UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CONVERSE COUNTY WEED AND	)	
PEST CONTROL DISTRICT	)	**DOCKET NO. I.F.&R. VIII-95-382C**
	)	
RESPONDENT	)	

ORDER

A hearing was held in this matter on May 20, 1997[(1)]. At the hearing, complainant moved to dismiss count III of the complaint. Respondent did not object as long as the count was dismissed with prejudice. Complainant argued that the dismissal should be without prejudice.

By order dated May 27, I instructed the parties to provide any additional legal support for their positions in writing by June 12[(2)].

DISCUSSION

Respondent presents two major arguments in their June 11 Memorandum. The first deals with the prejudice they claim to have suffered due to complainants' delay in actually dismissing count III (an oral motion was presented by complainant at the May 20 Hearing) since it required that they prepare a defense to this count to be presented at the hearing. Respondent states "the District was faced with the prospect that the EPA could have changed its mind and pursued count III in spite of its informal agreement to dismiss this part of the Complaint."[(3)] However it is noted that respondent's prehearing exchange, dated January 31 states that:

[t]he EPA is not going to pursue Count 3 in the

Complaint against Converse County Weed &

Pest Control District.

The above understanding is based on a January 6, 1997 phone conversation between Michael G Weisz, Respondents' counsel, and Dana Stotsky, Complainant's counsel. . . Mr. Stotsky also informed Mr. Weisz that the EPA would not pursue Count 3 against Converse County Weed & Pest. The above understanding was confirmed in another phone conversation on January 17, 1997 between Mr. Stotsky and Mr. Weisz.

Therefore, this pre-hearing exchange relates only to the defense of Counts 1 & 2 of the Converse County Weed & Pest case. The Respondents have not attempted to prepare a defense in relation to Count 3 of the CCWP case. . .[(4)]

In addition, Respondent states that they were informed that the EPA intended to dismiss count III during the disclosure period which took place between November 1996 and January 1997[(5)].

So at least as late as January 31 and possibly as early as November 1996, respondent has been on notice that complainant was intending to withdraw count III of the complaint against this respondent. Further, as of the filing of their prehearing exchange, respondent made clear that they were not preparing a defense for count III of the complaint in anticipation of its dismissal.

Therefore, respondents' contention that they were prejudiced because of the EPA's motion to withdraw count III at the hearing in this matter is without merit. Respondent, as well as the undersigned presiding officer were on notice well before the hearing in this matter that this count would not be pursued.

Respondents' second argument for dismissal of count III with prejudice is that 40 C.F.R. § 14(e) is analogous to Federal Rule of Civil Procedure (F.R.C.P.) 41(a)(2) which allows federal courts discretion in determining the terms and conditions in fashioning a voluntary dismissal. It should be noted that 40 C.F.R. § 14(e) and F.R.C.P. 41(a)(2) are not identical. While such discretion is granted to the federal courts in such matters, the EPA's rule appears to offer no such leeway.

40 C.F.R. § 22.14(e) dealing with content and amendment of the complaint states as follows:

(e) *Withdrawal of the complaint.* The complainant may

withdraw the complaint, or any part thereof, without

prejudice one time before the answer has been filed.

After one withdrawal before the filing of an answer,

or, after the filing of an answer, the complainant may

withdraw the complaint, or any part thereof, without

prejudice, only upon motion granted by the Presiding

Officer or Regional Administrator, as appropriate.

(Emphasis Supplied)

A plain reading of this rule shows that there is no provision for the dismissal of a complaint, or any portion thereof, "with prejudice" as respondent in this matter seeks. The only available means of dismissal pursuant to this rule is "without prejudice." However, respondents' argument that I am free to look to the F.R.C.P for guidance in the absence of such express language is well taken.[(6)]

The analogous provision in the federal court arena is as follows:

F.R.C.P. 41(a)(2). Except as provided in paragraph (1)

of this subdivision of this rule, an action shall not be

dismissed at the plaintiff's instance save upon order of

the court and upon such terms and conditions as the court

deems proper . . . Unless otherwise specified in the order,

a dismissal under this paragraph is without prejudice.

Respondent goes on to cite cases to support the proposition that a voluntary dismissal should be made with prejudice, with the award of attorney fees and costs against the plaintiff, if the respondent has suffered prejudice by having incurred the expense of trial preparation without the benefit of a final determination of the controversy[(7)]. Even assuming, *arguendo*, that respondent is correct in this interpretation of F.R.C.P. 41(a)(2), their argument still fails. In the present action respondent had actual knowledge that count III would not be pursued at the hearing. Any preparation in formulating a defense for this count was unnecessary. Complainant made it clear to all of the participants of this action, including the undersigned, that they would not pursue this count.

Conclusion

Therefore, Complainant's Motion for Withdrawal of Count III of the complaint without prejudice in this matter is granted.

SO ORDERED

_____

Edward J. Kuhlmann

Administrative Law Judge

Washington, D.C.

1. Unless indicated otherwise, all dates referenced herein are for the 1997 calander year.

2. Respondent timely filed their Memorandum of Authorities for Dismissal of Complainant's Count III with Prejudice. Complainant filed by pleading dated June 20, and received in this office June 23, a pleading responding to respondent's Memorandum. Complainant's Response will not be considered since it was not timely filed.

3. Respondent's June 11 Memorandum at 2.

4. Respondents' Prehearing Exchange @ 5

5. Respondent's June 11 Memorandum @ 2.

6. The F.R.C.P. are not applicable to Agency proceedings conducted under 40. C.F.R. Part 22; however, "[in] some cases, the experience of federal courts in applying a federal rule can offer an instructive example." See, In Re Detroit Plastic Molding Co., TSCA Appeal No 87-7 @ 7 (CJO, March 1, 1990); In Re Wego Chemical & Mineral Corporation, TSCA Appeal No 92-4, @ 19, n.10 (EAB), Feb 24, 1993).

7. See generally, Respondent's June 11 Memorandum.