

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

Wayne R. Erickson,

Respondent

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Docket No. CWA-05-2014-0003

Dated: August 20, 2014

**ORDER GRANTING MOTION TO WITHDRAW COMPLAINT**  
**WITHOUT PREJUDICE**

This matter was initiated by Complaint filed on November 13, 2013 by Complainant, Director of the Water Division, Environmental Protection Agency Region 5. The Complaint alleges that Respondent discharged pollutants from a point source into navigable waters in violation of Sections 301 and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311 and 1344. Under Section 309(g)(2) of the CWA, the Complaint proposes a penalty in the amount of \$90,000 for the violations. After Respondent, appearing *pro se*, filed an Answer to the Complaint, a Prehearing Order was issued, directing the parties to submit prehearing exchanges, or to execute and file a Consent Agreement and Final Order if this matter is settled.

Subsequently, Complainant filed a motion to withdraw the Complaint with prejudice, with an attached Administrative Order on Consent ("AOC"), Docket No. V-404-AO-14-20, issued to Respondent, signed by Complainant and Respondent in July 2014, wherein Respondent agrees to execute a real estate instrument protecting approximately five acres of wetlands and 800 linear feet of stream. The AOC recites facts and allegations of violation almost identical to those in the Complaint. The motion stated that the parties intend the AOC to resolve the matters alleged in the Complaint. The motion was denied by Order dated August 11, 2014 on grounds that the AOC's reservation of Complainant's right to seek penalties under Section 309(g) of the CWA for the violations alleged in the Complaint was inconsistent with the withdrawal of the Complaint with prejudice, which is conclusive of the rights of the parties. The Order directed Complainant to submit either a motion to withdraw the Complaint without prejudice or to submit a renewed motion to withdraw it with prejudice along with an explanation.

On August 18, 2014, Complainant submitted a Motion to Withdraw Complaint, Without Prejudice ("Motion"), requesting that this Tribunal "dismiss the underlying administrative complaint, Docket No. CWA-05-2014-003, without prejudice." The Motion states that on August 18, Complainant discussed the August 11 Order with Respondent and that he indicated that he would not oppose the Motion.

This proceeding is governed by the Rules of Practice at 40 C.F.R. Part 22 ("Rules"). Regarding settlement, the Rules provide that settlement agreements shall be executed and forwarded with a proposed final order to the Regional Judicial Officer or Regional Administrator

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and that “[n]o settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, . . . ratifying the parties’ consent agreement.” 40 C.F.R. § 22.18(b)(2).

The Rules govern the assessment of civil penalties under several statutes, including section 309(g) of the CWA. 40 C.F.R. § 22.1(a)(6). The AOC is not a settlement agreement under the Rules, but is issued under Section 309(a) of the CWA, which authorizes the Administrator to issue an order requiring compliance when a person is in violation of the CWA. Furthermore, the AOC does not include a final order from the Regional Judicial Officer ratifying the agreement. Thus it does not serve to dispose of this proceeding automatically.

The question is whether it can serve in this case as a basis for a motion for withdrawal of a complaint. The Rules merely provide that after the filing of an answer, the complainant may withdraw the complaint without prejudice only upon motion granted by the administrative law judge, and do not provide a standard for granting such motions. 40 C.F.R. § 22.14(d). Thus the Federal Rules of Civil Procedure (“FRCP”) and federal court decisions interpreting the FRCP provide guidance. The determination of whether to grant or deny a plaintiff’s motion to dismiss a complaint under FRCP 41(a)(2) is within the discretion of the court. *Westlands Water District v. United States Dep’t of Interior*, 100 F.3d 94, 96 (9<sup>th</sup> Cir. 1996); *Roberts v. Smithkline Beecham Corp.*, Civ. No. 09-0162, 2010 U.S. Dist. LEXIS 20040 \* 9 (E.D. La. Jan. 29, 2010). As the Supreme Court stated many decades ago, “a plaintiff possesses the unqualified right to dismiss his complaint . . . unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter.” *Jones v. Securities & Exchange Comm’n*, 298 U.S. 1 (1936); see, *Wimber v. Dep’t of Soc. & Rehab. Servs.*, 156 F.R.D. 259, 261 (D. Kan. 1994)(“Courts generally allow dismissal without prejudice unless the defendant will suffer some plain legal prejudice.”).

Because terms of the AOC reserve Complainant’s right to seek penalties under the CWA for the violations which were alleged in the Complaint, and Respondent agreed to these terms, it is appropriate to grant withdrawal of the Complaint without prejudice. Motions under 40 C.F.R. § 22.14(d) to withdraw a complaint without prejudice are commonly granted when the complainant represents that conditions have been met to address the claims in the complaint, or that complainant received information as to the respondent’s compliance with regulations at issue in the complaint, indicating that the complaint is no longer warranted, and the respondent has no objection to the motion. There is no need for the judge to inquire as to the details of the conditions, information or asserted compliance. Similarly, where the complainant presents a fully executed AOC and represents that the complaint for penalty assessment is no longer warranted, there is no need to evaluate the details of the compliance. There is no indication that any plain legal prejudice to the Respondent would result from granting the Motion.

Accordingly, the Motion to Withdraw Administrative Complaint Without Prejudice is **GRANTED**. The Complaint in this matter is deemed withdrawn without prejudice.

  
M. Lisa Buschmann  
Administrative Law Judge

**In The Matter of Wayne R. Erickson, Respondent.**  
**Docket No. CWA-05-2014-0003**

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Order Granting Motion To Withdraw Complaint Without Prejudice**, dated August 20, 2014, was sent this day in following manner to the addresses listed below:



Sybil Anderson  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
(202)564-6261

Dated: **August 20, 2014**

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