



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
El Dorado Chemical Company,) **Docket No. CWA-06-2011-1746**
)
Respondent.)

**ORDER DEFERRING COMPLAINANT'S MOTION TO WITHDRAW COMPLAINT
WITHOUT PREJUDICE PENDING ADDITIONAL BRIEFING**

I. Background

The Complaint in this matter was filed on June 9, 2011. It alleges that El Dorado Chemical Company ("Respondent") has violated Section 301 of the Clean Water Act ("CWA"), 33 U.S.C. § 1311, by discharging pollutants from a point source to waters of the United States in excess of effluent limitations established in Respondent's permit and, in one instance, without a permit. Complaint at 3-4. Respondent filed an Answer denying the alleged violations on July 7, 2011. On December 2, 2011, the Regional Hearing Clerk for the United States Environmental Protection Agency, Region 6 forwarded the matter to the undersigned for assignment. Following receipt of the parties' consent, alternative dispute resolution was initiated on January 4, 2012.

On January 11, 2012, Complainant filed the pending Motion to Withdraw Complaint Without Prejudice and Postpone the Alternative Dispute Resolution Process ("Motion"). The Motion requested that ADR be postponed pending a decision on the Motion and that the Complaint be withdrawn if the Motion is granted. For the purpose of deciding the Motion, ADR was terminated and the case returned to the undersigned on January 19, 2012.

This proceeding is governed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1 - 22.45.

II. Arguments of the Parties

Complainant's argument in support of the Motion is brief and opaque. It is quoted below in full.

Due to the similarity of the issues involved, environmental impacts resulting from

discharges from multiple parties operating within the same industrial region, and the fact that the three parties found in violation serve the same community, Respondent, in conjunction with Lion Oil Company (“Lion”), Great Lakes Chemical Corporation (“Great Lakes”), and the city of El Dorado, Arkansas, chose to develop an inter-basin transfer option (an ongoing effort) in order to attain less stringent effluent limitations. The issues involving Lion and Great Lakes have since been referred by Complainant to the United States Department of Justice (“DOJ”) for review and potential judicial action.

Complainant and DOJ have recently decided to refer the instant issues contained in the Complaint to DOJ for further review and action in order to provide a greater benefit to the community, ensure fairness and consistency with each party in addressing the similar issues, save time, resources, and money by consolidating and addressing the Respondent, Lion, and Great Lakes cases all at once and in a similar manner, and at the same time ensuring no additional prejudice to the Respondent.

Motion ¶¶ 4-5.

In its response to the Motion filed on January 12, 2012 (“Response”), Respondent opposes the Motion on the basis that: (1) the enforcement issues relating to Respondent, Lion and Great Lakes are dissimilar so withdrawal of the Complaint will not promote efficiency; and (2) bringing a single enforcement proceeding against Respondent, Lion and Great Lakes will substantially prejudice Respondent. Response ¶¶ 3, 5.

In support of the first point, Respondent explains that at a January 2010 meeting of the four pipeline participants (presumably a reference to what Complainant called the “inter-basin transfer option”), Complainant stated that enforcement matters with respect to alleged NPDES violations by Respondent, Lion and Great Lakes would be treated separately, and that they have in fact been treated separately since then until commencement of the present proceeding. Response ¶ 1. Respondent also explains that, since 2003, it, Lion, and Great Lakes have been pursuing a joint wastewater pipeline for which the participants now have NPDES permits, and that it is expected to be operational in 2013. Response ¶ 2. Finally, Respondent argues that the enforcement issues related to it, Lion and Great Lakes are dissimilar in that they involve different industrial sectors, separate NPDES permits with different effluent limits, permit violations that are unique to each entity, and different environmental impacts in terms of location and receiving waters. Response ¶ 3.

In support of the second point, Respondent contends that “Complainant’s stated desire to conduct coordinated settlement discussions” should not influence the resolution of this Motion, that joining three separate enforcement matters into one proceeding will result in undue complication, and that Respondent will suffer substantial prejudice by virtue of the substantial time and resources it has devoted to addressing and defending this proceeding. Response ¶ 5.

Complainant filed a reply to the Response on January 26, 2012 (“Reply”), in which it asserted that the Motion should be granted unless Respondent shows actual prejudice, and that it had failed to do so. Reply ¶ 1. Specifically, Complainant argues that there will be long-term injunctive relief involving the pipeline, whether an enforcement action is pursued administratively, judicially, or both, and that it will benefit Respondent in terms of time, resources, and finances to address only one set of proceedings instead of two. Reply ¶ 1.

III. Discussion and Conclusion

As a preliminary matter, the delay of almost five months on the part of the Regional Hearing Clerk in sending the pleadings in this case to the undersigned is noted. The Rules of Practice state that “[w]hen an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge ...” 40 C.F.R. § 22.21 (emphasis added). No explanation for this delay appears in the record before me. It is also noted that the version of the Complaint received from the Regional Hearing Clerk omits Table A, referred to in paragraph 8 of the Complaint.


Turning to the substance of the Motion, Complainant provides no coherent explanation as to why the Motion should be granted. No indication is given of the nature of the “issues involving Lion and Great Lakes [which] have since been referred by Complainant to the United States Department of Justice (“DOJ”) for review and potential judicial action.” Thus, it is impossible to assess their similarity to the issues raised in the present proceeding. Complainant also fails to explain how the withdrawal of the Complaint will result in “a greater benefit to the community, ensure fairness and consistency with each party in addressing the similar issues, save time, resources, and money,” particularly when judicial action against Lion and Great Lakes is by no means a certainty (Complainant refers to “potential judicial action”, Motion ¶ 4). Further, Respondent’s intention to meet less stringent effluent limitations through an “inter-basin transfer option” at some time in the future does not appear to be relevant to the violations alleged in the Complaint to have already occurred. Although the Reply argues that there will be long-term injunctive relief involving the pipeline, further explanation of the precise nature of the relief it envisages and its relevance to the pending Motion is absent. Respondent refers to “Complainant’s stated desire to conduct coordinated settlement discussions.” If this is Complainant’s desire, it has not been stated in the Motion or Reply, nor has Complainant indicated why the withdrawal of the Complaint is necessary for the conduct of coordinated settlement discussions. Finally, Complainant fails to explain any change in circumstances which has led to the dramatic change in its approach to this proceeding.

Although the Response sheds a little light on the factual background to Complainant’s Motion, Respondent’s claim that it will suffer substantial prejudice if the Motion is granted is vague. No detail of this alleged substantial prejudice is given beyond a reference to the substantial time and resources it has devoted to addressing and defending this proceeding. Since the case file indicates that Respondent’s only activity has been to draft and file a four page answer, further explanation of the claim of prejudice is necessary.

Notably, the briefings of both parties fail to cite and address the relevant legal authority. In particular, neither party has cited to *City of Mandeville, Louisiana*, EPA Docket No. CWA-VI-97-1620, 1998 EPA ALJ LEXIS 57 (ALJ, July 14, 1998) (Order Denying Respondent's Motion for a Default Order and Order Denying Complainant's Motion to Withdraw the Complaint), or the federal cases referred to therein, particularly *FDIC v. Knostman*, 966 F.2d 1133 (7th Cir. 1992).

For these reasons, the Motion is **DEFERRED** pending additional briefing by the parties. The briefs are directed to correct the factual deficiencies identified above, and address the factors relevant to the consideration of a motion to withdraw complaint without prejudice articulated in the cases referred to above. Each party's brief shall be filed no later than March 23, 2012. The Complainant's brief shall be accompanied by the missing attachment to its Complaint, Table A.

SO ORDERED.



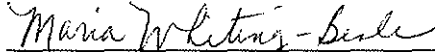
Susan L. Biro
Chief Administrative Law Judge

Dated: February 23, 2012
Washington, DC

In the Matter of El Dorado Chemical Company, Respondent
Docket No. CWA-06-2011-1746

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Deferring Complainant's Motion To Withdraw Complaint Without Prejudice Pending Additional Briefing**, dated February 23, 2012, was sent this day in the following manner to the addressees listed below:



Maria Whiting-Beale
Staff Assistant

Dated: February 23, 2012

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