10/18/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
ESSROC MATERIALS, INC.	)	Docket No. CAA-17-1993
	)	
Respondent	)	

Order Dismissing Complaint Without Prejuidice

The complaint and answer have been filed in this matter under Section 113(d) of the Clean Air Act, 42 U.S.C. §7413(d). The complaint charges that Respondent owns and operates a portland cement plant and that emissions from Respondent's Kiln #2 exceeded the PM (particulate matter) limits in December 1992, and the opacity standard for the fourth quarter of 1992, and the first quarter of 1993. The parties have been negotiating with respect to possible settlement. As yet, however, there has been no prehearing exchange.[1]

Complainant has now moved, pursuant to 40 C.F.R. §22.14(e) to withdraw the complaint without prejudice. The grounds for the motion are that reports filed by Respondent subsequent to issuing the complaint in this matter disclosed that emissions from Respondent's Kiln #2 and Clinker Cooler exceeded the applicable limits in the first quarter and second quarters of 1994. Complainant, accordingly, has decided to sue in the federal court

[1] By order of the then presiding administrative law judge, the parties were directed to make a prehearing exchange on October 21, 1994. No prehearing exchange was made, however, presumably because of Complainant's motion to withdraw the complaint, which was served on October 5, 1994,

where injunctive relief to stop what appear to be continuing violations will be available.[2]

Respondent objects to withdrawal of the complaint without prejudice. Respondent asserts that it will be prejudiced by such withdrawal because of the efforts it has expended in attempting to settle this matter and because it has disclosed information to the EPA in these efforts, that it would not otherwise have disclosed. Accordingly, Respondent contends that if withdrawal is allowed it should be under such conditions as will protect Respondent.

Withdrawal of the complaint should not be allowed, if Respondent suffers "legal prejudice" thereby. FDIC v. Knostman, 966 F. 2d 1133, 1142 (7th Cir. 1992). Factors to be considered in determining whether a defendant has suffered legal prejuidice are the defendant's efforts and expense of preparation for trial, excessive delay and lack of diligence on the part of plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal and whether a motion for summary judgement has been filed by respondent. Id., 966 F2d at 1142.

Complainant has come forward with a reasonable explanation for withdrawing the complaint, namely, that in view of the additional violations that have been discovered since the complaint was filed, the federal court is the more appropriate forum because of the availability of injunctive relief. That Respondent will now be subject to injunctive relief as well as a penalty does not constitute legal prejudice. Respondent argues that civil penalties

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[2] Clean Air Act, §113(b), 42 U.S.C. §7413(b).

are also effective in stopping a violation. But if they were adequate as a deterrent aginst future violations in this case, presumably, Respondent would not have exceeded the standards again as it appears to have done. The EPA's judgement that an injunction may be a more effective way of insuring compliance should be given weight here.

Judicial economy in permitting all violations to be litigated in the same forum also favors allowing withdrawal of the complaint. Respondent argues that the new violations are different from those alleged in the complaint in that they involve emissions from the Clinker and not from Kiln #2. They are, however, all violations of the performance standards under the Clean Air Act by the same facility, and Complainant asserts that it intends to seek injunctive relief broad enough to cover emissions from both sources. This is sufficient to establish the reasonableness of including all violations in one suit. The Federal rules would appear to protect Respondent against any disadvantage that may arise from a consolidated district court proceeding.[3]

Respondent also argues that it will be prejudiced because of the efforts it has expended in settlement discussions with the EPA in the course of which it furnished confidential information that it would never have revealed if it had known that the complaint would be withdrawn.

Respondent's argument is unpersuasive. Respondent must necessarily have known that if the settlement discussions were

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[3] See Fed. R. Civ. P. 42.

unproductive, Respondent would have had to go to trial. Although the trial will now be in the district court rather than in the administrative proceeding, it is difficult to see how Respondent will be prejudiced thereby. To the extent that information given in settlement discussions is by rule inadmissible in the administrative proceeding, Respondent would appear to be afforded similar protection under the Federal rules in a judicial action.[4]

Accordingly, Complainant's motion is granted, and the complaint is dismissed without prejudice.

Gerald Harwood
Senior Administrative Law Judge

Dated: October 18, 1995.

[4] See 40 C.F.R. §22.22(a) which makes inadmissible evidence that would be excluded under Fed. R. Evid. 408.

In the Matter of ESSROC MATERIALS, INC., Respondent
Docket No. CAA-17-1993

Certificate of Service

I certify that the foregoing **Order**, dated October 18, 1995, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

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Dated: October 18, 1995