

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
MARINE FACILITIES, INC.;) Docket No. II TSCA-PCB-92-0124
MARINE MOVEMENTS, INC.,)
)
Respondents)

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Complainant has filed a motion, pursuant to 40 C.F.R. § 22.14(e), to withdraw the complaint in this matter without prejudice. Respondent opposes the motion.

Section 22.14(e) provides, in pertinent part, that "the complainant may withdraw the complaint, . . . without prejudice, only upon motion granted by the Presiding Officer" In support of the motion, Complainant states that the United States Attorney for the Eastern District of New York is conducting an ongoing grand jury investigation of the conduct relating to this matter and that continuation of this administrative proceeding could be detrimental to such investigation. In opposition to the motion, Respondent contends that it has already expended considerable costs in defending the administrative complaint and that it would be unjust to allow Complainant to withdraw the complaint without prejudice, thereby affording Complainant the opportunity to file a similar administrative complaint at a future date. Respondent further contends that the criminal investigation had been ongoing long before the administrative complaint was filed

and Complainant should have made a judgment at the time of the filing of the administrative complaint as to the effect the action would have on the criminal investigation.

An order granting the Complainant's motion to dismiss is somewhat analogous to a dismissal by a federal court upon a motion by a plaintiff under the Federal Rules of Civil Procedure 41(a)(2). A motion for dismissal under that rule is generally granted without prejudice "unless the result would be to legally harm the defendant."¹ The mere prospect of a second lawsuit for defendant is not a sufficient basis upon which to deny the motion.² The fact that the government here may gain some tactical advantage by obtaining the option of bringing a criminal proceeding or filing a new administrative complaint is an insufficient ground for denial of the motion; substantial prejudice to Respondent must be shown.³ Thus, where substantial prejudice is lacking, I should exercise my discretion and grant Complainant's motion for dismissal of the complaint without prejudice.

I cannot find that substantial prejudice to the Respondent would result from my granting the Complainant's motion. The Complainant has not been dilatory in bringing the basis for this motion to the attention of the Presiding Officer and to the

¹LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976); Alvarado v. Maritime Overseas Corp., 528 F.2d 605 (5th Cir. 1976).

²Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143 (9th Cir. 1982).

³See, Williams v. Ford Motor Credit Co., 627 F.2d 158 (8th Cir. 1980); See also, 5 Moore's Federal Practice ¶ 41.05[1] at 41-62.

Respondent. The issue of whether this proceeding should be continued in light of the grand jury investigation was first raised in the status report filed only three months after the filing of the complaint and the present motion was preceded by a motion to stay this proceeding which motion was filed only a month after the status report, i.e., at the time the prehearing exchange was due to be filed.

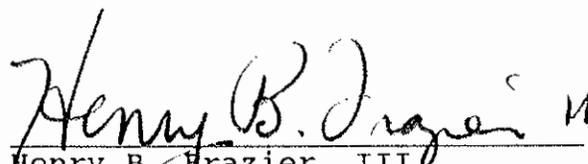
The fact that a party may have expended resources as a result of the filing of an administrative complaint provides no reasonable foundation upon which to deny Complainant's motion. If such an argument were valid, there would be no basis for the rule which permits granting a motion to withdraw without prejudice after an answer has been filed and, hence, after resources have been expended. Any duplicative expenses for Respondent which may result from the possible filing of a second administrative complaint would be minimal. No hearing has been held in this matter; indeed, none has been scheduled. Furthermore, the investigation of the matter by Respondent's counsel and the development of evidence and the preparation of witnesses is not necessarily wasted effort; the product of such effort could be useful regardless of the nature of the proceeding which is ultimately pursued by the government.

Finally, the Complainant's explanation for the need to dismiss is more than adequate and there quite clearly has been no "undue vexatiousness" on Complainant's part. The conduct of the grand jury investigation is in the hands of the United States Attorney, not in the hands of EPA counsel in this matter. The United States

Attorney made a judgment that "continuation of the TSCA administrative proceeding could interfere with and be detrimental to the grand jury's criminal investigation." That judgment was made two months after the filing of the complaint in this matter. Considering the fact that this has been an evolving investigation, there is no way to determine at what point in time and for what reasons, the United States Attorney reached this conclusion. Therefore, I reject the Respondent's contention that Complainant's counsel should have known that the United States Attorney would reach such a judgment before the administrative complaint was filed.

Complainant's motion to withdraw the complaint without prejudice is granted.

SO ORDERED.


Henry B. Brazier, III
Chief Administrative Law Judge

Dated: September 29, 1992
Washington, DC

IN THE MATTER OF MARINE FACILITIES, INC.; MARINE MOVEMENTS, INC.,
Respondent, Docket No. II TSCA-PCB-92-0214

Certificate of Service

I hereby certify that this Order Dismissing Complaint Without Prejudice, dated SEP 29 1992, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA, Region 2
26 Federal Plaza
New York, NY 10278

Copy by Certified Mail,
Return Receipt Requested, to:

Attorney for Complainant:

Robert G. Hazen, Esquire
Assistant Regional Counsel
Waste & Toxic Substances Section
Air, Waste & Toxic Substances
Branch
U.S. EPA, Region 2
26 Federal Plaza
New York, NY 10278

Attorneys for Respondents:

Peter M. Frank, Esquire
President
Marine Movements, Inc.
1 Ingham Avenue
Bayonne, NJ 07002

Christopher Carpentieri, Esquire
Stults Balber Horton & Slotnik
1370 Avenue of the Americas
New York, NY 10019



Doris M. Thompson
Secretary

Dated: SEP 29 1992