UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

VIRGIN ISLANDS WATER AND POWER AUTHORITY

Docket No. II-95-0107

Respondent

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

The complaint in this proceeding, filed on July 12, 1995, alleged five violations of New Source Performance Standard regulations, 40 CFR Part 60, Subparts A and GG, promulgated under Sections 111 and 114 of the Clean Air Act, 42 U.S.C. §§ 7411 and 7414. The complaint proposed a penalty of $105,000. Virgin Islands Water and Power Authority ("VIWAPA") filed an answer and request for hearing on August 18, 1995.

By pleading dated March 14, 1997, EPA filed a motion for withdrawal of the complaint, without prejudice. EPA explained that the violations at issue involved paperwork and testing violations only, and did not involve substantive violations or environmental degradation. EPA's belief apparently changed when it received test results on January 7, 1997, purportedly showing that VIWAPA had operated the gas turbine at issue in this case in violation of emissions limitations since October 31, 1994. The test results also purportedly showed that VIWAPA had operated another gas turbine unit, not a subject of this complaint, in violation since December 15, 1994.

As a result, EPA sought to withdraw this action so that it could pursue relief for what it believes to be a newly discovered substantive violation, as well as the present alleged violation, in Federal district court. There, EPA can request an injunction to compel VIWAPA to address the alleged emissions exceedances and to enter into an enforceable compliance schedule, a form of relief not available in this forum. The undersigned granted the motion for withdrawal, without prejudice, by order dated March 19, 1997.

By pleading dated March 28, 1997, VIWAPA filed an opposition to EPA's motion to withdraw the complaint without prejudice. This pleading will be construed as a motion for reconsideration of the March 19, 1997, order. VIWAPA asserts that the complaint should not have been withdrawn because respondent already has invested considerable effort and expense in these administrative proceedings and EPA has not provided adequate justification for withdrawal. VIWAPA further believes that this case is at a stage where it can, and should be, settled. Respondent additionally asserts that the issues presented here are wholly unrelated to the new claims described in EPA's motion. Finally, VIWAPA states that if the complaint is dismissed, it should be dismissed with prejudice.

Discussion

The Agency's Consolidated Rules of Practice governing this proceeding allow the complainant to withdraw the complaint, without prejudice, after the filing of the answer, upon motion granted by the judge. 40 CFR § 22.14(e). These procedural rules, however, do not elaborate upon when granting such a motion is appropriate. The Supreme Court has offered guidance, holding that "the right to dismiss is unqualified unless the dismissal would legally prejudice the defendants in some other way than by future litigation of the same kind." Jones v. S.E.C., 298 U.S. 1, 21 (1936). [1/]

The Second Circuit, in Zagano v. Fordham University, 900 F.2d 12 (2d Cir. 1990), cert. denied, 498 U.S. 899 (1990), delineated a number of factors that are relevant in determining whether a case has proceeded so far that dismissing it in order for the plaintiff to start a separate action would prejudice the defendant. The court stated: "Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any 'undue vexatiousness' on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss." Zagano, 900 F.2d at 14. [2/] See Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 358 (l0th Cir. 1996), for similar discussion.

Respondent's position that the application of the Zagano factors supports a denial of EPA's motion is not persuasive. The Second Circuit's reasoning, in fact, supports complainant's position. First, EPA filed its motion within a reasonable time after it discovered new information concerning the respondent's gas turbines. Second, there is no evidence that bad faith motivated EPA's interest in seeking to withdraw this action. Complainant's decision to request

withdrawal of this administrative action so that it could pursue a remedy for all of VIWAPA's alleged violations in the district court forum, where it may obtain both injunctive and civil penalty relief, is reasonable and will promote judicial economy.

Finally, respondent will experience little, if any, prejudice by the withdrawal of EPA's complaint. In that regard, this proceeding has not progressed very far, neither party has submitted a preheating exchange, and there are no outstanding motions. Indeed, this case has not even been set for hearing. Although VIWAPA may have invested time and expense meeting with EPA to clarify issues and to negotiate a possible settlement, the positions of the parties with regard to settlement apparently changed when EPA received results of emissions tests at VIWAPA's location. Therefore, even if this case continued, it appears that the parties' previous efforts at settlement would not have much influence in the resolution of the case. Also, respondent's expenses in arranging for further emissions testing and employing and training new personnel have little bearing on whether to allow EPA to withdraw the complaint. VIWAPA, in any event, would have been required to expend resources to ensure that its facility complies with environmental laws regardless of the outcome of this proceeding.

In sum, there is no evidence that the respondent in this case would be prejudiced by withdrawal of the complaint. VIWAPA's motion for reconsideration of the March 19, 1997, order granting EPA's motion for withdrawal of the complaint is, therefore, **denied**.

Carl C. Charneski

Administrative Law Judge

Dated: June 10, 1997

Washington, D.C.

[1/] The Court in Jones v. S.E.C. also noted an exception to this rule, namely, when "'the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree."' Id. at 20 (quoting Ex parte Skinner &

Eddy Corp., 265 U.S. 86, 93-94 (1924). See Fed. R. Civ. P. 41(a)(2). This exception, however, is not applicable to the present case.

[2/] Zagano involved a voluntary dismissal without prejudice pursuant to Rule 41(a)(2), Fed. R. Civ. P. Rule 41(a)(2) dismissals are at the district court's discretion and will only be reviewed for an abuse of that discretion. Zagano, 900 F.2d at 14. Accord, D'Alto v. Dahon California, Inc., 100 F.3d 281, 283 (2d Cir. 1996).

IN THE MATTER OF VIRGIN ISLANDS WATER AND POWER AUTHORITY,

Respondent

Docket No. II-95-0107

Certificate of Service

I certify that the foregoing Order, dated June 10, 1997, was sent this day in the following manner to the below addressees.

Original by Regular Mail to: Ms. Karen Maples

Regional Hearing Clerk

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Dated: June 10, 1997