UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City of Mandeville, Louisiana	)	Docket No. CWA-VI-97-1620
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION FOR A DEFAULT ORDER

and

ORDER DENYING COMPLAINANT'S MOTION TO WITHDRAW THE COMPLAINT

The Region 6 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint against the City of Mandeville, Louisiana (the "Respondent" or "City") on June 30, 1997. The Complaint alleges that the City committed a series of violations of the effluent limits in its National Pollutant Discharge Elimination System ("NPDES") permit for its wastewater treatment plant. The City's plant discharges wastewater into a bayou that is tributary to Lake Pontchartrain, a navigable water of the United States. The alleged violations consist of approximately 175 discharges in excess of the NPDES permit's effluent limits for biochemical oxygen demand, ammonia, total suspended solids, and fecal coliform bacteria, from 1992 to 1997. The Complaint alleges that these discharges comprise violations of the Clean Water Act ("CWA") §301(a), 33 U.S.C. §1311(a). Pursuant to the CWA §309(g), 33 U.S.C. §1319(g), the Region seeks assessment of a civil penalty against the City of $125,000, the maximum Class II administrative penalty authorized by that subsection.

On November 3, 1997 the City filed a request for a hearing on the amount of the proposed civil penalty. On January 27, 1998, the matter was then assigned to (the undersigned) Administrative Law Judge ("ALJ") Andrew S. Pearlstein. I issued a Prehearing Order dated February 6, 1998 that required the Respondent to file an answer that met the requirements of the EPA Rules of Practice, 40 CFR §22.15.

Respondent filed such an Answer on March 3, 1998. The Answer admitted that the City's plant had exceeded its permit limitations as alleged in the Complaint, but denied that those discharges constituted permit violations. The Answer also contested the appropriateness of the proposed penalty.

The Prehearing Order also set a schedule for the parties to file their prehearing exchanges of intended witnesses and evidence. Complainant was required to make its initial prehearing exchange on April 30, 1998. The Respondent's exchange was due May 21, 1998.

On May 8, 1998, the Region filed a motion to withdraw the Complaint without prejudice. The Region states that it now also believes that injunctive relief is necessary to address the future operation of Respondent's wastewater treatment plant. Withdrawal of this Complaint will allow the Region to pursue both injunctive and civil penalty relief in a single judicial forum, in federal court, pursuant to subsections (b) and (d) of the CWA §309, 33 U.S.C. §1319(b) and (d). In its motion, the Region acknowledged that it had failed to file its prehearing exchange when due on April 30, but asked that such failure be excused or rendered moot, should the motion be granted.

On May 20, 1998, the City responded in opposition to the Complainant's motion to withdraw the Complaint without prejudice. The City also filed a motion seeking an order dismissing this proceeding *with* prejudice due to the Region's default in filing its prehearing exchange.

Respondent's Motion for a Default

Initially I will address Respondent's motion for a default order against Complainant, dismissing this proceeding with prejudice. The EPA Rules of Practice, at 40 CFR §22.17(a) authorize the Presiding Officer to find a party in default upon failure to comply with a prehearing order. A default by the complainant results in the dismissal of the complaint with prejudice.

The Administrative Law Judge has broad discretion in ruling upon a motion for a default. Generally, the law favors resolution of conflicts on their merits, rather than by the harsh remedy of default. *Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th Cir. 1986). This is so particularly where the opposing party will not be prejudiced by the default or delay. *In re Jay Harcrow* (Docket No. UST6-91-031-A0-1, Ruling on Default Motion, ALJ, September 20, 1995). Since this ruling will deny Complainant's motion to withdraw the Complaint without prejudice, and the due date for Respondent's prehearing exchange will be rescheduled as well, Respondent will not be prejudiced by the delay caused by Complainant's failure to file its exchange in a timely manner.

In its responsive brief, the Complainant explained the inadvertent calendar error that led to its failure to file its prehearing exchange or ask for an extension before filing the motion for withdrawal of the Complaint. It is not my usual practice to default any party for a first-time, short, inadvertent error in failing to file a prehearing exchange or other document, where the opposing party is not prejudiced by the delay. I see no reason to depart from that practice here.

There is no indication that the Region has acted in bad faith by failing to file its prehearing exchange or to request an extension. However, the filing of its motion for dismissal soon after missing the deadline, at least creates the appearance that it was filed in order to avoid a default. Taking Complainant's explanation at face value, a lack of due diligence in on the part of the Region is indicated, but not to the extent to warrant a default order. Although the Region apparently diligently pursued negotiations with Respondent, it neglected its litigation responsibilities. This may be considered a factor in denying the Region's motion for dismissal for without prejudice. It is not sufficient, however, to justify ordering a default or dismissal with prejudice. Therefore, Respondent's motion for a default order against the Complainant, and for dismissal of the Complaint with prejudice, will be denied.

Motion to Withdraw Complaint Without Prejudice

The EPA Rules of Practice, 40 CFR §22.14(e), govern the withdrawal of the complaint. After respondent has filed an answer, a motion to the Administrative Law Judge is required in order to allow the complainant to withdraw the complaint without prejudice. This provision does not mention withdrawal with prejudice. As indicated above, 40 CFR §22.17(a) does provide for dismissal of the complaint with prejudice upon a default by the complainant. However it is not entirely clear that, even if this proceeding were to be dismissed *with* prejudice, that the EPA would be precluded from pursuing a civil penalty action against the City in federal court under the CWA §309(d), 33 U.S.C. §1319(d).(1)

The EPA's administrative practice rule governing withdrawal of a complaint without prejudice is substantively equivalent to Rule 41(a) of the Federal Rules of Civil Procedure. Rule 41(a) also requires an order of the court for dismissal of an action without prejudice, after the defendant has filed its answer. The common law rule was stated by the Supreme Court in *Jones v. S.E.C.,* 298 U.S. 1, 18-19, (1935) as follows:

> The general rule is settled for federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter.

Under Rule 41(a), a motion for voluntary dismissal or withdrawal of a complaint without prejudice is addressed to the sound discretion of the court. *U.S. v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir. 1986). The federal courts have interpreted Rule 41(a) consistently with *Jones v. S.E.C.* If the respondent would suffer "legal prejudice," withdrawal of the complaint should not be allowed. *FDIC v. Knostman*, 966 F.2d 1133, 1142 (7th Cir. 1992).

In *Knostman*, the court listed the following factors to be considered in determining whether a defendant (or respondent) will suffer such legal prejudice: (1) the respondent's efforts and expense of preparation for hearing; (2) delay or lack of diligence on the part of the complainant in prosecuting the action; (3) the sufficiency of the explanation for the need to take a voluntary dismissal; and (4) whether the defendant has made a motion for summary judgment. 966 F.2d at 1142. Courts should bear in mind principally the interests of the defendant while weighing the relevant equities to do justice between the parties in each case, imposing appropriate costs and conditions to a dismissal. *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855 (11th Cir. 1986).

Another factor relevant to the potential legal prejudice to the respondent is any difference in the applicable law between the current and the proposed forum. "The court should deny a motion for a voluntary dismissal that will prejudice the defendant by subjecting it to the less favorable law of a different forum." (8 Moore's Federal Practice 3d, §41.40[7][b], p. 41-152). In terms of the factors listed above, this is considered under the sufficiency of the complainant's reasons for the motion for withdrawal of the complaint without prejudice. Courts have denied motions for voluntary dismissal without prejudice where the plaintiff intended to refile the action in a different forum that would deprive the defendant of a defense available in the initial forum.(2)

In this case, there is also a significant difference in the applicable law that would result in plain legal prejudice to Respondent if the administrative complaint is allowed to be withdrawn. The Region has stated its intent to file an action in federal court for injunctive relief under the CWA §309(b), 33 U.S.C. §1319(b), as well as for civil penalties. Under the CWA §309(d), 33 U.S.C. §1319(d), a defendant in a federal civil penalty action is subject to a penalty of up to $25,000 per day for each violation. The Region has charged the City with 175 days of violations. This would subject the Respondent to a potential civil penalty in federal court of $4,375,000. In this administrative proceeding brought under the CWA §309(g), the

Respondent, pursuant to §309(g)(2)(B), 33 U.S.C. §1319(g)(2)(B), is subject to a civil penalty of up to $10,000 per day, with a maximum of $125,000.

The law applicable in federal court is thus less favorable to the City than the law applicable in this administrative forum. In federal court, the City would be subject to a potential civil penalty 35 times higher, and $4,250,000 more, than the maximum penalty to which it is subject in this forum. The Region has stated that it has "assured the City that its position wouldn't change just because DOJ [the Department of Justice] became involved in the action, and DOJ has assured the parties that it intends to respect EPA's determinations."[(3)] This falls short of a promise to limit the penalty to the same $125,000 sought in this administrative proceeding. It is doubtful that such a promise could be made binding, in any event. The City has expressed its belief that the EPA's motive for removal of this proceeding to federal court is to assess higher penalties.[(4)]

The difference in the law itself is more than a mere "tactical advantage," which would not constitute sufficient grounds for denying the motion to withdraw.[(5)] The choice of forum implements a choice between two different subsections of a statute that can have very real and different consequences. Certainly the Region could use the higher penalty limits in federal court to its tactical advantage in seeking injunctive relief. But it could also actually seek to assess such higher penalties, which the City may eventually actually have to pay. The much larger penalty limits in federal court amount to a substantive difference, less favorable to the Respondent than the applicable penalty limits in this administrative forum. This provides a sufficient reason to deny Complainant's motion to withdraw the Complaint without prejudice.

In addition, the Region has not provided an adequate explanation for its desire to withdraw the Complaint at this particular time. The Complainant has not pointed to any new information or any change in the circumstances surrounding this matter since the Complaint was first filed. The Region filed the Complaint on June 30, 1997. Although the Respondent requested a hearing earlier, it did not file its Answer until March 3, 1998. The Region could have withdrawn the Complaint without prejudice without leave of the ALJ, at any time until the Respondent filed its Answer, under 40 CFR §22.14(e).

Complainant states that it told Respondent repeatedly, as early as February 19, 1998, that it intended to seek a judicial decree. But the Region was fully aware of the extent of the City's alleged violations since the Complaint was filed, and did not make the motion to withdraw until May 8, 1998. The parties have apparently engaged in extensive negotiations during this period, with the Complaint pending in this administrative forum. The Region elected to proceed administratively in 1997 and has not indicated what has changed since then. Two other EPA administrative proceedings have been cited in which motions for withdrawal of the complaints, in order to seek injunctive relief and civil penalties in federal court, have been granted. In both of those, the motion was prompted by the discovery of new information on new or continuing violations by the respondents.[(6)] The lack of such new information or change in circumstances in this case indicates the insufficiency of the Region's reasons for withdrawal of the Complaint.

The only legitimate reason given by the Region for the motion to withdraw is to promote judicial economy. Since injunctive relief is only available in federal court, it would be more efficient to consider the civil penalty there as well. While judicial economy is a worthy objective, it must be balanced against the equities of the effects of a withdrawal on the parties. If the motion to withdraw is denied, the Region would still be free to pursue injunctive relief in federal district court under the CWA §309(b). Indeed, in that event, the Region has stated its intention to do just that.[(7)] The civil penalty issue would, however, remain for determination in this administrative proceeding, subject to the $125,000 maximum. At perhaps some cost to judicial economy, the legal prejudice of exposing Respondent to a higher penalty would be avoided. At the same time, the Complainant would still be able to pursue injunctive relief, as well as the full civil penalty it originally sought.[(8)]

The City also argues that it has expended substantial effort and incurred expenses in negotiating with the Region and preparing for hearing. The City has not shown, however, that this effort and expense would be significantly wasted if this proceeding were removed to federal court. The litigation in federal court would address the same allegations and seek relief similar in character. Although this matter has now been pending for over a year, it is still in a relatively early procedural stage, as prehearing exchanges have not yet occurred. Therefore, application of this factor alone - concerning the respondent's efforts and expense in preparation for trial - does not provide a reason to deny the Region's motion to withdraw the Complaint.

The remaining factors to be considered in ruling on a motion for voluntary dismissal are whether the complainant has caused undue delay and whether the respondent has filed a summary judgment motion or the case is at a similar critical juncture. In this case, those two factors are interrelated. The Region's failure to file its prehearing exchange on time led to the City's making its motion for a default order, a dispositive motion. As discussed above, that motion for a default order will be denied. However, the missed exchange caused a delay, and suggests of a lack of diligence on the part of the Region. It also creates the appearance of a possible reason for the Region's decision to move to withdraw the Complaint. The Region's timing of the motion, right after it became subject to a potential default order, thus provides another reason to deny its motion to withdraw the Complaint.

To summarize, a balancing of the relevant equities between the parties in this case leads to the conclusion that the Region's motion to withdraw the Complaint without prejudice should be denied. If it were granted, Respondent would suffer plain legal prejudice by its exposure to much higher civil penalties in federal court. This would amount to more than a mere tactical advantage to the Complainant and more than, in the words of *Jones v. S.E.C.*, "a mere second litigation on the same subject matter." In addition, the Complainant has not offered an adequate explanation for moving to withdraw the Complaint at this time, soon after it became subject to a possible default order by missing its prehearing exchange deadline. The Region will still be able to pursue injunctive relief and civil penalties against Respondent if the motion is denied, although perhaps at some cost to judicial economy if it elects to also proceed in federal court. For these reasons, the Complainant's motion to withdraw the Complaint without prejudice will be denied.

Order

1. Respondent's motion for a default order against Complainant for failing to timely file its prehearing exchange is DENIED.

2. Complainant's motion to withdraw the administrative complaint, without prejudice, is DENIED.

Further Proceedings

It is further ordered that Complainant's prehearing exchange will now be due August 12, 1998. Respondent's prehearing exchange will now be due September 2, 1998.

Andrew S. Pearlstein
Administrative Law Judge

Dated: July 14, 1998
Washington, D.C.

1. See CWA §309(g)(6)(A), 33 U.S.C. §1319(g)(6)(A). Although there are some provisos, this subsection generally limits federal civil penalty actions only if a prior administrative enforcement proceeding has resulted in the payment of a

penalty by the respondent for the violation. If this is correct, dismissal of this proceeding with prejudice, as requested by the City, would not necessarily shield the City from higher civil penalty liability under §1319(d).

2. See, e.g., *Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d 176 (5th Cir. 1990) (district court abused discretion in granting motion for dismissal, where dismissal had effect of allowing plaintiff to refile in Louisiana state court, where defendants' *forum non conveniens* defense would not be available); and *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990), (to the same effect as *Ikospentakis*). The courts of appeal are split on whether dismissal should be allowed to permit the plaintiff to sue in a forum where the statute of limitations has not run. See 8 Moore's Federal Practice 3d, §41.40[7][b][viii] and cases cited there.

3. Complainant's Response, p. 2-3.

4. Respondent's Memorandum in Opposition, p. 7.

5. See, e.g. *Hoffmann v. Alside, Inc.*, 596 F.2d 822 (8th Cir. 1979), (no legal prejudice to defendants where dismissal after denial of motion for jury trial meant future trial might be before jury rather than before the court).

6. See *In re ESSROC Materials, Inc.*, Docket No. CAA-17-1993 (Order Dismissing Complaint Without Prejudice, October 18, 1995); and *In re Matter of Virgin Islands Water and Power Authority*, Docket No. II-95-0107 (Order Denying Respondent's Motion for Reconsideration, June 10, 1997).

7. Complainant's Motion to Withdraw Administrative Complaint, p. 3.

8. Under the CWA §309(g)(6)(A), assuming "diligent prosecution" of this proceeding, the Region will be prevented from also seeking civil penalties in federal court under §309(d) against the City for these alleged violations.