant to its Motion for Summary Judgment.

The Rules of Practice provide at Section 22.14(e) that "after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer." Similarly, Federal Rule of Civil Procedure 41(a)(2) provides that once an answer or motion for summary judgment has been filed, the plaintiff may voluntarily dismiss an action by Order of the Court, and such dismissal is without prejudice unless otherwise specified on the Order. The grant or denial of a dismissal is within the sound discretion of the trial court. *See*, 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure,* Civil 2d § 2364 (1995).

No standard is provided in the Rules of Practice upon which to rule on such a motion. Federal courts interpreting Rule 41(a)(2) normally grant such dismissal

unless the defendant would suffer legal prejudice as a result of the dismissal. *McCants v. Ford Motor Co.*, 781 F.2d 855, 856-57 (11th Cir. 1986). The mere prospect of a second lawsuit does not constitute legal prejudice. *Radiant Technology Corp. v. Electrovert USA Corp,* 122 F.R.D. 201, 203 (N.D. Tex. 1988); *Chodorow v. Roswick,* 160 F.R.D. 522, 523 (E.D. Pa. 1995). Since Rule 41(a)(2) only applies when an answer or a motion for summary judgment has been filed by the defendant, "the mere filing of an answer or a motion for summary judgment could not, without more, be a basis for refusing to dismiss without prejudice." *Andes v. Versant Corp.,* 788 F.2d 1033, 1036 n. 4 (4th Cir. 1986)(denial of motion for summary judgment was proper where defendant incurred substantial costs of discovery).

Federal courts have looked with disfavor on motions for voluntary dismissal without prejudice when the party seeks to avoid an expected adverse decision on motion for summary judgment, however. Dismissal without prejudice has been denied where defendant was entitled to summary judgment. *Radiant Technology,* 122 F.R.D. at 203-204 (dismissal improper where court would be precluded from deciding pending case or dispositive motion); *Phillips,* 77 F.3d at 358 (defendant was entitled to summary judgment); *Yoder v. Oestreich,* 820 F.Supp. 405, 406 (W.D. Wisc. 1993)(motion for dismissal without prejudice denied where both parties had filed motions for summary judgment, defendant put forth extensive efforts on preparing its motion and plaintiff did not respond to it but instead filed motion for dismissal after the due date for the response); *Pace v. Southern Express Co.,* 409 F.2d 331, 334 (7th Cir. 1969).

Here, however, PRLA has not shown that, at this time, it is entitled to summary judgment, as concluded above. Therefore, other factors may be considered in determining whether to dismiss without prejudice.

Other factors considered by the Federal courts in determining whether legal prejudice exists include the following: the opposing party's effort and expense in preparing for trial, the excessive and duplicative expenses of defending a second action, excessive delay and lack of diligence on the part of the movant, and the sufficiency of the explanation for the need for a dismissal. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997); *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.,* 77 F.3d 354, 358 (10th Cir. 1996)(dismissal properly denied where case was pending over one year, defendant's motion for summary judgment was pending four months, and plaintiff lacked diligence in failing to respond but instead filing motion for dismissal with little explanation); *United States v. Outboard Marine Corp.,* 789 F.2d 497, 502 (7th Cir. 1986)(interest in protecting environment from further damage by immediate cleanup by EPA of hazardous waste site, avoiding delay of years of anticipated litigation, justified dismissal without prejudice of EPA's action to require defendants to conduct cleanup); *Pace,* 409 F.2d at 334 (dismissal properly denied where action had been pending one and a half years, considerable discovery had been taken at substantial cost to defendant, and defendant had fully supported its motion for summary judgment to which plaintiff failed to respond); Wright and Miller, § 2364; *cf. Radiant,* 122 F.R.D. at 204 n. 5 (refusing to evaluate the sufficiency of plaintiff's explanation for dismissal). The Courts acknowledge that not all of the factors must be resolved in favor of one party for either dismissing or denying dismissal. *Ohlander,* 114 F.3d at 1537; *Phillips*, 77 F.3d at 358.

The future uncertainty as to title to land and resultant jeopardy to development of a project thereon also has been considered as prejudice. *Paulucci v. City of Duluth,* 826 F.2d 780 (8th Cir. 1987)(millions of dollars already expended, and future financing on paper mill on the land allegedly jeopardized, no explanation provided for voluntary dismissal) *citing, Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974). However, a more recent decision considering uncertainty over water rights resulting from dismissal without prejudice has held that "the threat of future litigation which causes uncertainty is insufficient to establish plain legal prejudice." *Westlands Water District v. United States,* 100 F.3d 94, 96 (9th Cir. 1996).

This matter has been pending for less than a year. Although Complainant has filed its Prehearing Exchange, PRLA, due to the stay, has not, although it has submitted significant briefing with its Motion for Summary Judgment. It does not appear that

Complainant has excessively delayed in filing its Motion for Voluntary Dismissal.

Complainant's response to PRLA's Motion for Summary Judgment was delayed, however, and not well supported. PRLA's Motion for Summary Judgment was filed October 21, 1997. Pursuant to a Motion for Extension of Time, Complainant was granted until November 28, 1997 to respond to PRLA's Motion. Rather than filing a response, Complainant submitted the Motion for Voluntary Dismissal on November 28, 1997. It was not until December 11, 1997, thirteen days after the filing deadline, that Complainant filed its opposition to PRLA's Motion. Moreover, Complainant does not explain therein why dismissal should be without prejudice or point to specific facts that are disputed. Complainant merely alleges that it "has never agreed with the PRLA's position that it is not liable under the CWA" and states that there is no provision in the Rules of Practice for a dismissal with prejudice. *See*, Complainant's Motion Opposing Summary Judgment Motion, dated December 11, 1997.[(6)] Complainant notes that CODEFIN informed EPA that it has no position on the Complainant's Motion.

It is conceivable that dismissal without prejudice may result in uncertainty as to title to the site and future development of the housing project due to the potential for Complainant to bring a future enforcement action against PRLA. However, neither PRLA nor CODEFIN have challenged Complainant's Motion on that basis.

Considering the factors discussed above, PRLA has not shown that it would suffer legal prejudice if the Motion for Voluntary Dismissal is granted. Therefore, Complainant's Motion for Voluntary Dismissal is hereby **GRANTED**, and the Complainant against PRLA dismissed without prejudice.

III. Complainant's Motion for a Default Order Against INPC

On March 31, 1997, INPC was served with the Complaint in this action alleging that INPC violated the CWA. On May 5, 1997, INPC sent to Complainant an informal letter, which was not filed with the Regional Hearing Clerk, asserting no connection to the Quintas housing project and denying any liability under the Clean Water Act. Complainant responded to INPC's letter informally on August 19, 1997, disagreeing with INPC's denial of liability. INPC offered no response to Complainant's August 19, 1997 letter and, to date, has not filed an answer to the Complaint or any other document in this proceeding with the Regional Hearing Clerk.

The Rules of Practice require that a written answer to the complaint "must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint." 40 C.F.R. § 22.15(a). The Rules provide further that "[a] party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a). Although INPC sent a brief letter to the Complainant, denying any connection to the Quintas project, the letter does not constitute "fil[ing] a timely answer to the complaint." The Complaint having been served on March 31, 1997, INPC's answer was due to be filed by April 20, 1997. 40 C.F.R. § 22.15(a). INPC clearly has failed to file a timely answer to the Complaint and is therefore in default.

In the case of a default order, the Rules of Practice state that "the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." 40 C.F.R. § 22.17(a). In this instance, however, considering the continued participation of Respondent CODEFIN, the penalty cannot be fairly apportioned until the liability and roles of all parties are determined. Accordingly, the amount of the penalty to be issued against INPC will be stayed until full resolution of the dispute.[(7)]

ORDER

1. Respondent PRLA's Motion for Summary Judgment is **DENIED.**

2. Complainant's Motion to Dismiss Respondent PRLA Without Prejudice is and

GRANTED

the Complaint against PRLA is hereby dismissed, without prejudice.

3. Complainant's Motion for a Default Order against Respondent INPC is **GRANTED**. The imposition of a penalty against INPC is **STAYED** until resolution of the issue of liability as to the other Respondent in this proceeding.

4. Any document which has been submitted or will be submitted by the parties to this proceeding, and which is in any non-English language, must be accompanied by a direct written translation in English provided by a certified translator.

_____

Susan L. Biro

Chief Administrative Law Judge

Dated: February 3, 1998

Washington D.C.

1. Section 308(a) authorizes EPA to require the owner or operator of any point source to, *inter alia,* establish and maintain records and make reports. Regulations promulgated at 40 C.F.R. §§ 122.21 and 122.26, cited in the Complaint, require permit applications for discharge of stormwater. Paragraph 402(p)(4) of the CWA, which was not cited in the Complaint, authorizes EPA to establish regulations setting forth permit application requirements for stormwater discharges.

2. Section 22.15(a), 40 C.F.R. provides with respect to service of the Answer, in pertinent part, "Where respondent (1) Contests any material fact upon which the complaint is based . . . or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk. Any such answer to the complaint must be filed

with the Regional Hearing Clerk within twenty (20) days after service of the complaint."

3. The Prehearing Order specifically noted that the record evidenced that Respondents PRLA and INPC had not filed answers to the Complaint and instructed the Complainant to file evidence of service so default orders could issue. At that time, the undersigned was unaware that the day before, PRLA had filed a Motion for Summary Judgment.

4. "Navigable waters" is defined in Section 502(7) of the CWA as the waters of the United States, including the territorial seas.

5. This document is written in Spanish. A certified direct translation in English should have accompanied the document. The parties may not assume that the Judges who preside over this case have the ability to accurately translate documents written in any non-English language.

6. While the Rules of Practice at 22.14(e) refer only to a withdrawal of a complaint or part thereof without prejudice, they do not preclude a complainant from moving to dismiss with prejudice. Such a motion is permitted in Federal court, under Federal Rule of Civil Procedure 41(a), which provides that voluntary dismissal is without prejudice unless otherwise stated in the notice or order of dismissal.

7. Although this ruling contravenes the literal language of Section 22.17(a), the rule appears to have contemplated default scenarios with only one respondent. Penalizing a defaulting respondent when other respondents still remain active may lead to an unjust allocation of the penalty. In the face of such uncertainty, Section 22.01(c) provides, "Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall

be resolved at the discretion of the . . . Presiding Officer."